Major Events and Policy Issues in EU Competition Law 2017–2018: Part 1

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Abuse of dominant position; Cartels; Competition policy; EU law

Abstract

John Ratliff and his colleagues set out their annual review of major events in EU competition law in 2017–2018, dealing with legislative developments and European Court judgments. Of particular interest are judgments on: competition and agriculture (French Endives), online marketplace bans and selective distribution (Coty Germany), misleading information as a restriction by object in the pharma sector (Hoffmann-La Roche); appeals in the Power Cables cartel case, including the issue of private equity investment (Goldman Sachs); various judgments on the EC's reasoning of the "exceptional circumstances" exception in its Fining Guidelines; price discrimination and distortion of competition under art.102 TFEU (MEO); and judgments on EC inspections (Czech Railways and Alcogroup).

This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU[1] from November 2017 until the end of October 2018.[2]

This article is divided into an overview of:

- legislative developments;
- European Court judgments;
- European Commission decisions;
- sectoral reviews; and
- selected policy issues.

[*] With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this article, and to my other Brussels colleagues for their more specific contributions, which are indicated with the appropriate sections.

[1] "TFEU" is the abbreviation for Treaty on the Functioning of the European Union; "TEU" is Treaty on European Union; "EC" for European Commission (not European Community, as before the Lisbon Treaty); "GC" is the abbreviation for General Court, "ECJ" for the European Court of Justice and "CJEU" for the overall Court of Justice of the European Union; "AG" for Advocate-General; "NCA" is the abbreviation for National Competition Authority; "SO" is the abbreviation for Statement of Objections"; "BE" is the abbreviation for Block Exemption; "Article 27(4) Notice" refers to the EC's Communications under that article of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. References to the "ECHR" are to the European Convention of Human Rights 1950 and references to the "CFR" are to the EU Charter of Fundamental Rights 2000.

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 11 January 2019]. References to "I.C.C.L.R." are to previous articles in the series, "Major Events and Policy Issues in EU Competition Law", published in the *International Company and Commercial Law Review*.

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Legislative developments and European Court judgments on general issues and cartel appeals are included in Part 1. EC decisions and other sections will be published in the next issue of I.C.C.L.R (Issue 4).

Box 1

- **Major themes/issues in 2017/18**
  - — *MEO*: Price discrimination and distortion of competition.
  - — *Wouters/Meca-Medina* and minimum lawyers' fees/sports association activities.
  - — Online marketplace bans and selective distribution: *Coty Germany*.
  - — *Google Android*: Another fine, this time €4.34 billion.
  - — Fine reductions for co-operation in vertical infringements: *Electronics Manufacturers*.
  - — Energy and the internal market: *Gazprom, Tennet, Transgaz*.
  - — Digital Economy Policy.

Legislative developments

Box 2

- **Legislative developments**
  - — ECN+ almost through the co-legislators.
  - — Draft guidelines on passing-on overcharges.
  - — Liner Shipping Consortia Block Exemption: renewal or not?

ECN+

It will be recalled that, in March 2017, the EC adopted a Proposed Directive "to empower the competition authorities of the Member States to be more effective enforcers" (Proposed Directive).[3] This was extensively summarised last year.[4]

During the year, the Proposed Directive was reviewed by the European Parliament and the Council (the "co-legislators") and a political agreement was reached in May 2018.[5] Adoption of the final text of the Directive was expected by the end of 2018. Following the two years for transposition, the Directive is expected then to enter into force by the end of 2020.

These are the main points added or clarified:

First, after the review of the Proposed Directive by the co-legislators, some aspects such as the right to be heard and the right to a statement of objections were

[3] With thanks to Virginia Del Pozo and Maria Tsoukala. EC Press Release IP/17/685, 22 March 2017 and EC Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market COM(2017) 142 final available on the EC's website.

[4] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016–2017: Part 1" [2018] I.C.C.L.R. 143, 145.

[5] EC Statement/18/3996, 30 May 2018.

moved from the Recitals to art.3, strengthening their legal force. An explicit reference to the need to conduct proceedings within a reasonable timeframe was also introduced.

Secondly, to reinforce the independence of the NCAs, the Proposed Directive now states that staff and members of the NCAs should refrain from being involved in cases in which they were involved for a reasonable period after leaving office. Moreover, any person taking key enforcement decisions will be dismissed only if he or she does not fulfil conditions for performance of duties or is found guilty of serious misconduct.

Decision-making bodies will also reflect a clear and transparent procedure for selection, recruitment and appointment. NCAs will have independence in spending their allocated budgets but will need to make periodic reports public on activities, amount of resources and appointments and dismissals.

Thirdly, the co-legislators introduced the power for NCAs to compulsorily summon for interviews, as the EC may do.[6] All NCAs investigative and decision-making tools are also to be backed up by effective sanctions.

Fourthly, the co-legislators decided to enable NCAs to accept leniency statements and requests for markers in either the official language of the Member State or another EU official language bilaterally agreed with the applicant.

Fifthly, the co-legislators have addressed the issue regarding the position of summary applications to NCAs while the EC decides whether to deal with a case or not. They note simply that the EC should decide if it will proceed with a case within a reasonable period, during which the NCA should only receive the summary application (i.e. not investigate further). The NCAs will only be able to ask for specific clarifications about the summary applications. However, in exceptional circumstances and when it is strictly necessary for case delineation or allocation, the NCAs may be able to ask for full applications before the EC reaches a decision.

Sixthly, as regards the protection of leniency and settlement submissions, the co-legislators have clarified that the aim of the Proposed Directive is to give full protection from both administrative and criminal sanctions. There is, however, a possibility for derogation concerning criminal sanctions, allowing for either full protection or only mitigation of sanction depending on the outcome of the balancing test (i.e. interest to prosecute or sanction v contribution of the individual to the detection of the cartel). In practice, insofar as several Member States have introduced criminal sanctions, protection appears therefore only to be established for administrative sanctions.

We are waiting for the revised, finalised text.

Draft guidelines on cartel overcharges

In July 2018, the EC published a consultation document on draft guidelines for national courts to determine the amount of cartel overcharges passed on to direct and indirect customers of companies which participated in a cartel and to final consumers.[7]

[6] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[7] With thanks to Katrin Guéna. EC Press Release IP/18/4369, 5 July 2018; the consultation document is available on the EC's website.

Pursuant to the EU Competition Damages Directive,[8] which had to be implemented by December 2016, the EC is to issue non-binding guidelines to help national courts with the calculation of passing-on overcharges.

The draft guidelines describe available procedural instruments for the assessment of the existence of passing-on overcharges and the national courts' power to estimate those overcharges. They also describe the most common economic methods and techniques to quantify overcharges. The future guidelines are intended to complement the *Practical Guide on Quantifying Harm*, issued by the EC in 2013.[9]

The EC asked interested parties for comments to be submitted by 4 October 2018.

Liner Shipping Consortia Block Exemption

In September 2018, the EC launched a consultation on the renewal of the Liner Shipping Consortia Block Exemption Regulation (Consortia BE), which will expire in April 2020.[10]

The Consortia BE provides that shipping carriers may enter into co-operation agreements for joint cargo transport services if they have a combined market share below 30%. Such consortia are exempted from the application of art.101(1) TFEU because their users benefit from increased productivity and better service.

The Consortia BE was adopted in 2009 and extended already in 2014 following a consultation of interested parties.[11]

However, the EC considers that in recent years the shipping industry has been significantly consolidated: carriers left the market, merged or participated in much larger consortia. In that context, the EC has raised the question whether the Consortia BE needs to be prolonged further.

The EC recalled that the Consortia BE is the only remaining competition measure in the maritime sector and that consortia agreements would not be unlawful without the Consortia BE, the position would just be that the general competition rules would apply.

The EC therefore asked, in particular, shipping carriers, shippers, freight forwarders, port operators and trade associations to submit their comments before the end of 2018. The EC indicated that it would also send targeted questionnaires to major stakeholders.

[8] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1. See also John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 1)" [2015] I.C.C.L.R. 73, 73.

[9] *Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* SWD(2013)205.

[10] With thanks to Katrin Guéna. Regulation 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2009] OJ L256/31; see also John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008–2009: Part 1" [2010] I.C.C.L.R. 101, 104. Amended by Regulation 697/2014 amending Regulation 906/2009 as regards its period of application [2014] OJ L184/3.

[11] See John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2013–2014 (Part 1)" [2015] I.C.C.L.R. 73, 76.

European Court cases

General

Box 3

- **Court cases—General**
  - — *CHEZ Elektro Bulgaria*:
    - * Bulgarian rules on minimum legal fees may be caught by art.101(1) TFEU.
    - * Referring court to consider application of *Wouters*.
  - — *French Endives*:
    - * The extent of exclusions from the EU competition rules for agricultural POs and APOs.
    - * Agreements *between* POs and/or APOs may be caught by EU competition law.
    - * Activities *within* a PO may not be caught if strictly proportionate to the objectives of the PO.
  - — *Coty Germany*:
    - * The operator of a selective distribution system for luxury goods can prohibit its selected distributors from selling on discernible third-party online marketplaces, while still allowing them to sell on their own internet sites.
  - — *Hoffmann-La Roche*:
    - * Concerted practices involving misleading information to influence third parties not to buy an off-label pharma product, reducing competitive pressure on another product, may be a restriction by object.
  - — N.B. Regulation 44/2001 cases.

CHEZ Electro Bulgaria

In November 2017, the ECJ ruled on two requests for a preliminary ruling from the Bulgarian Supreme Court concerning the compatibility of rules on minimum lawyers' fees with EU law and EU competition law.[12]

Under Bulgarian law, a lawyer and his client are not allowed to agree a remuneration in an amount below the minimum amount laid down in a regulation issued by a professional body of lawyers, without the lawyer being subject to a disciplinary procedure. In addition, courts are not authorised to order the reimbursement of fees in an amount below the minimum amount.[13]

The referring court queried whether such rules were contrary to art.101 TFEU and art.4(3) TEU (among other things).[14]

The ECJ found that, when determining the minimum fees, the professional body of lawyers acted as an *association of undertakings*, not as a public authority, for two reasons. First, the lack of provisions ensuring that the professional body fixed the fees as an arm of the State working in the public interest. Secondly, the fact that only the Supreme Administrative Court could review such minimum fees and

[12] With thanks to Álvaro Mateo Alonso. *CHEZ Elektro Bulgaria v Kotsev* (C-427/16) and *FrontEx International EAD v Yanakiev* (C-428/16) EU:C:2017:890; [2017] B.V.C. 63; judgment in preliminary ruling issued on 23 November 2017.

[13] *CHEZ Elektro Bulgaria* EU:C:2017:890; [2017] B.V.C. 63 at [6]–[11].

[14] *CHEZ Elektro Bulgaria* EU:C:2017:890; [2017] B.V.C. 63 at [21], [40].

its review was limited to compatibility with the Bulgarian Constitution and Bulgarian law.[15] So the *Arduino*/*API* case law did not apply.[16]

The ECJ then assessed whether such national legislation was capable of restricting competition within art.101(1) TFEU. The ECJ found that it was. The court noted that the national legislation prevented providers of legal services from setting lower fees than the minimum fees and therefore amounted to the *horizontal fixing of mandatory minimum tariffs*.[17]

However, the court found that such legislation did not *necessarily* fall within the prohibition of art.101(1) TFEU, read in conjunction with art.4(3) TEU (which prevents Member States from depriving Treaty rules of their "*effet utile*") referring to *Wouters*.[18]

Notably, the legislation would not be so caught if the rules were necessary for the implementation of a legitimate objective. For that assessment, account must be taken of the overall context in which the regulation fixing the minimum fees was taken or produces its effects and, specifically, the objectives of the legislation.[19] It was for the referring court also to assess whether the restrictions involved (disciplinary proceedings and non-reimbursement of fees below the minimum) were limited to what is necessary to ensure that those legitimate objectives were met.

French Endives

In November 2017, the ECJ, sitting in Grand Chamber, ruled on a request for a preliminary ruling concerning the relationship between EU legislation on the common agricultural policy (CAP) and the application of EU competition law.[20]

In 2012, the French Competition Authority (FCA) imposed a fine of almost €4 million on 18 producer organisations (POs), associations of producer organisations (APOs) and certain professional associations for operating a complex and continuous cartel in the endive production and marketing sector for 14 years.

The FCA found that these entities had agreed on minimum prices of endives through various mechanisms, colluded on the quantities of endives placed on the market and implemented a system for the exchange of strategic information used for the purpose of price maintenance. The aim of these practices was to collectively fix and maintain minimum producer and sale prices.[21]

On appeal, the case came before the *Cour de cassation*, which referred to the ECJ questions as to whether the practices were excluded from the scope of the prohibition of art.101(1) TFEU. In particular, the *Cour de cassation* sought assistance on the question whether the exclusions set out in specific EU legislation

[15] *CHEZ Elektro Bulgaria* EU:C:2017:890; [2017] B.V.C. 63 at [43]–[49].

[16] *Criminal Proceedings against Arduino* (C-35/99) EU:C:2002:97; [2002] 4 C.M.L.R. 25; and *API—Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti* (C-184/13) EU:C:2014:2147; [2014] 5 C.M.L.R. 21 at [43]–[48].

[17] *CHEZ Elektro Bulgaria* EU:C:2017:890; [2017] B.V.C. 63 at [51]–[52].

[18] *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) EU:C:2002:98; [2002] 4 C.M.L.R. 27 at [97].

[19] *CHEZ Elektro Bulgaria* EU:C:2017:890; [2017] B.V.C. 63 at [53]–[58].

[20] With thanks to Georgia Tzifa. *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE)* (C-671/15) EU:C:2017:860; [2018] 4 C.M.L.R. 6 (*French Endives*). ECJ Press Release 120/17, 14 November 2017.

[21] *French Endives* (C-671/15) EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [25].

might apply,[22] insofar as they established objectives of: (1) ensuring that production was planned and adjusted to demand; (2) the concentration of supply and commercialisation of PO members products; and (3) optimising production costs and stabilising producer prices, while in various related pieces of legislation there are references to not fixing or charging identical prices.[23]

The main points of the ECJ's judgment are as follows:

First, the ECJ noted that endives are an agricultural product under art.38 and Annex I of the TFEU. Therefore, they fall under the Treaty provisions on the CAP.[24] These provisions, in particular art.42 TFEU, state that the Treaty rules on competition apply to the production of, and trade in, agricultural products only to the extent determined by the European Parliament and the EU Council within the framework of art.43(2) TFEU. In other words, art.42 TFEU recognises that the CAP takes precedence over the Treaty objectives in the field of competition and also that the EU legislature has power to decide to what extent the competition law rules are to be applied in the agricultural sector.[25]

The court noted that the EU legislature's interventions in that respect, rather than establishing derogations or justifications from the prohibitions in arts 101(1) and 102 TFEU, seek to exclude from the scope of these provisions practices which would come under them, if they were to take effect in a sector other than that of the CAP.[26]

Secondly, the ECJ examined the secondary legislation in the fruit and vegetables sector which applied to endives.

Pursuant to art.175 of Regulation 1234/2007,[27] arts 101–106 TFEU apply to all agreements, decisions and practices referred to in arts 101(1) and 102 TFEU which relate to the production of, or trade in, agricultural products covered by that Regulation, subject to arts 176 and 177 of that Regulation and unless otherwise provided there.

As regards this last exclusion, the Regulation states, in arts 122(1) and 125(c), that Member States shall recognise the POs and APOs which are responsible for the objectives referred to in the specific legislation noted by the *Cour de cassation*.[28] A recognised PO or APO may therefore use means other than those which govern normal market operations.[29]

Based on these provisions, the ECJ concluded that, in the fruit and vegetables sector, art.101(1) TFEU does not apply to the practices of POs and APOs which are necessary in order to achieve one or more of the above objectives. Were it otherwise, the effectiveness of the EU regulations establishing a common organisation of the markets in this sector would be called into question, as the responsible POs and APOs would be deprived of the means to achieve the objectives assigned to them.[30]

[22] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [12].
[23] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [6], [21]–[22].
[24] Articles 39–44 TFEU.
[25] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [35]–[37].
[26] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [38].
[27] Regulation 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [2007] OJ L299/1.
[28] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [42].
[29] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [43].
[30] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [44]–[45].

Thirdly, the ECJ stressed that the scope of these exclusions is to be construed strictly. According to the case law, the common organisations of the markets in agricultural products are "not a competition-free zone". On the contrary, the maintenance of effective competition on these markets has been recognised as an objective of both the CAP and the common organisation of the markets. This means that the practices in question may not go beyond what is strictly necessary in order to achieve one or more of the objectives assigned to the PO or APO at issue, in accordance with the principle of proportionality.[31]

Fourthly, in light of the above considerations, the ECJ considered the collective practices in the endive sector and found that for EU competition law to be inapplicable, these practices must:

- *be implemented by a PO or APO that* is in fact entitled to pursue one or more of the objectives referred to above and *has been recognised* as such by a Member State[32] (so the activities of some of the professional associations covered by the FCA decision might not be excluded from the scope of competition law);
- *remain within a single PO or APO*: the objectives assigned to a PO or APO may relate to the production and marketing of the products of the members of *only the entity in question*. Accordingly, the specific exclusions can justify certain forms of co-ordination or concertation only between producers that are members of the same PO or APO recognised by a Member State. Agreements *between different POs or APOs* go beyond what is necessary in order to fulfil those responsibilities[33]; and
- *be actually and strictly connected to the pursuit of one or more of the objectives* assigned to the PO or APO.[34]

The court considered that exchange of strategic information between producers in a PO or an APO was liable to be proportionate if in fact exchanged for such an objective and limited strictly thereto.[35]

This may hold true for co-ordination between agricultural producers in the same organisation with regard to the quantities of agricultural products put on the market, a practice which may be justified by the objective of stabilising producer prices.

Similarly, the objective of concentrating supply to strengthen the position of producers in the face of ever greater concentration of demand may justify a certain form of co-ordination of the pricing policy of individual agricultural producers within a PO or APO,[36] in particular, where the members of a PO or an APO have assigned the responsibility for marketing all their products to the PO or an APO.[37]

However, the *collective* fixing of minimum sales prices *within* a PO or APO may not be considered as proportionate to the objectives of stabilising prices and concentrating supply where it does not allow producers *selling their own produce*

[31] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [46]–[49].
[32] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [51]–[54]. Whether a particular PO or APO has been so recognised is a matter for the national court to ascertain, as noted by the ECJ at [55].
[33] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [56]–[60].
[34] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [61]–[62].
[35] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [63].
[36] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [62]–[65].
[37] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [65].

themselves to sell at a price below those minimum prices. It would then have the effect of reducing the already low level of competition in the markets for agricultural products.[38]

While it was for the referring court to establish the facts in question, this ruling underscores therefore that producer organisations can be excluded from competition in a decentralised way but not through collective sectoral agreements.

Coty Germany

We considered this case in detail already last year, considering Advocate-General (AG) Wahl's Opinion.[39] It may be recalled that the case deals with the compatibility of selective distribution systems (SDS') for luxury goods with online marketplace bans (i.e. a prohibition to sell on websites such as Amazon or eBay offering an online marketplace for goods) with art.101 TFEU.[40] The issue is highly topical. It is also dealt with in the EC's e-commerce inquiry.

Background

Coty Germany (CG) is one of Germany's leading suppliers of luxury cosmetics. CG sells its products on the basis of a selective distribution contract employed uniformly throughout Europe.[41] Parfumerie Akzente (PA) has distributed CG's products for many years, both in brick and mortar locations (actual physical shops) and over the internet, partly through its own online store and partly via Amazon.[42]

CG justifies its SDS by the need to support the luxury image of its brands.[43] As a result, each point of sale must be authorised by CG and meet certain standards to promote the luxury character of CG's brands.[44] A supplemental agreement on internet sales provides that the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised.[45]

In March 2012, CG revised the supplemental agreement and provided that retailers can only sell on the internet provided that they do so on their own website and that they preserve the luxury character of CG's products. CG also prohibited the use of a different business name and the discernible use of a third-party undertaking which is not an authorised retailer of CG.[46]

PA refused to approve those amendments and CG brought an action before the *Landgericht* Frankfurt, seeking an order prohibiting PA from distributing products bearing the brand in issue via Amazon.[47]

In July 2014, the *Landgericht* Frankfurt dismissed CG's action. The court relied on the ECJ's judgment in *Pierre Fabre Dermo-Cosmétique* (*Pierre Fabre*) in

[38] *French Endives* EU:C:2017:860; [2018] 4 C.M.L.R. 6 at [66].
[39] Opinion of AG Wahl of 26 July 2017 in *Coty Germany GmbH v Parfumerie Akzente GmbH* (C-230/16) EU:C:2017:603; ECJ Press Release 89/17, 26 July 2017. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016–2017: Part 1" [2018] 29 I.C.C.L.R. 143, 151.
[40] With thanks to Itsiq Benizri. *Coty Germany GmbH v Parfumerie Akzente GmbH* (C-230/16) EU:C:2017:941; [2018] 4 C.M.L.R. 9.
[41] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [8].
[42] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [9].
[43] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [10].
[44] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [11]–[13].
[45] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [14].
[46] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [15].
[47] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [16].

which the court had stated that the objective of preserving a prestige brand image does not justify the introduction of a SDS.[48]

The *Landgericht* also found that CG's amendments constituted a hardcore restriction within the meaning of art.4(c) of the Vertical Block Exemption Regulation (VBER), which prohibits restrictions of active or passive sales to end users by members of a SDS operating at the retail level of trade.[49]

The *Landgericht* also found that the marketplace ban could not benefit from an individual exemption because it was an unnecessary restriction. It would have been sufficient for Coty to apply specific quality criteria to third-party platforms to preserve the luxury character of Coty's brands.[50]

On further appeal, the *Oberlandesgericht* Frankfurt requested a preliminary ruling from the ECJ.[51] The *Oberlandesgericht* asked four questions:

(1) Were SDS' for luxury and prestige goods compatible with art.101 TFEU?
(2) Were bans on using online marketplaces which are discernible to the public in a SDS for luxury goods compatible with art.101 TFEU?
(3) Was an absolute online marketplace restriction a hardcore restriction within the meaning of art.4(b) VBER? and
(4) Was such a ban a hardcore restriction under art.4(c) VBER?

In July 2017, AG Wahl issued his Opinion. The ECJ issued its judgment in December 2017 and agreed with his suggested approach.

The ECJ's answers

As regards the first question, the ECJ recalled that the key question was whether the SDS met the conditions of the *Metro I* case law,[52] as noted in *Pierre Fabre*. In other words, purely qualitative SDS' are compatible with art.101 TFEU when the following conditions are met: (1) the properties of the product require a SDS to preserve its quality; (2) resellers are chosen based on objective criteria applied in a non-discriminatory manner; and (3) these criteria do not go beyond what is necessary.[53]

The ECJ also confirmed that SDS' relating to luxury goods, seeking mainly to preserve the brand image of those goods, *are* compatible with art.101 TFEU.[54] The ECJ noted that the ruling in *Pierre Fabre* was different, insofar as the system there involved a *total* ban on internet sales for the goods in question.[55]

As regards the second question, the ECJ considered that an online marketplace ban is an appropriate restriction for three reasons. First, it provides suppliers with

[48] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [17]. See *Pierre Fabre Dermo-Cosmétique SAS v President de l'Autorité de la Concurrence* (C-439/09) EU:C:2011:649; [2011] 5 C.M.L.R. 31.
[49] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [17]. See Regulation 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices [2010] OJ L102/1, art.4(c).
[50] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [18]. The *Landgericht* also found that no individual exemption could apply because CG did not demonstrate the marketplace ban's efficiency gains.
[51] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [19].
[52] *Metro SB-Großmärkte GmbH & Co KG v Commission of the European Communities* (C-26/76) EU:C:1977:167; [1978] 2 C.M.L.R. 1.
[53] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [24]. See *Pierre Fabre* EU:C:2011:649; [2011] 5 C.M.L.R. 31 at [41].
[54] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [29].
[55] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [34].

a guarantee that the goods will be exclusively associated with the authorised distributors, which is one of the guarantees that suppliers are looking for in the context of a SDS.[56] Secondly, an online marketplace ban enables the supplier of luxury goods to check that the goods will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors.[57] In particular, the ECJ noted that the supplier would need a contractual relationship with the online marketplaces to be able to ensure compliance with its quality requirements.[58] Thirdly, the fact that luxury goods are solely sold on specific online shops, rather than in a sales channel for goods of all kinds, contributes to their luxury image.[59]

The ECJ also considered that the online marketplace ban in question was proportionate because, contrary to the total online sales ban in *Pierre Fabre*, retailers were still allowed to sell *via their own internet websites*.[60] Since the EC's e-commerce sector inquiry (or the e-commerce report) showed that, at this stage of the development of e-commerce, distributors' online stores are the preferred distribution channel for distribution via the internet, a discernible third-party marketplace ban could not be assimilated to a total online sales ban.[61]

The court also considered that it was appropriate to require that a third-party platform not be discernible in order to protect the luxury brand image, the "aura of quality" in perfume supply.[62]

As regards the third and fourth questions related to the VBER (i.e. was the online marketplace ban a restriction of the customers to whom a buyer may sell the goods or a restriction of active or passive sales to end-users by members of a SDS operating at the retail level of trade), the ECJ's answer was "no". These provisions refer to market-sharing or customer-sharing measures, which tend to partition the markets.[63] The ECJ considered that the marketplace ban did not constitute such a restriction for three reasons:

(1) first, the online marketplace ban in question did not prohibit the use of the internet as a means of marketing the goods[64];

(2) secondly, it is not possible a priori to identify a customer group or a particular market to which users of third-party platforms would correspond[65]; and

(3) thirdly, the online marketplace ban in question did not prevent authorised distributors from advertising via the internet on third-party platforms and to use online search engines. Therefore, customers were still able to find the online offer of authorised distributors by using such means.[66]

[56] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [44]–[45].
[57] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [47].
[58] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [48], [65].
[59] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [50].
[60] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [52].
[61] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [54]. See also the EC Staff Working Document, Accompanying the Final Report on the E-commerce Sector Inquiry SWD(2017) 154 final, para.978.
[62] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [25]–[29], referring to *COPAD SA v Christian Dior Couture SA* (C-59/08) EU:C:2009:260; [2009] E.T.M.R. 40.
[63] EC, Guidelines on Vertical Restraints [2010] OJ C130/1, para.50.
[64] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [65].
[65] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [66].
[66] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [67].

The case then went back to the referring court, which has since upheld CG's ban.

Comment

This issue is still hotly debated. Some argue that CG's ban was not necessary and limits internet competition too much. Others emphasise that the ECJ judgment shows the need to protect non-price competition as well as price competition, a point also echoed in the EC's final e-commerce report. AG Wahl also noted that price is not the only effective form of competition.[67]

Although the EC welcomed the ECJ judgment as bringing more clarity and legal certainty,[68] the *Bundeskartellamt* (BKA) took another line, arguing that online third-party marketplaces are more significant in Germany and such sales are key for small and medium-sized enterprises (SMEs).[69]

The BKA also argues that the ruling only applies to luxury goods so that electronic goods would not be covered.[70] That view is controversial. Others argue that the logic of the ruling is simply to apply the *Metro I* conditions and allow an SDS operator to control its system, including online, which could also apply to electronic SDS'.

There is also discussion about the way that the ECJ links its assessment in part to the EC's finding in its e-commerce report that, at this stage of the development of e-commerce, distributors' own online stores are the preferred distribution channel for distribution via the internet.[71] The ECJ therefore said that the restriction should not be assimilated to an outright ban on or substantial restriction of internet sales.

Some argue that this sort of consideration should be irrelevant to the classification of the restriction. Rather, what matters is the ban's nature and justification. Others argue that it is all part of the relevant context. The BKA also argues that in some regions (e.g. Germany) online marketplaces are more significant than the e-commerce report found overall.[72]

Hoffmann-La Roche

In January 2018, the ECJ, sitting in Grand Chamber, gave an important ruling on whether a concerted practice between a licensor and licensee, allegedly involving the dissemination of misleading information, amounted to a restriction by object.[73] The court also offered important clarifications on the interplay between pharmaceutical regulatory law and EU competition law.

[67] AG Wahl's Opinion in *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [33]. The ECJ has already explicitly indicated that price is not the only effective form of competition. See *Metro I* EU:C:1977:167; [1978] 2 C.M.L.R. 1 at [21]: "although price competition is so important that it can never be eliminated it does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded".

[68] *Mlex*, 8 September 2017 and see EC Competition Policy Brief, April 2018, available on the EC's website.

[69] *Mlex*, 8 September 2017.

[70] See "Competition restraints in online sales after Coty and Asics—what's next" (October 2018), available on the BKA's website.

[71] *Coty Germany* EU:C:2017:941; [2018] 4 C.M.L.R. 9 at [54].

[72] For example, the BKA as reported in *Mlex*, 8 September 2017.

[73] With thanks to Lukas Simas and Georgia Tzifa. *F Hoffmann-La Roche Ltd v Autorità Garante della Concorrenza e del Mercato* (C-179/16) EU:C:2018:25; [2018] 4 C.M.L.R. 13.

Background

The case concerns two medicinal products, Avastin and Lucentis, developed by Genentech, a US subsidiary of F. Hoffmann-La Roche (Roche). Both drugs are derived from the same active substance but are approved by the regulatory authorities to cure different types of conditions.

Avastin was granted a marketing authorisation (MA) by the EC for the treatment of cancer in 2005. Since Genentech is only active in the US market, it entrusted the commercial exploitation of Avastin outside the US to Roche.

Lucentis was granted an MA in 2007 for the treatment of eye disease. Roche was not active in that field so Genentech granted an exclusive licence to develop and market Lucentis outside the US to Novartis. Under the terms of the licence, Genentech retained marketing rights for Lucentis in the US whereas Novartis received exclusive commercialisation rights for the rest of the world.

Before Lucentis entered the market, medical practitioners observed that, when they treated patients suffering from both cancer and eye disease with Avastin, the eye condition also improved. As a result, doctors prescribed a repackaged Avastin for the treatment of eye diseases, despite the fact that its MA did not cover those indications ("off-label"). This off-label use of Avastin spread worldwide and continued even after the market launch of Lucentis, owing to the former's significantly lower price.[74]

In February 2014, the *Autorità Garante della Concorrenza e del Mercato* (the Italian competition authority—AGCM) found that Roche and Novartis had entered into an arrangement to reduce demand of Avastin for the treatment of eye disease in favour of Lucentis by overstating the safety concerns of Avastin's off-label use. According to the AGCM, the arrangement had been implemented: (1) by the production and dissemination of opinions which could give rise to public concerns regarding the safety of the off-label use of Avastin; and (2) by downplaying the value of scientific evidence to the contrary.

The AGCM also found that the arrangement in place was intended to disclose to the European Medicines Agency information exaggerating the perception of the risks associated with the off-label use of Avastin in order to obtain an amendment of the "Summary of Product Characteristics" and to be granted leave to send healthcare professionals a letter drawing their attention to the safety concerns of the off-label use of Avastin.[75]

The AGCM considered this arrangement to be a restriction of competition "by object" and imposed a fine on Novartis of €92 million and a fine of €90 million on Roche. Both companies appealed the decision before the Italian courts. The case ultimately reached the Italian Council of State, which referred several questions to the ECJ for a preliminary ruling.

The ECJ ruling

First, the ECJ confirmed that, for the purposes of the application of art.101 TFEU, an NCA may include in the relevant market, in addition to the medicinal products

[74] See AG Saugmondsgaard's Opinion of 21 September 2017 in *F Hoffmann-La Roche Ltd v Autorità Garante della Concorrenza e del Mercato* (C-179/16) EU:C:2017:714 at [46].

[75] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [32], [89]–[90].

authorised for the treatment of the diseases concerned, other medicinal products whose MA do not cover that treatment but which are used for this purpose and are thus actually substitutable with the former.[76]

The ECJ explained that the illegal manufacture or sale of a medicinal product in principle prevents it from being considered substitutable or interchangeable with products manufactured and sold lawfully. However, at the time of the AGCM decision, no illegality had been established as regards the prescription or repackaging of Avastin.[77]

The fact that Avastin was frequently prescribed by doctors for the treatment of eye disease on an off-label basis led the ECJ to conclude that there existed a specific relationship of substitutability between Avastin and other medicinal products which were authorised for those treatments, such as Lucentis. As a result, the AGCM was not precluded from finding that these products belonged to the same relevant market.[78]

Secondly, the ECJ found that the arrangement concerning the dissemination of allegedly misleading information about adverse reactions arising from the off-label use of Avastin was not ancillary to the licensing agreement between Genentech and Novartis and therefore fell within the scope of EU competition law as a separate agreement.[79] Notably, the arrangement was not designed to restrict the commercial autonomy of the parties to a licensing agreement, but rather to influence the conduct *of third parties*, such as regulatory authorities and healthcare professionals. Further, the arrangement was not objectively necessary for the implementation of the licensing agreement since it had been agreed on between the parties only several years after the conclusion of the licensing agreement.[80]

Thirdly, the ECJ held that an arrangement between competitors to disseminate, in a context of scientific uncertainty, misleading information about adverse reactions to the off-label use of a medicinal product, with the aim of reducing the competitive pressure resulting from such use on the use of another product, constitutes a restriction of competition "by object" for the purposes of art.101(1) TFEU.

While pharmacovigilance requirements might require the dissemination of information about the risks associated with the use of medicines, those requirements *fell only on the MA holder, not other parties*. Accordingly, the fact that two competitors (i.e. the MA holder and another entity) collude with each other to disseminate such information might constitute evidence that the conduct pursues objectives unrelated to pharmacovigilance.[81]

The ECJ ruled that here, if the information in question did not satisfy the requirements of completeness and accuracy laid down in art.1(1) of Regulation 658/2007,[82] then it is misleading if its purpose was:

- to confuse regulators in order to have adverse reactions to one of the drugs mentioned in the summary of product characteristics so as to

[76] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [67].
[77] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [56]–[62].
[78] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [66]–[67].
[79] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [75].
[80] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [72]–[74].
[81] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [78]–[88], [91].
[82] Regulation 658/2007 concerning financial penalties for infringement of certain obligations in connection with MAs granted under Regulation 726/2004 [2007] OJ L155/10, as subsequently amended.

enable the MA holder to launch a communication campaign with a view to exaggerating that perception artificially; and

- to emphasise, in a context of scientific uncertainty, the public perception of the risks associated with the off-label use of that drug with a view to artificially exaggerating this perception.

Whether that was the purpose of the information in this particular case was for the national court to determine.[83]

The ECJ concluded that, given the characteristics of the pharmaceutical industry, the dissemination of such information was likely to discourage doctors from prescribing the product in question, thus leading to the expected reduction of the competitive pressure resulting from its off-label use. In those circumstances, an arrangement that pursues the objectives described reveals a sufficient degree of harm to competition to be characterised as a "by object" restriction.[84]

Gasorba/Repsol

In November 2017, the ECJ ruled on a request for a preliminary ruling from the Spanish Supreme Court concerning the legal effects of EC commitment decisions on national judicial proceedings.[85]

It may be recalled that in 2004 the EC opened proceedings as regards the long-term exclusive supply agreements between Repsol and certain service station tenants (including Gasorba) in Spain. In 2006, the EC adopted a commitment decision under art.9(1) of Regulation 1/2003, whereby Repsol would refrain in future from concluding long-term exclusivity agreements and committed to offer the service station tenants concerned a financial incentive to terminate their agreements with Repsol prematurely.[86]

After this decision, Gasorba brought an action against Repsol for the annulment of their agreements (which were for 25 years) on the ground that they were contrary to art.101 TFEU. The lower courts dismissed the case. On appeal, the Supreme Court asked the ECJ whether an EC commitment decision precluded national courts from examining the lawfulness of the agreements.[87]

The ECJ answered "no".[88] The court noted that, according to art.9(1) of Regulation 1/2003, commitment decisions have the effect of making binding the commitments proposed by undertakings in order to meet the competition concerns identified by the EC on its preliminary assessment.

However, these decisions do not establish that there is an infringement. Neither do they certify that the practice complies with art.101 TFEU. The EC carries out just a preliminary assessment of the competition situation, without concluding whether there has been or still is an infringement.[89] A commitment decision could

[83] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [92].
[84] *Hoffmann-La Roche* EU:C:2018:25; [2018] 4 C.M.L.R. 13 at [93]–[95].
[85] With thanks to Álvaro Mateo Alonso. *Gasorba SL v Repsol Comercial de Productos Pertoliferos SA* (C-547/16) EU:C:2017:891; [2018] 4 C.M.L.R. 7, judgment of 23 November 2017.
[86] Decision 2006/446 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/B-1/38.348—*Repsol CPP*) [2006] OJ L176/104. The commitments decision is available on the EC's website. Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[87] *Gasorba v Repsol* EU:C:2017:891; [2018] 4 C.M.L.R. 7 at [8]–[22].
[88] *Gasorba v Repsol* EU:C:2017:891; [2018] 4 C.M.L.R. 7 at [24]–[25].
[89] *Gasorba v Repsol* EU:C:2017:891; [2018] 4 C.M.L.R. 7 at [25]–[26].

not legalise the market behaviour of the undertaking concerned, and certainly not retroactively.[90]

Under Regulation 1/2003, commitment decisions are also without prejudice to the powers of NCAs and national courts to decide on cases.[91]

Consequently, the ECJ concluded that a commitment decision *does not prevent* national courts from examining agreements under competition rules.[92]

However, importantly, the ECJ also stated that national courts could not overlook such a decision and *should take it into account* as an indication, or even prima facie evidence, of the anti-competitive nature of the agreement.[93]

Telefónica

In December 2017, the ECJ[94] dismissed Telefónica's appeal against the GC's judgment in 2016,[95] in which the GC upheld the EC's decision that a non-compete agreement with Portugal Telecom during Telefónica's acquisition of Vivo amounted to a market-sharing agreement with the object of restricting competition. The court noted that this finding was not affected by the fact that the clause concerned was qualified by the words "to the extent permitted by law".

Regulation 44/2001 and competition law claims

flyLAL/Riga Airport and Air Baltic

In July 2018, the ECJ ruled[96] on a reference from the Court of Appeal in Lithuania concerning the determination of jurisdiction for competition claims under Regulation 44/2001.[97]

The complex background was as follows:

flyLAL (in liquidation) had brought claims that Riga Airport in Latvia and Air Baltic had concluded an agreement to oust flyLAL from the market. In particular, flyLAL alleged that Riga Airport had granted discriminatory discounts of up to 80% for landing services which had benefited Air Baltic. Air Baltic had then allegedly used those reductions to pursue predatory pricing practices on services to and from Vilnius Airport in Lithuania and then, having driven flyLAL out of business, moved the majority of its flights to Riga Airport.

flyLAL therefore alleged that there was an agreement contrary to art.101(1) EC Treaty (Treaty establishing the European Community) between Riga Airport and Air Baltic; and an abuse of dominant position by Air Baltic.

[90] *Gasorba v Repsol* EU:C:2017:891; [2018] 4 C.M.L.R. 7 at [28].
[91] *Gasorba v Repsol* EU:C:2017:891; [2018] 4 C.M.L.R. 7 at [27].
[92] *Gasorba v Repsol* EU:C:2017:891; [2018] 4 C.M.L.R. 7 at [30].
[93] *Gasorba v Repsol* EU:C:2017:891; [2018] 4 C.M.L.R. 7 at [29].
[94] *Telefónica SA v European Commission* (C-487/16 P) EU:C:2017:961.
[95] With thanks to Álvaro Mateo Alonso. *Telefónica SA v European Commission* (T-216/13) EU:T:2016:369; [2018] 4 C.M.L.R. 21. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2015–2016: Part 1" [2017] 28 I.C.C.L.R. 75, 82.
[96] With thanks to Geoffroy Barthet for his assistance. *AB flyLAL-Lithuanian Airlines v Starptautiska Lidosta "Riga" VAS* (C-27/17) EU:C:2018:533; [2018] I.L.Pr. 32.
[97] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

It appears that in 2006 the Latvian Competition Council decided that Riga Airport's discount system infringed art.82(c) of the EC Treaty (now art.102(c) TFEU) and ordered it to stop applying the system.

In January 2016, the Regional Court Vilnius ruled on flyLAL's claim for some €57.8 million in damages, ordering Air Baltic to pay flyLAL some €16 million, with interest. However, it dismissed flyLAL's action against Riga Airport.

In those proceedings, Riga Airport objected to the court's jurisdiction, arguing that the Lithuanian courts should not hear the case. The Regional Court disagreed, stating that issue had been ruled on already in earlier litigation, in which the Court of Appeal in Lithuania had found jurisdiction based on art.5(3) and (5) of Regulation 44/2001. It may be recalled that those provisions state that a person domiciled in another Member State can be sued in tort in the courts of the place where the harmful event occurred (art.5(3)); and as regards a dispute arising out of the operations of a branch, in the courts for the place where the branch is situated (art.5(5)).[98]

In its judgment in January 2016, the Regional Court Vilnius found that the Lithuanian courts had jurisdiction because:

- the anti-competitive conduct that had caused damage to flyLAL (in particular predatory prices and movement of passenger traffic to Riga Airport) took place in Lithuania; and
- Air Baltic operated in Lithuania through its branch there.

All parties appealed. The Court of Appeal in Lithuania then sent questions to the ECJ, seeking various clarifications:

- first, the court sought assistance as to whether "the place where the harmful event occurred" under art.5(3) of Regulation 44/2001 was the place of conclusion of the unlawful agreement infringing art.82(c) of the EC Treaty; or where the acts were committed, by means of predatory pricing when competing with flyLAL;
- secondly, the court asked whether flyLAL's loss of income, as a result of the unlawful acts by Riga Airport and Air Baltic, amounted to "damage" under art.5(3); and
- thirdly, the court asked whether Air Baltic's activities through its branch amounted to "operations of a branch" for art.5(5) of Regulation 44/2001.

The ECJ ruling

The court took the second question on loss of income as "damage" first and held that a distinction had to be made between the "initial damage", resulting directly from the event causing it and "subsequent adverse consequences". The place where the initial damage occurred could found jurisdiction under art.5(3) but not the

[98] An application was then made for enforcement of that judgment in Latvia, which came before the Senate of the Supreme Court in Latvia, which led to a reference to the ECJ: *flyLAL-Lithuanian Airlines AS v Starptautiska lidosta Riga VAS* (C-302/13) EU:C:2014:2319; [2014] 5 C.M.L.R. 27.

place of the subsequent adverse consequences.[99] To include the latter would be too extensive an interpretation of "the place where the harmful event occurred".[100]

Without prejudice to the referring court's role of finding the facts, the court noted that flyLAL's claimed loss of income included the loss of sales (and related profits) in relation to routes to and from Vilnius Airport affected by the alleged predation. The court considered that such loss of income as a result of conduct contrary to arts 101 and 102 TFEU may be regarded as damage under art.5(3), providing a basis for jurisdiction in the courts of the Member State where the harmful event occurred.[101]

The court also considered how to establish the place where such damage occurred. The ECJ noted that the alleged losses concerned flights to and from Vilnius, where flyLAL was established. Therefore the "main market affected" was that of the Member State where flyLAL conducted the main part of its activities related to such flights, i.e. the Lithuanian market.[102]

The court stated:

> "[W]here the market affected by the anti-competitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred for the purposes of … Article 5(3)."[103]

As regards the first question (whether "the place where the harmful event occurred" meant either where the relevant agreement was concluded or where the acts exploiting the financial benefit of that agreement, i.e. the predation, occurred), the court noted that jurisdiction could be based on either ground.[104]

In the court's view, in a case like this where there was a "chain of events", each of which may have caused the damage or which may have interacted to cause the damage, it was therefore for the referring court to verify the relationship between the various anti-competitive acts concerned:

- if the anti-competitive event causing the damage was the agreement between Riga Airport and Air Baltic, jurisdiction was with the Latvian courts;
- if the predatory practices of Air Baltic merely implemented that agreement, jurisdiction was again with the Latvian courts;
- however, if the predatory pricing was a separate infringement of (now) art.102 TFEU, jurisdiction over that issue was with the Lithuanian courts, since implementation of the conduct was in Lithuania[105]; and
- if the events were shown to be part of a common strategy to oust flyLAL from the market for flights to and from Vilnius and *all those events* contributed to the damage alleged, the referring court had to

[99] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [31].
[100] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [32]. Applying *Marinari v Lloyds Bank Plc* (C-364/93) EU:C:1995:289; [1995] I.L.Pr. 737.
[101] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [36]. Applying *Concurrence SARL v Samsung Electronics France SAS* (C-618/15) EU:C:2016:976; [2017] I.L.Pr. 11.
[102] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [39].
[103] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [40]–[43].
[104] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [57].
[105] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [47]–[52].

> identify which of the events had the "most importance" in implementing the strategy in order to assess the linking factors to Lithuania where the court was situated.[106] This was just a prima facie assessment, without assessing the substance of the case, because the rules on tortious liability might vary in national laws.[107]

As regards the third question (when were the operations of a branch relevant to assess jurisdictions), the court indicated that, in a case of tortious liability, for a dispute to be regarded as arising from the operations of a branch under art.5(5), that branch must have actually participated in some of the actions constituting the tort.[108] The referring court had to assess whether the branch had offered or applied the alleged predatory pricing and whether such participation was sufficiently significant to be a close link with the dispute in the case. The branch had to have "actually and significantly participated" in the abuse.[109]

Apple/MJA (eBizcuss.com)

In October 2018, the ECJ ruled on a reference from the French *Cour de cassation* concerning a jurisdictional dispute under Regulation 44/2001 in a competition claim[110] concerning conduct alleged to infringe art.102 TFEU.

MJA, acting for eBizcuss.com in liquidation (eBizcuss), claimed damages from Apple for infringement of art.102 TFEU. eBizzcuss brought its claim before the French courts, arguing that the liability was tortious. Apple claimed, however, that the proper jurisdiction was in Ireland where it is based, notably because eBizcuss, as its semi-exclusive distributor in France, had entered into an agreement which included a clause stating that the Irish courts had jurisdiction over the agreement and "the corresponding relationship".

eBizcuss argued that such a jurisdiction clause was not enough here because, applying the ECJ's *CDC Hydrogen Peroxide* judgment,[111] the clause did not refer to disputes concerning liability incurred as a result of an infringement of competition law. Apple countered that the jurisdiction clause should be respected because the action arose from a contractual relationship, even if the clause did not expressly cover such a competition claim and where no infringement of competition law had yet been found by a competition authority.

The *Cour de cassation* sought guidance from the ECJ on how to assess these questions.

First, the ECJ noted that the *CDC Hydrogen Peroxide* judgment concerned a contract for the supply of goods in relation to cartel. The court had held that a contracting party could be taken by surprise if it found jurisdiction fixed in such a case, without an express reference to disputes concerning liability incurred as a result of an infringement of competition law.[112]

[106] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [54], [56].
[107] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [54]–[55].
[108] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [63].
[109] *flyLAL-Lithuanian Airlines* EU:C:2014:2319; [2014] 5 C.M.L.R. 27 at [66].
[110] *Apple Sales International v MJA* (C-595/17) EU:C:2018:854; [2019] 4 C.M.L.R. 1.
[111] *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* (C-352/13) EU:C:2015:335; [2015] 5 C.M.L.R. 4.
[112] *Apple Sales International v MJA* EU:C:2018:854; [2019] 4 C.M.L.R. 1 at [22]–[25].

The question here was whether the same applied to a jurisdiction clause involving alleged tortious liability for an infringement of art.102 TFEU. In that context, the court found that anti-competitive conduct covered by art.102 TFEU could materialise in contractual relations that the undertaking in a dominant position establishes and by means of contractual terms.[113]

In the context, here, of an action based on art.102 TFEU, the taking into account of a jurisdiction clause that refers to an agreement and "the corresponding relationship" could not be regarded as surprising to one of the parties as in *CDC Hydrogen Peroxide*.[114]

So the jurisdiction clause could be applied even though it did not expressly refer to disputes related to liability incurred as a result of an infringement of competition law.[115]

Secondly, the ECJ found that it was not a pre-condition for the application of the jurisdiction clause that there had already been a finding of infringement of competition law. Such an approach had no connection with the considerations going to whether the jurisdiction clause should apply. It would also be contrary to the objective of foreseeability as to the relevant jurisdiction underpinning Regulation 44/2001. The right to claim damages for infringement of competition law is also independent of any prior finding of infringement by a competition authority.[116]

Cartel appeals

Box 4

- **Court cases—Cartel Appeals (1)**
  - — *YIRDs—ICAP*:
    - * EC references to ICAP as a facilitator in its YIRDs settlement decision were contrary to the presumption of innocence.
    - * However, ICAP decision not overturned on that basis because: (1) legality generally upheld; and (2) EC's decision not shown to be biased.
    - * Fine based on para.37 of EC Fining Guidelines annulled as not sufficiently reasoned.
  - — *North Sea Shrimps/Stührk Delikatessen Import*:
    - * GC annulled EC fine based on para.37 as not sufficiently reasoned.
    - * Becoming a theme now!
    - * (See *Envelopes* cartel amending decision reasoning in Part 2.)
  - — Smart Card Chips—*Infineon*:
    - * GC judgment on fine overturned on the basis that the court had not reviewed six out of 11 alleged anti-competitive contacts.
    - * ECJ considered that the court could not rule on the proportionality of the fine without assessing that, nor had the GC undertaken an overall assessment of the circumstances to which the number of contacts was relevant.

[113] *Apple Sales International v MJA* EU:C:2018:854; [2019] 4 C.M.L.R. 1 at [28].
[114] *Apple Sales International v MJA* EU:C:2018:854; [2019] 4 C.M.L.R. 1 at [29].
[115] *Apple Sales International v MJA* EU:C:2018:854; [2019] 4 C.M.L.R. 1 at [30].
[116] *Apple Sales International v MJA* EU:C:2018:854; [2019] 4 C.M.L.R. 1 at [31]–[36].

Box 4 continued

— *Power cables*:

* Appeals rejected, including claims by Goldman Sachs that it should not be presumed to have exercised decisive influence over Prysmian; and was a pure financial investor.

Yen interest rate derivatives—ICAP

In November 2017, the GC annulled the EC's decision on ICAP's participation in the *Yen interest rate derivatives (YIRDs)* cartel.[117] The case is interesting mainly because of consideration of ICAP's position in a hybrid settlement procedure and because of the court's view on reasoning for fines under para.37 of the EC Fining Guidelines.[118]

Background

YIRDs are globally traded financial products used by banks to manage their risk exposure and to speculate (e.g. interest rate swaps).

The British Bankers Association set reference interest rates for these financial instruments, i.e. the "JPY LIBOR". The JPY LIBOR rates were set daily on the basis of submissions made by the members of the JPY LIBOR panels (i.e. banks). The rates were based on the average resulting from the submissions and immediately published each day. JPY LIBOR rates were reflected in the pricing of YIRDs.

The EC found that some banks manipulated the JPY LIBOR by biasing some of their submissions, which amounted to indirect price-fixing and fixing of trading conditions for YIRDs.

In December 2013, the EC issued a settlement decision imposing fines totalling €669.7 million on several banks and on the broker RP Martin, which had admitted their involvement in cartels operating in the YIRD sector. The banks involved were Deutsche Bank, RBS, UBS and Citigroup.

However, ICAP, another broker, decided not to settle and the proceedings therefore continued under the standard procedure.

The EC then fined ICAP €14.9 million in February 2015 for facilitating six sets of anti-competitive bilateral contacts between banks. For one infringement, ICAP was found to have served as a conduit for collusive communications. For the other five infringements, ICAP was found to have aimed to influence certain JPY LIBOR panel banks that did not participate in the infringement to submit JPY LIBOR rates by: (1) disseminating misleading information to them; and/or (2) directly contacting them. This was at the request of the other banks.

[117] With thanks to Geoffroy Barthet. *ICAP Plc v European Commission* (T-180/15) EU:T:2017:795; [2018] 4 C.M.L.R. 8.

[118] *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003* [2006] OJ C210/2 (EC Fining Guidelines (2006)).

The GC's judgment

ICAP appealed the decision to the GC, which partly upheld the EC decision and partly annulled it on substance; and then annulled the fine insofar as the related reasoning was not sufficient.

The main points are as follows:

First, the GC found that the three items used by the EC to prove ICAP's awareness of the role played by RBS in one of the six infringements involving UBS and RBS in 2008 were not firm, precise and consistent evidence as required by the case law.[119] In particular, the ambiguity of two items of evidence created doubts as to whether ICAP knew of the role played by RBS in the UBS/RBS 2008 infringement. The benefit of such doubt had to be given to ICAP, as provided in the ECJ's case law.[120] As a result, the GC annulled the EC decision insofar as it had found that ICAP participated in the UBS/RBS 2008 infringement.

Secondly, the GC found that the EC did not sufficiently prove the duration of four further cartels in which ICAP was considered to have participated. The GC found, among other things, that the EC used the wrong starting date for two infringements and absence of evidence for a long period should have led to the conclusion that there was an interruption regarding ICAP's participation in another infringement. The GC concluded that the duration of these four infringements was excessive and partially annulled the EC's decision accordingly.

Thirdly, ICAP complained that it was already referred to as a cartel facilitator by the EC in the settlement decision in 2013, which was contrary to the presumption of innocence.

The GC confirmed that the EC's 2013 decision referred many times to ICAP as having "facilitated" the cartels,[121] which "reveal[s] very clearly the Commission's position on ICAP's participation in the unlawful conduct".[122]

In addition, the GC rejected the EC's assertion that the efficiency of the settlement procedure demands reference to the conduct of third parties in settlement decisions.[123] On the contrary, the GC emphasised that the requirements relating to the compliance with the presumption of innocence could not be distorted by such considerations.[124]

The GC acknowledged that it is difficult for the EC to determine the liability of the undertakings participating in the settlement, without also taking a view on the participation in the infringement of a non-settling undertaking. However, the EC had to operate the settlement procedure so as to avoid conflict with the presumption of innocence, including for hybrid settlements. Referring to the *Timab* judgment,[125] the GC suggested, for example, to adopt the decisions relating to all the undertakings concerned by the cartel on the same date.[126] This would enable the presumption of innocence to be safeguarded. Since the EC did not do so for

[119] *Knauf Gips KG v European Commission* (C-407/08 P) EU:C:2010:389; [2010] 5 C.M.L.R. 12.
[120] *E.ON EnergieAG v European Commission* (C-89/11 P) EU:C:2012:738; [2013] 4 C.M.L.R. 3 at [72].
[121] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [258].
[122] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [259].
[123] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [264].
[124] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [266].
[125] *Timab Industries v European Commission* (T-456/10) EU:T:2015:296; [2015] 5 C.M.L.R. 1.
[126] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [268].

ICAP, the GC ruled that the presumption of innocence in favour of ICAP had been infringed.

Fourthly, however, the GC indicated that that breach of the presumption of innocence at the time of the adoption of the settlement decision could not have had a direct impact on the legality of the decision against ICAP in view of the separate and independent nature of the proceedings which gave rise to the settlement decisions and the decision against ICAP. Therefore, the contested decision was not annulled on that ground.

Fifthly, the GC then considered that it was necessary to ascertain whether the EC's finding in the settlement decision was capable of vitiating the contested decision, insofar as it showed a *lack of objective impartiality*, as also submitted by ICAP.

The GC looked at where the EC made findings, i.e. (1) in determining ICAP's participation in infringements; and (2) in classifying the infringement as a restriction "by object" and found no EC bias. The court noted that the EC's decision had been upheld on the evidence in five out of six infringements (even if partially annulled).[127] Further, the court considered that the EC's classification of ICAP's behaviour as a restriction by object was not vitiated by a lack of objective impartiality, since that finding was correct.[128]

Sixthly, the GC addressed ICAP's challenges to the EC's calculation of the fine. As a mere broker, ICAP was not active on the YIRDs market affected by the cartel so the EC applied para.37 of the EC Fining Guidelines.

The GC recalled that para.37 requires the EC to justify any deviation from the methodology set out in the Guidelines. The court then found that the EC had justified deviating from the standard methodology because ICAP had no turnover in the markets concerned.[129] However, the court also found that the EC did not explain the alternative methodology that it followed but only provided a general statement that the amounts reflected the gravity, duration and nature of the infringements, as well as ensuring a deterrent effect.[130]

As a result, the GC concluded that the EC's decision provided insufficient reasoning. The decision did not enable the applicants to understand the justification for the methodology favoured by the EC or allow the court to verify that justification. In addition, the GC emphasised that the facts that the EC had discussed the methodology with ICAP or offered explanations in the written phase of the litigation were irrelevant.[131] The methodology had to be provided when the decision was communicated to the addressee.

The GC therefore annulled the EC's decision on fines.

Air Cargo—British Airways

In November 2017, the ECJ dismissed the appeal by British Airways (BA) and upheld its fine for participation in an infringement in the *Air Cargo* cartel.[132] The

[127] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [270], [274], [277]–[279].
[128] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [279].
[129] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [286].
[130] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [293].
[131] *ICAP* EU:T:2017:795; [2018] 4 C.M.L.R. 8 at [295]–[296].
[132] With thanks to Lukas Šimas. *British Airways Plc v European Commission* (C-122/16 P) EU:C:2017:861; [2018] 4 C.M.L.R. 1.

ECJ held that the GC had been correct in not granting BA a full annulment of the infringement decision since it had only sought a partial annulment before the GC.

Background

It will be recalled that, in 2010, BA and several other air carriers were fined for an infringement in the *Air Cargo* cartel. On appeal, most addressees of the fining decision requested a full annulment. However, BA brought an action only for a partial annulment.

On appeal, the GC raised of its own motion, as a matter of public policy, whether the "tenor" of the EC's decision, i.e. the final rulings, were compatible with the reasoning in the decision and found that the decision at issue was vitiated by various contradictions.

The GC subsequently annulled the EC decision in its entirety in relation to those carriers that had asked for full annulment. It did not, however, annul the decision in its entirety for BA, on account of the principle of *ne ultra petita* (i.e. because the subject matter of an action is defined by parties themselves). The GC only annulled the decision in part within the scope of BA's notice of appeal.

BA appealed further, arguing that the GC should have gone beyond BA's request for a partial annulment and ordered a full annulment.

The ne ultra petita issue

BA argued that the GC erred in law by applying the concept of *ne ultra petita* to restrict its action, when it had of its own motion found there to be fundamental public policy defects that vitiated the entire EC decision.[133]

BA stated that it is difficult to understand why, although the GC did not rule on the pleas in law put forward by BA, it decided to have regard to the form of its application at first instance to annul the decision only in part.[134] Further, BA argued that the GC created an illogical distinction between BA's position (i.e. partial annulment) and that of other carriers at issue which obtained a complete annulment of the decision, even though some of those carriers did not put forward pleas alleging defective statements of reasons, such as that raised by the GC of its own motion.[135]

The ECJ disagreed. The court stated that a court reviewing the legality of an act cannot rule *ultra petita* (i.e. cannot grant an annulment which goes beyond that sought by the applicant).[136] The ECJ also stated that the EU courts may raise of their own motion pleas involving matters of public policy but this does not mean that the court has jurisdiction to amend the form of order sought.[137] As for the logic of the distinction between BA and other carriers, the ECJ held that the GC was correct not to treat the carriers in the same way in view of the differences between them as regards the scope of the forms of order they had sought.[138]

[133] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [59].
[134] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [69].
[135] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [70].
[136] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [81].
[137] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [89].
[138] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [96].

Effective judicial protection

BA also claimed that even if the prohibition on ruling *ultra petita* applied in this case, the higher principle of effective judicial protection under art.47 of the CFR would require the annulment of the contested decision in its entirety.[139]

The ECJ disagreed and stated that the fact that the judicial review carried out by the EU courts is limited to the claims of the parties is not contrary to the principle of effective judicial protection. Such a principle does not require the respective courts to extend their review to cover aspects of a decision that have not been put in issue in the dispute before them.[140]

The ECJ also emphasised that the defective reasoning by the EC could have been identified by BA and that it could thus have relied on such reasoning in its application before the GC and sought annulment of the decision in question in its entirety, as did some of the other carriers, such as Air Canada.[141]

Freight Forwarding

Background

In March 2012, the EC fined 14 groups €169 million for participating in one or more of four separate cartels[142] aimed at fixing prices and other trading conditions in international air freight forwarding services (FFS).[143] In 2016, the GC dismissed various appeals brought.[144] Schenker, Deutsche Bahn, Panalpina and Kühne+Nagel then appealed further to the ECJ.

In February 2018, the ECJ issued four separate judgments dismissing all pleas in their entirety.[145]

Since the reasoning of the appellants is similar in the four cases and only *Schenker* includes all arguments in its appeal, we focus here on the *Schenker* case, with reference to *Kühne+Nagel* for one other point.

[139] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [75].
[140] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [105].
[141] *BA* EU:C:2017:861; [2018] 4 C.M.L.R. 1 at [106].
[142] With thanks to Virginia Del Pozo. The cartels were: (1) the New Export System (NES) cartel; (2) the Advanced Manifest System (AMS) cartel; (3) the Currency Adjustment Factor (CAF) cartel; and (4) the Peak Season Surcharge (PSS) cartel.
[143] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/39.462—*Freight forwarding*) [2012] OJ C375/7; the non-confidential version of the decision is available on the EC's website.
[144] *EGL Inc v European Commission* (T-251/12) EU:T:2016:114; [2016] 4 C.M.L.R. 23; *Kühne+Nagel International AG v European Commission* (T-254/12) EU:T:2016:113; *UTi Worldwide Inc v European Commission* (T-264/12) EU:T:2016:112; [2016] 4 C.M.L.R. 24; *Schenker Ltd v European Commission* (T-265/12) EU:T:2016:111; [2016] 4 C.M.L.R. 25; *Deutsche Bahn AG v European Commission* (T-267/12) EU:T:2016:110; [2016] 4 C.M.L.R. 26; *Panalpina World Transport (Holding) Ltd v European Commission* (T-270/12) EU:T:2016:109; [2016] 4 C.M.L.R. 27. All judgments of 29 February 2016. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2015–2016: Part 1" [2017] I.C.C.L.R. 75, 90.
[145] ECJ Press Release 9/18, 1 February 2018. *Kühne+Nagel International AG v European Commission* (C-261/16 P) EU:C:2018:56 (*K+N*); *Schenker Ltd v European Commission* (C-263/16 P) EU:C:2018:58; [2018] 4 C.M.L.R. 18 (*Schenker*); *Deutsche Bahn AG v European Commission* (C-264/16 P) EU:C:2018:60; [2018] 4 C.M.L.R. 19 (*Deutsche Bahn*); *Panalpina World Transport (Holding) Ltd v European Commission* (C-271/16 P) EU:C:2018:59; [2018] 4 C.M.L.R. 20 (*Panalpina*). All judgments of 1 February 2018.

The Schenker case

First, the ECJ agreed with the GC that the question whether a lawyer has complied with his obligations under national law and rules governing conduct, in agreeing to represent a client in a case liable to give rise to a conflict of interest in respect of another client, falls outside the scope of the EC's competence for the purposes of applying arts 101 and 102 TFEU.[146]

Moreover, the ECJ stated that the GC had been correct to find that there are no provisions of EU law preventing the EC from using information and evidence submitted by a leniency applicant, where the lawyer representing that company has infringed the prohibition on double representation or the duty of loyalty to his or her former clients.[147]

It may be recalled here that the underlying issue was whether a law firm had infringed conflicts rules by first representing a trade association and then one of its members which was the immunity applicant.

Secondly, the ECJ found that the GC had been correct to find that a cartel relating to the fixing of the rates and conditions of the services provided by freight forwarders in supplying, in one package, a number of services that are distinct from the transport operation in itself is not excluded from the scope of Regulation 17/62 (the predecessor to Regulation 1/2003) by Regulation 141/62.[148]

Thirdly, the GC had not erred in considering that the NES cartel in the UK, in which Schenker was involved, was capable of having repercussions on freight forwarders in other Member States, where they were also competing, and was also capable of altering the structure of competition in the EU—in other words, not looking at effect on trade only as regards the NES cartel but also as regards the market for international freight forwarding services as a package.[149]

Fourthly, the ECJ reiterated that the EC enjoys discretion to hold a parent company liable for the conduct of its subsidiary which participated in the infringement, provided that it respects the principle of equal treatment.[150] The EC is under no obligation to hold the *earlier* parent company of a subsidiary liable or jointly liable.[151] Further, the court considered that, taking into account the significant number of entities involved in the procedure, the EC was entitled to exclude former parent companies without exceeding the limits of its discretion.[152] The ECJ also considered that the EC had set out sufficient reasons for its decisions.[153]

Fifthly, the ECJ stated that Schenker confused the infringement in question with the definition of the relevant market affected by that infringement in considering the value of sales for fining purposes. Pursuant to para.13 of the EC Fining Guidelines, the EC has to take the value of the sales of goods or services to which

[146] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [15].
[147] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [16].
[148] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [27]–[28]. *Official Journal*, English Special Edition (1959–62), p.291. Regulation 17/62: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204; Regulation 141/62 exempting transport from the application of Regulation 17 [1962] OJ 124/2751.
[149] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [37]–[38].
[150] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [48].
[151] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [49].
[152] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [50].
[153] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [52].

the infringement directly or indirectly relates for the determination of the basic amount of the fine to be imposed.[154]

The "value of sales" refers to sales on the market concerned by the infringement, here, the market for international air freight forwarding services.[155] Since the GC had correctly found that the NES cartel affected the freight forwarding services as a package, the GC was correct to find that the EC had not erred in taking Schenker's sales in all such services for the value of sales, not just its sales in NES filing services.[156]

Finally, there was no unequal treatment between the immunity given to Deutsche Post as regards the investigation as a whole and the reduction given to Schenker which had been applied to the fine for its specific infringement. Deutsche Post was rewarded for *revealing* the infringement, whereas Schenker was rewarded for evidentiary co-operation, i.e. there were two different situations.[157]

The Kühne+Nagel case

In the *Kühne+Nagel* (*K+N*) case, K+N claimed that the EC infringed the principle of equal treatment because it ignored the differences between K+N's business model (intermediation) and that of the other cartel participants (consolidation). Consequently, the EC should have deducted the cost of the services which K+N purchased from others to provide the freight forwarding services from the turnover used as a basis for its fine.[158]

The ECJ disagreed, noting that deduction of such costs would be unfair vis-à-vis the other undertakings which internalised those costs. The EC had been correct to take sales on the relevant market as the starting point for fines for all. The ECJ considered that companies with such a business model (mediation) are in a comparable situation to companies with the business model of consolidation.[159] Neither was it disproportionate to fine on this basis, even though K+N's profit as an "intermediary" was small compared to the fine.[160]

Consequently, the ECJ rejected the four appeals in their entirety.

Smart Card Chips—Infineon

In September 2018, the ECJ ruled on a further appeal by Infineon against the GC's judgment of December 2016 by which the GC upheld the EC's decision imposing a fine of some €82.7 million on Infineon for its participation in this cartel. The ECJ annulled the GC's ruling.[161]

Before the ECJ, Infineon argued, among other things, that the GC had been wrong only to look at five alleged bilateral contacts between Infineon and Renesas, out of 11 on which the EC had relied against Infineon in its decision.[162]

[154] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [59].
[155] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [59]–[61].
[156] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [62].
[157] *Schenker* EU:C:2018:58; [2018] 4 C.M.L.R. 18 at [75].
[158] *K+N* EU:C:2018:56 at [71]–[73].
[159] *K+N* EU:C:2018:56 at [83]–[84].
[160] *K+N* EU:C:2018:56 at [87].
[161] *Infineon Technologies AG v European Commission* (C-99/17 P) EU:C:2018:773; [2018] 5 C.M.L.R. 35, ECJ Press Release 139/18, 26 September 2018.
[162] *Infineon* EU:C:2018:773; [2018] 5 C.M.L.R. 35 at [27]–[29].

The GC considered that it was enough to look at five alleged unlawful contacts since the infringement alleged was only for three years, from 2003 to 2005 and contracts were in principle on an annual basis.

The court also considered, in its unlimited jurisdiction, that the EC had been entitled to set the gravity of the infringement at 16% and to adapt to the nature of the infringement by only finding that Infineon's contacts with Samsung and Renesas were unlawful, it not having been shown that Infineon was aware of contacts with Philips or of the whole infringement. Infineon had been given a 20% fine reduction to reflect this.

The ECJ noted that the GC's approach was not unlawful in the sense of being incompatible with the requirements of a complete judicial review of the EC's decision, given the circumstances. The court had considered whether the EC had shown a single and continuous infringement and given adequate reasons for its approach of reviewing only a limited number of contacts.[163]

However, the ECJ took a different view insofar as the GC, in applying its unlimited jurisdiction, considered whether the amount of the fine was proportionate to the infringement.[164] For that purpose, the European courts are required to examine all complaints based on issues of fact and law seeking to show that the amount of the fine is disproportionate to the infringement. That included all factors capable of affecting the assessment of gravity. Such factors included the number and intensity of the incidents of anti-competitive conduct.

The important point here was therefore that the EC had found Infineon liable for the infringement on the basis of 11 bilateral contacts which Infineon disputed and the EC took into account the limited participation of Infineon in granting it a 20% fine reduction.[165] The GC had been asked to review that to see if the fine imposed was commensurate with the precise extent of its participation. Although the GC was not required to rely on the exact number of bilateral contacts found, that could be a relevant factor.

As a result, the GC could not respond to Infineon's claim of lack of proportionality without taking into account the small number of contacts in which Infineon participated. All the more so as the GC had confirmed only five of the 11 contacts found in the EC's decision, without checking whether the EC had established the other 6 found in its decision.[166]

The court noted that other factors could still justify the EC's approach: the fact that Infineon's turnover in the products concerned was greater than that of others; and the fact that a gravity multiplier of 16% is at the low end of the penalty scale for cartels. However, the GC still had to review whether the fine was commensurate with the number of contacts it found as regards Infineon.

A further reduction would not be required for each mitigation circumstance made out by Infineon. However, the GC had to undertake an overall analysis of the relevant circumstances and the court noted that the GC also had not done that.[167]

[163] *Infineon* EU:C:2018:773; [2018] 5 C.M.L.R. 35 at [49]–[55].
[164] *Infineon* EU:C:2018:773; [2018] 5 C.M.L.R. 35 at [195]–[197].
[165] *Infineon* EU:C:2018:773; [2018] 5 C.M.L.R. 35 at [200]–[201].
[166] *Infineon* EU:C:2018:773; [2018] 5 C.M.L.R. 35 at [206]–[207].
[167] *Infineon* EU:C:2018:773; [2018] 5 C.M.L.R. 35 at [212]–[213].

The case was referred back to the GC to reassess proportionality, if necessary by examining the other six contacts which the EC had found.[168]

Power Cables

In July 2018, the GC issued 15 judgments related to appeals against the EC's decision in this case.[169] The GC dismissed them all.

It may be recalled that the EC took its *Power Cables* decision in 2014, imposing some €302 million in fines on 11 producers of high-voltage underground and submarine power cables.[170] The EC found that European, Japanese and Korean producers of such cables had entered into a worldwide market-sharing agreement, save for the US. In addition, the European producers of such cables had a market-sharing agreement within Europe. The EC found that some 60% of worldwide projects were allocated to European producers and 40% to Asian producers. The infringement had lasted some 10 years from 1999.

The main points of interest were as follows:

First, Goldman Sachs argued that it should not be liable for its investment in Prysmian since Goldman Sachs owned only 84–91% of Prysmian at times. Therefore, the presumption of decisive influence based on 100% share ownership should not apply.

The GC disagreed, noting that Goldman Sachs had full control of Prysmian, even when it sold certain equity to others, because of specific contractual provisions to that effect.[171] Given that Goldman Sachs held a very high stake and 100% of the voting rights over Prysmian, Goldman Sachs was in a similar position to a share owner and the presumption of actual exercise of decisive influence over Prysmian applied.[172]

This was not the case after Goldman Sachs' shareholding fell to 31.69%. However, the GC found that, during that period too, Goldman Sachs' powers over management and strategy, as well as its behaviour, which was typical of an industrial owner, meant that it did actually exercise a decisive influence over Prysmian.[173] The fact that Prysmian was not perceived externally as part of Goldman

[168] On the same day, the ECJ rejected Philips' further appeal. *Koninklijke Philips NV v European Commission* (C-98/17 P) EU:C:2018:774; [2018] 5 C.M.L.R. 34.

[169] With thanks to Geoffroy Barthet, Virginia Del Pozo, Itsiq Benizri, Yujin Suga and Georgia Tzifa. GC Press Release 107/18, 12 July 2018. *Goldman Sachs Group Inc v European Commission* (T-419/14) EU:T:2018:445; [2018] 5 C.M.L.R. 12; *Viscas Corp v European Commission* (T-422/14) EU:T:2018:446; [2018] 5 C.M.L.R. 13; *Silec Cable SAS v European Commission* (T-438/14) EU:T:2018:447; [2018] 5 C.M.L.R. 14; *LS Cable & System Ltd v European Commission* (T-439/14) EU:T:2018:451; [2018] 5 C.M.L.R. 15; *Brugg Kabel AG and Kabelwerke Brugg AG Holding v European Commission* (T-441/14) EU:T:2018:453; *Furukawa Electric Co Ltd v European Commission* (T-444/14) EU:T:2018:454; [2018] 5 C.M.L.R. 26; *ABB Ltd v European Commission* (T-445/14) EU:T:2018:449; [2018] 5 C.M.L.R. 18; *Taihan Electric Wire Co Ltd v European Commission* (T-446/14) EU:T:2018:444; [2018] 5 C.M.L.R. 19; *NKT Veraltungs GmbH v European Commission* (T-447/14) EU:T:2018:443; [2018] 5 C.M.L.R. 20; *Hitachi Metals Ltd v European Commission* (T-448/14) EU:T:2018:442; [2018] 5 C.M.L.R. 21; *Nexans France SAS and Nexans France SAS v European Commission* (T-449/14) EU:T:2018:456; [2018] 5 C.M.L.R. 22; *Sumitomo Electric Industries Ltd v European Commission* (T-450/14) EU:T:2018:455; [2018] 5 C.M.L.R. 24; *Fujikura Ltd v European Commission* (T-451/14) EU:T:2018:452; [2018] 5 C.M.L.R. 17; *Pirelli & C. SpA v European Commission* (T-455/14) EU:T:2018:450; *Prysmian SpA v European Commission* (T-475/14) EU:T:2018:448; [2018] 5 C.M.L.R. 30. All Judgments of 12 July 2018.

[170] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39610—*Power Cables*) [2014] OJ C319/10; the non-confidential version of the decision is available on the EC's website.

[171] *Goldman Sachs* EU:T:2018:445; [2018] 5 C.M.L.R. 12 at [48], [53]–[64].

[172] *Goldman Sachs* EU:T:2018:445; [2018] 5 C.M.L.R. 12 at [48]–[68].

[173] *Goldman Sachs* EU:T:2018:445; [2018] 5 C.M.L.R. 12 at [86]–[143].

Sachs and was not included in the group for accounting purposes did not rebut the factors supporting the presumption of control.[174]

Secondly, Goldman Sachs argued that it should not be liable because its investment was a purely financial one. Again the GC disagreed. To be a pure financial investor (and therefore not liable), Goldman Sachs had to show that the presumption of actual exercise of decisive influence had been rebutted. A pure financial investor is a shareholder which/who has no involvement in the management or control of a company, which the court found was not the case here.[175]

Goldman Sachs argued that it was concerned with the strategy of Prysmian but it was Prysmian's management that was involved in the cartel. The EC's position was that it did not have to show that Goldman Sachs was involved in the infringement, just that Goldman Sachs had control of the business concerned, so formed a single undertaking with Prysmian.[176] The GC agreed.

Thirdly, in *Goldman Sachs*, the GC noted that the EC is not required to determine the share of the fine to be paid by those companies which are jointly and severally liable, insofar as that was an "internal relationship" (within a group). Here this was the case for the entire infringement period. The court held that it did not matter that, at the date of the contested decision, Goldman Sachs was no longer a single entity with Prysmian.[177]

Fourthly, there were various arguments about attribution of liability as between two Japanese companies, Furukawa Electric and Fujikura and their joint venture (JV) Viscas.[178] These were rejected by the GC, which found that Viscas, from its creation, succeeded its parents in having collusive contact with other members. On the facts, it appears that the JV was co-operative, not full-function, and that there was a share of sales responsibilities between the parents and the JV.

Fifthly, the EC considered that conduct outside the EU was relevant to the infringement, where it was foreseeable that the conduct would have direct and substantial effects on the EU internal market.[179] This was the case here.

Sixthly, the GC also upheld the EC's approach of looking at worldwide sales/conduct (including in Japan and export territories outside the EU, Japan and Korea) to determine a market share ratio to apply to European Economic Area (EEA) sales for fining purposes (under para.18 of the EC Fining Guidelines). Notably, the court rejected the argument that the use of para.18 led the EC to infringe the principles of proportionality and equal treatment.[180]

Seventhly, some companies argued that inactivity for a period should have led the EC to exclude them from the cartel for that period. The GC disagreed, noting that a company could continue to be liable if there was evidence of emails or contacts showing continued activity and/or if it was found that the company had not publicly distanced itself from the cartel (i.e. made that clear to other cartel participants).[181]

[174] *Goldman Sachs* EU:T:2018:445; [2018] 5 C.M.L.R. 12 at [155].
[175] *Goldman Sachs* EU:T:2018:445; [2018] 5 C.M.L.R. 12 at [151], [156].
[176] *Goldman Sachs* EU:T:2018:445; [2018] 5 C.M.L.R. 12 at [83], [132].
[177] *Goldman Sachs* EU:T:2018:445; [2018] 5 C.M.L.R. 12 at [203]–[207].
[178] For example, *Fujikura* EU:T:2018:452; [2018] 5 C.M.L.R. 17 at [50]–[70].
[179] For example, *Brugg Kabel* EU:T:2018:453 at [94]–[99].
[180] For example, *Viscas* EU:T:2018:446; [2018] 5 C.M.L.R. 13 at [170]–[195].
[181] For example, *Sumitomo* EU:T:2018:455; [2018] 5 C.M.L.R. 24 at [90]–[102].

Eighthly, the GC found that the EC had also correctly treated the underground and submarine power cables cases separately. If not, combining the two cases might have wrongly diluted the weight to attribute to a company involved in only one of the two.[182]

Ninthly, the court rejected arguments about barriers to entry in the EU by Asian producers. If an anti-competitive agreement had been established, there was no need to show that there was a plausible alternative explanation for a Japanese company's absence from the EEA market.[183] Neither had such producers shown that the barriers to entry were insurmountable so that the agreement was not capable of affecting competition in the EEA.

Tenthly, in assessing jurisdiction, the EC was not required to make findings as regards specific projects to be implemented outside the EEA for which there was evidence of allocation/sharing among the parties.[184] The EC was entitled to consider the overall effects of the various anti-competitive practices (taken as a whole, not in isolation from one another).

Finally, the GC confirmed that the EC was entitled to take a copy-image of a hard disk and continue review in its Brussels premises, provided that the defence was allowed to be present at that continued review and to exercise its rights. The court rejected an argument that the delay related to this infringed defence rights because it inhibited the defence from assessing if it should make a partial immunity application. The EC found that the company still had the information concerned and could decide on that for itself.[185]

Comment

In all this, it is the *Goldman Sachs* case which has attracted the most attention, insofar as: (1) Goldman Sachs was a private equity investor; and (2) Goldman Sachs' holding of 100% of voting rights was considered enough to apply the presumption of the actual exercise of decisive influence, even if Goldman Sachs did not hold all or virtually all of its subsidiary's shares.

Bathroom Fittings—Keramag/Sanitec

In July 2018, the GC ruled on the part of EC's decision as regards Keramag/Sanitec in the *Bathroom Fittings* case which the GC had annulled but which the EC had successfully appealed to the ECJ.[186]

It may be recalled that the issue was whether a meeting of the French industry association AFICS in February 2004, as described in Ideal Standard (IS)'s statement for leniency, should be considered anti-competitive. The EC considered that it should, insofar as it was supplemented by a chart drawn up by one of IS's representatives following the meeting, AFICS statistics and a statement by a competitor, Roca, seeking leniency.[187]

[182] *LS Cable* EU:T:2018:451; [2018] 5 C.M.L.R. 15 at [152], [157]–[163].
[183] *Furukawa Electric* EU:T:2018:454; [2018] 5 C.M.L.R. 26 at [90].
[184] For example, *Brugg Kabel* EU:T:2018:453 at [100]–[113].
[185] *Prysmian* EU:T:2018:448; [2018] 5 C.M.L.R. 30 at [60], [75]–[76].
[186] With thanks to Lukas Šimas. *Keramag Keramische Werke GmbH v European Commission* (T-379/10 RENV and T-381/10 RENV) EU:T:2018:400; [2018] 5 C.M.L.R. 5. The ECJ judgment was *European Commission v Keramag Keramische Werke GmbH* (C-613/13 P) EU:C:2017:49; [2017] 4 C.M.L.R. 18.
[187] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [32].

The ECJ had required the GC to reassess its findings as regards these elements and to consider whether, viewed as a whole, they suggested that the meeting was anti-competitive.

The court did so, noting that:

- the chart was undated, not linked to the meeting in question and did not have names of competitors or prices which competitors should apply. It therefore drew its probative value from the IS statement, rather than as corroboration of it[188];
- Roca's statement, although not as precise as IS's statement, confirmed it in certain respects, in particular as regards the fact that discussions on prices of products had occurred over several years and that a 3% price increase could have been decided on during those meetings, so it amounted to corroboration of IS's statement[189]; and
- the AFICS statistics, while not showing that a discussion on prices happened in the meeting in February 2004, showed that price co-ordination took place during 2004 so that they also could be viewed as corroboration of IS' statement.[190]

Looking at the evidence overall, the GC also ruled that it showed price co-ordination in 2004 for low-end products in AFICS.[191]

As a result, the appeals of Keramag and Sanitec were dismissed in their entirety.[192]

North Sea Shrimps—Stührk Delikatessen Import

In July 2018, the GC annulled the €1.1 million fine imposed by the EC on Stührk Delikatessen Import (SDI).[193]

It may be recalled that, in 2009 the EC carried out inspections after Klaas Puul applied for leniency related to a cartel for the supply of North Sea Shrimps.[194] In November 2013, the EC issued its decision, imposing fines of some €29 million on Heiploeg, Kok Seafood and SDI.

SDI appealed against the EC decision.

The GC generally rejected SDI's arguments. However, the court upheld SDI's plea that the EC had not adequately reasoned the adjustment that the EC had made to SDI's fine under para.37 of the EC Fining Guidelines.

The key issue for SDI was that it admitted involvement in the cartel in Germany, as regards supply to one customer, Aldi-Nord. The EC found that SDI had done more than that, including co-ordination as regards supply to Metro, another customer, but still only in Germany. Nevertheless, the EC found that SDI was part of the wider North Sea Shrimps cartel and the GC upheld that view.

[188] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [41]–[43].
[189] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [52].
[190] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [57]–[58].
[191] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [63].
[192] *Keramag* EU:C:2017:49; [2017] 4 C.M.L.R. 18 at [66].
[193] With thanks to Geoffroy Barthet. *Stührk Delikatessen Import GmbH & Co KG v European Commission* (T-58/14) EU:T:2018:474.
[194] Decision relating to a proceeding under Article 101 of the TFEU (Case AT.39633—*Shrimps*) [2014] OJ C453/16; the non-confidential version of the decision is available on the EC's website.

However, the EC reduced SDI's fine on three counts: (1) by considering only SDI's German turnover[195]; (2) by 15% as a mitigating circumstance since its involvement had been limited to and different to the conduct of other participants[196]; and (3) by 18% because it had admitted the infringement in its reply to the SO, giving the EC corroborative evidence to support the immunity applicant's statement,[197] i.e. co-operation outside leniency.[198]

In addition, the EC further reduced SDI's fine by 70% under para.37 of the EC Fining Guidelines[199] as well as the fines of the other participants in the cartel, the difference being that the EC applied a reduction percentage of 75% for Heiploeg and 80% for Kok Seafood.[200]

The EC stated that the reductions granted under para.37 of the EC Fining Guidelines were necessary because the majority of the cartelists' turnover was focused on North Sea shrimp sales (a "mono-product" argument) and the infringement was quite long.[201] Without such reductions, the 10% global turnover ceiling rule could have led to an infringement of the principle that the penalty must be specific, as each undertaking would have paid the maximum fine.[202]

The EC added that the variations in the reduction percentage applied to each undertaking reflected the share of North Sea shrimps sales in the total turnover in each undertaking, the differences in the individual participation of each undertaking and the need to have a deterrent effect.[203]

However, the GC noted that the cartelists' relative percentages of North Sea shrimps sales were different and that, generally, they were not "mono-product" producers. The figures were as follows: Heiploeg 25–35%; Klaas Paul 35–45%; KOK Seafood 90–100%; and SDI 22%.[204] Therefore, the GC considered the "mono-product" reasoning to be erroneous.[205]

The GC also observed that part of the EC's reasoning, i.e. in the assessment of the degree of participation of each undertaking in the infringement, appeared to duplicate other grounds for reduction.[206] Further, the court noted that the undertakings with greater involvement in the cartel had received the larger reductions of fine.[207]

The GC ruled therefore that the EC's reasoning did not allow SDI to effectively contest the merits of the EC's approach in the light of the principle of equal treatment or allow the GC to be able to fully exercise its powers of judicial review.[208] Therefore, the GC found that the EC's decision was vitiated by a failure to state adequate reasons as regards the amount of the fine.[209]

[195] *Stührk Delikatessen Import* EU:T:2018:474 at [177].
[196] *Stührk Delikatessen Import* EU:T:2018:474 at [176], [178].
[197] *Stührk Delikatessen Import* EU:T:2018:474 at [210].
[198] EC Fining Guidelines (2006), para.29.
[199] EC Fining Guidelines (2006), para.37: "Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21."
[200] *Stührk Delikatessen Import* EU:T:2018:474 at [298].
[201] *Stührk Delikatessen Import* EU:T:2018:474 at [295].
[202] *Stührk Delikatessen Import* EU:T:2018:474 at [296].
[203] *Stührk Delikatessen Import* EU:T:2018:474 at [297].
[204] *Stührk Delikatessen Import* EU:T:2018:474 at [301].
[205] *Stührk Delikatessen Import* EU:T:2018:474 at [302].
[206] *Stührk Delikatessen Import* EU:T:2018:474 at [308].
[207] *Stührk Delikatessen Import* EU:T:2018:474 at [305].
[208] *Stührk Delikatessen Import* EU:T:2018:474 at [310].
[209] *Stührk Delikatessen Import* EU:T:2018:474 at [310]–[333].

As a result, the GC annulled the part of the EC decision imposing an €1.1 million fine on SDI.

The GC also noted that the function of the 10% ceiling was only to ensure that fines were not excessive and disproportionate. It only applied therefore to the *final* amount of the fine.[210] An interesting issue because the argument is sometimes raised that at no stage in the fining process should the fine exceed 10% of turnover. SDI argued that but it was rejected.[211]

Heat Stabilisers—GEA

In October 2018, the GC ruled on a further appeal by GEA against the EC's decision in 2016 fining it as regards the *Heat Stabilisers* cartels. The GC annulled the EC's decision.[212]

It is a complex story, which is simplified here.

In 2009, GEA was held liable, as the successor to a company called MG, for infringements committed by two of its subsidiaries, OCG and OCA, up to May 2000. GEA's liability was shared, however, with the new owners of respectively OCG, renamed ACW, and OCA, renamed CPA. In practice, therefore, GEA was: (1) found jointly and generally liable with ACW and CPA for a fine of some €1.9 million; and (2) with ACW for a further fine of some €1.4 million.

GEA appealed on liability and lost.

ACW pointed out to the EC that its total liability exceeded 10% of its turnover, the ceiling for a fine under Regulation 1/2003. As a result, in 2010, the EC reduced ACW's fine in a new decision: (1) capping the first fine at €1.08 million among GEA, ACW and CPA; (2) making GEA and CPA liable for the balance of some €800 million; and (3) leaving ACW out of the second fine, so only GEA was liable.

GEA successfully appealed the EC's 2010 decision on the basis that its right to be heard had not been respected; and the EC decision was annulled.

The EC gave GEA an opportunity to be heard and then, in 2016, took an identical decision, stating that payment was due from 2010 (i.e. three months after its 2010 decision) and considering that the original decision in 2009 had remained effective and "final" for GEA.

GEA appealed again, arguing that:

- the EC's 2016 decision affected its legal interests despite its liability having become final after the 2009 decision and rejected appeal;
- the EC's approach was contrary to the principle of equal treatment because, among other things, the approach was too favourable to CPA in comparison with itself and left GEA with no joint and several co-debtors on the second part of the fine; and
- that payment could not be retroactive but had to date from the EC's 2016 decision.

The GC agreed with GEA on all three points and annulled the EC's 2016 decision.

First, the court found that its dismissal of GEA's appeal of its fine pursuant to the EC's 2009 decision made the EC's assessments final concerning GEA's *liability*

[210] *Stührk Delikatessen Import* EU:T:2018:474 at [267]–[273].
[211] *Stührk Delikatessen Import* EU:T:2018:474 at [268]–[270].
[212] *GEA Group AG v European Commission* (T-640/16) EU:T:2018:700.

for the infringement but not as regards the determination of the joint and several liability for the fine payable under the 2009 decision (which had been amended by the 2010 decision).[213] The 2010 decision affected the interests of GCA, ACW and CPA. The decision affected the amount of the fines for which they were jointly and severally liable and the breakdown of that liability as between those companies from an external perspective.[214] For this and other related reasons, GEA had an interest in challenging the EC's 2016 decision and its action was admissible.

Secondly, the court agreed with GEA that the EC could have taken another approach, which did not leave GEA as sole debtor for the second fine but spread the ACW reduction on account of the 10% ceiling across the two fines. GEA argued that it had to pay a higher share of the fine both as joint and several co-debtor and as sole debtor, unlike CPA, so that was not equal treatment.

The court noted that, if the EC had allocated the reduction of ACW's fine proportionately to both cases of joint and several liability: (1) the total amount of fines for which ACW could be liable would not have exceeded 10% of its turnover; and (2) the reduction would have been equally distributed between the two fines and their respective jointly and severally liable parties.[215] The EC's approach was, however, contrary to the principle of equal treatment.

Thirdly, the court agreed with GEA that the 2016 decision was the relevant one so the time limit for payment of the fines could be determined only from the date of receipt of notification thereof.[216]

Article 102 TFEU

Box 5

- **Court cases—art.102: *MEO***
  - — A mere competitive disadvantage "in and of itself" is not enough for art.102(c) TFEU.
  - — Need to look at the relevant circumstances and see if a price difference was capable of distorting competition (or if it was so small as to be just absorbed).

MEO

In April 2018, the ECJ ruled on a request for a preliminary ruling from the Portuguese Competition, Regulation and Supervision Court (the Portuguese Competition Court), concerning the interpretation of the concept of "competitive disadvantage" in art.102(2)(c) TFEU.[217]

Background

GDA is a Portuguese collecting society which manages the rights relating to the copyright of its members. GDA is the sole body responsible for the collective management of related rights in Portugal and operates on a non-profit basis. Among

[213] *GEA Group* EU:T:2018:700 at [66], [69].
[214] *GEA Group* EU:T:2018:700 at [71]–[77].
[215] *GEA Group* EU:T:2018:700 at [108]–[111].
[216] *GEA Group* EU:T:2018:700 at [126].
[217] With thanks to Georgia Tzifa. *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* (C-525/16) EU:C:2018:270; [2018] 4 C.M.L.R. 25.

its customers are providers of paid television signal transmission services and television content.[218]

In 2014, one such customer, MEO, lodged a complaint with the Portuguese Competition Authority (PCA). MEO alleged that GDA had abused its dominant position by charging excessive prices for the rights related to copyright and by applying to MEO different terms and conditions from those it applied to NOS, another TV provider.[219]

After investigating for one year, the PCA closed the case, finding no evidence of abuse. GDA had applied different tariffs to different customers between 2009 and 2013.[220] The PCA found that MEO's costs had been increased, but not by much compared with the average cost, and it was not clear that such an increase had affected its competitive position since MEO could absorb the difference.[221]

MEO contested that decision before the Portuguese Competition Court, arguing that a competitively disadvantageous price "in and of itself" should be enough for an infringement. That court then requested a preliminary ruling from the ECJ. In essence, the court asked:

- whether the concept of "competitive disadvantage" in art.102(2)(c) TFEU requires an analysis of the specific effects of differentiated prices being applied by a dominant undertaking on the competitive situation of the affected undertaking; and
- whether and to what extent the seriousness of those effects should be taken into account.[222]

The ECJ judgment

The ECJ first emphasised that, for art.102(2)(c) TFEU to apply, following *British Airways*,[223] there must be a finding of discriminatory behaviour by the dominant undertaking, *which tends to distort competition*.

The mere presence of an immediate disadvantage for certain operators who were charged higher tariffs was not enough. On the other hand, the court noted that it is not necessary to adduce proof of the actual, quantifiable deterioration in the competitive position of business partners, taken individually.[224]

The ECJ therefore held that price discrimination by a dominant undertaking between trade partners which are in a competitive relationship may be regarded as abusive only if this behaviour is capable of leading to *a distortion of competition* between those business partners, i.e. a competitive disadvantage for one or more of them.[225]

Secondly, in order for the price discrimination in question to be capable of producing such a competitive disadvantage, it must affect the interests of the business partner which was charged higher tariffs compared with its competitors.

[218] *MEO* EU:C:2018:270 at [5]–[7].
[219] *MEO* EU:C:2018:270 at [8], [10].
[220] *MEO* EU:C:2018:270 at [11]–[13].
[221] *MEO* EU:C:2018:270 at [16], [34].
[222] *MEO* EU:C:2018:270 at [21]–[22].
[223] *British Airways Plc v Commission of the European Communities* (C-95/04 P) EU:C:2007:166; [2007] 4 C.M.L.R. 22.
[224] *MEO* EU:C:2018:270 at [25]–[27].
[225] *MEO* EU:C:2018:270 at [27]–[28].

The ECJ agreed with AG Wahl that it is necessary to examine all the relevant circumstances to determine if that is the case. It pointed out, however, that no appreciability (*de minimis*) threshold can be fixed for that purpose.[226]

In such an assessment, it was open to the national authorities or courts to take into account, among other things, the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount as well as the possible existence of a strategy by the dominant undertaking aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors.[227]

Turning to the facts of the case, the court noted that MEO and NOS were GDA's main clients. According to the referring court, there was evidence that both undertakings had a certain negotiating power vis-à-vis GDA. In addition, it was apparent from the information in the file that the determination of prices by GDA was subject to legislation, which required the parties to have recourse to arbitration if they could not reach agreement. This is what had happened here. Since GDA and MEO could not agree, the prices charged to MEO had been established by an arbitration decision.[228]

It was also clear from the evidence set out in the PCA's decision that (1) the tariffs represented a relatively low percentage of the total costs borne by MEO in its services; and (2) the differentiation in tariffs had a limited effect on MEO's profits in that context.

The court noted that where the effect of the tariff differentiation on the costs or the profitability of the undertaking in question is not significant, then it may be deduced that this tariff differentiation is not capable of having any effect on the competitive position of that undertaking, as the PCA and the AG had suggested.[229] It should also be noted that the PCA had found that MEO had increased its market share at the expense of NOS in the relevant period.[230]

It fell to the Portuguese Competition Court to determine, in the light of the foregoing considerations, whether the tariff in the main proceedings was capable of placing MEO at a competitive disadvantage.[231]

Comment

This is an important ruling, partly because it emphasises the need for some distortion of competition for discrimination under art.102 TFEU and partly because of the depth of the PCA's assessment, checking for some real competitive disadvantage, as confirmed by the ECJ's ruling.

[226] *MEO* EU:C:2018:270 at [28]–[30]. See also Opinion of AG Wahl of 20 December 2017 in *MEO—Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* (C-525/16) EU:C:2017:1020 at [86].
[227] *MEO* EU:C:2018:270 at [31], referring by analogy to *Intel Corp Inc v European Commission* (C-413/14 P) EU:C:2017:632; [2017] 5 C.M.L.R. 18.
[228] *MEO* EU:C:2018:270 at [32]–[33].
[229] *MEO* EU:C:2018:270 at [34]. See also AG Wahl's Opinion in *MEO* EU:C:2017:1020 at [104].
[230] See AG Wahl's Opinion in *MEO* EU:C:2017:1020 at [39].
[231] *MEO* EU:C:2018:270 at [36].

Orange Polska

In July 2018, the ECJ dismissed Orange's further appeal against the GC's ruling, by which the GC had upheld the EC's decision imposing a fine of some €127.5 million on Orange.[232]

It may be recalled that Orange is the legal successor of Telekommunikacja Polska. The EC found that Orange had abused its dominant position in two wholesale markets, with the aim of protecting its position in the retail market, by developing a strategy aimed at limiting competition at all stages of the procedure for access to its broadband network.[233]

The EC found that Orange had infringed art.102 TFEU from August 2005 until at least October 2009, the date on which an agreement was signed with the Polish national telecoms regulatory authority (NRA), by which Orange undertook to comply with its regulatory agreements to conclude agreements with alternative operators on access and to invest in modernisation of its broadband network.[234]

The EC's fine took into account fines imposed by the NRA for Orange's breach of its regulatory obligations.

Before the ECJ, Orange argued, among other things, that the GC had been wrong not to find that the EC had an obligation to justify taking an infringement decision for an infringement based on art.7(1) of Regulation 1/2003. That text states in its final sentence: "If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past."

The ECJ disagreed, noting that the GC had correctly found that the EC had fined Orange for its infringement. If the EC decided to fine, it did not have to justify a legitimate interest in finding an infringement just because the infringement was in the past.[235] Rather, the EC only had to justify an infringement finding where both the infringement had ceased and the EC does not impose a fine.

Orange also argued that the GC should have found that Orange's investments to improve the broadband network were mitigating circumstances.[236] The GC had rejected this argument, finding that the EC had been entitled not to take them into account. Notably, the measures were not compensatory measures as had been accepted by the EC in *Nintendo*.[237] Further, the GC took the view that Orange had given the commitments to avoid functional separation and that such investments were just a normal part of business life. So they benefitted Orange above all.[238]

The ECJ noted that Orange had asked the GC to consider its argument in relation to the court's exercise of unlimited jurisdiction, rather than in its review of the legality of the EC's decision where the GC had made these points.

Nevertheless, the ECJ found that this did not matter since in fact the GC had shown its reasoning when exercising its unlimited jurisdiction.[239] That also meant that the GC had not unlawfully substituted its own reasoning for that of the EC

[232] *Orange Polska SA v European Commission* (C-123/16 P) EU:C:2018:590; [2018] 5 C.M.L.R. 31.
[233] *Orange Polska* EU:C:2018:590 at [20].
[234] *Orange Polska* EU:C:2018:590 at [18], [21].
[235] *Orange Polska* EU:C:2018:590 at [50]–[51], [57]–[60].
[236] *Orange Polska* EU:C:2018:590 at [93].
[237] Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/35.706—*PO Nintendo Distribution*) [2003] OJ L255/33, paras 440–441.
[238] *Orange Polska* EU:C:2018:590 at [109].
[239] *Orange Polska* EU:C:2018:590 at [110]–[114].

since, when exercising its unlimited jurisdiction, the court could do that, contrary to the position in a review of the legality of the EC decision, where it could not.[240]

Complaint rejections

Agria Polska

In September 2018, the ECJ dismissed an appeal brought by Agria Polska and others (Agria Polska) against the GC's dismissal of their action for annulment concerning the EC's rejection of their complaint.[241]

It may be recalled that, in July 2010, Agria Polska had brought a complaint before the Polish Office for the Protection of Competition and Consumers (the UOKiK), alleging that certain manufacturers and distributors of plant protection products (PPPs) (with related professional associations and a law firm) had infringed competition law by engaging in vexatious action.

In particular, Agria Polska had argued that these entities had carried out a co-ordinated campaign of making false claims to Austrian and Polish authorities with the intention of eliminating them from the market—for example, claims of alleged violations of regulations applicable to PPPs as well as provisions relating to tax. However, the UOKiK decided not to deal with the complaint because of a one-year limitation period provided for under Polish law (which had passed).

Agria Polska then submitted a complaint to the EC, which was dismissed in June 2015, for lack of EU interest. The EC noted, among other things, that the complaint would involve investigating activities over seven years by some 18 entities in four Member States. The resources necessary would probably be disproportionate in view of the limited likelihood of establishing an infringement. At that stage, the national authorities were better placed to deal with the issues raised.

The applicants' subsequent action for annulment against the EC decision was dismissed by the GC.[242]

Agria Polska's general theme on appeal to the ECJ was that the GC and EC had been wrong to find that the EC did not have to act on its complaint because, given the circumstances, notably alleged infringers in several Member States and the fact that the Polish Competition Authority had ruled that its complaint there was time-barred, otherwise it would have no effective remedy.

The ECJ dismissed the appeal. Various claims were held inadmissible. Otherwise, the main points are as follows:

First, Agria Polska argued that the GC erred in its application of the case law arising from the judgments in *ITT Promedia*[243] and *AstraZeneca*,[244] essentially arguing that the GC should have found that the conditions in these cases were met. However, the court found that its argument was incorrectly targeted ("ineffective").

[240] *Orange Polska* EU:C:2018:590 at [113]–[114].

[241] With thanks to Georgia Tzifa. *Agria Polska sp z oo v European Commission* (C-373/17 P) EU:C:2018:756; [2018] 5 C.M.L.R. 32.

[242] *Agria Polska sp z oo v European Commission* (T-480/15) EU:T:2017:339; [2017] 5 C.M.L.R. 1. For an overview of the background of the case and the GC decision, see John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016–2017: Part 2" [2018] I.C.C.L.R. 227, 242.

[243] *ITT Promedia NV v Commission of the European Communities* (T-111/96) EU:T:1998:183; [1998] 5 C.M.L.R. 491.

[244] *AstraZeneca AB v European Commission* (T-321/05) EU:T:2010:266; [2010] 5 C.M.L.R. 28.

In its rejection of the action for annulment, the GC did not rule on whether the conditions for applying this case law were met in the case in question. Rather, it found that these two judgments involved *different conduct* from that attributed to the entities of the current complaint. In other words, in contrast to the UOKiK, the administrative and judicial authorities in *ITT Promedia* and *AstraZeneca* had no discretion to decide whether it was appropriate to act on the complaints submitted to them.[245]

Secondly, the court noted that, on the case law, the EC had to consider multiple factors in deciding whether to intervene.[246] Agria Polska's arguments amounted, in essence, to asserting that, whenever the investigation sought would encompass the territory of several Member States and require considerable resources, the EC would be required to open such an investigation without having regard to all the circumstances of the case and, in particular, the low likelihood of finding an infringement of EU competition law rules. Those arguments would, therefore, militate in favour of establishing territorial scope and the costs of an investigation as decisive criteria for finding that there is an EU interest in opening an investigation, in disregard of the case law.[247] This was incorrect.

Thirdly, the GC did not err in finding that the EC's refusal to open an investigation did not have the consequence of depriving arts 101 and 102 TFEU of any practical effect. Agria Polska had not shown how it was impossible for it to obtain compliance with arts 101 and 102 TFEU before the national authorities. On the contrary, the court considered that the alleged impossibility of obtaining compliance with arts 101 and 102 TFEU before the UOKiK, because of the expiry of the limitation period, was due to its own lack of diligence.[248]

Finally, in accordance with the settled case law of the Court of Justice, it was open to Agria Polska to bring actions before the national courts for compensation for the damage allegedly caused by the conduct of the subject of a complaint, in order to obtain compliance with arts 101 and 102 TFEU and to assert its rights under those provisions before a national court, in particular when the EC decides not to pursue their complaint.[249]

On this point, Agria Polska had alleged that an action for damages before the national courts would have been impossible in practice, for procedural and institutional reasons. The ECJ, however, held that it is for the Member States to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law; and not for the EC to make up for any shortcomings in judicial protection at national level, by opening an investigation requiring considerable resources, where the likelihood of finding an infringement of arts 101 and 102 TFEU is low.[250]

EAEPC

In September 2018, the GC dismissed an application by the European Association of Euro-Pharmaceutical Companies (EAEPC) for the annulment of an EC decision

[245] *Agria Polska* EU:C:2018:756 at [56]–[57].
[246] *Agria Polska* EU:C:2018:756 at [61].
[247] *Agria Polska* EU:C:2018:756 at [65].
[248] *Agria Polska* EU:C:2018:756 at [76]–[77], [81]–[82], [89].
[249] *Agria Polska* EU:C:2018:756 at [83].
[250] *Agria Polska* EU:C:2018:756 at [73], [86]–[87].

rejecting its complaint concerning an alleged infringement by Glaxo Wellcome SA (GSK) of art.101 TFEU (Case COMP/AT.36957—*Glaxo Wellcome*).[251]

Background

In 1998, GSK notified its general sales conditions in Spain to the EC for negative clearance or exemption. According to these conditions, there was a distinction between prices charged for reimbursable medicines to be resold on the national market and prices for exported medicines.

In January 1999, EAEPC filed a complaint with the EC requesting the refusal of GSK's application and claiming that the dual pricing scheme imposed an indirect prohibition on exports contrary to what is now art.101 TFEU.

The EC issued a prohibition decision in May 2001. The EC found that this price distinction had the object and the effect of restricting competition within the meaning of what is now art.101(1) TFEU and did not meet the exemption criteria of art.101(3) TFEU.

On appeal, the GC took the view that the EC had erred in finding a "by object" restriction. However, GSK had not shown that the EC's subsidiary conclusion was wrong, that such practices were restrictive by effect. The court then partially annulled the EC's decision on the basis that the EC had not adequately examined whether art.101(3) TFEU could apply.

Then, in October 2009, the ECJ upheld the EC's decision. In other words, the ECJ found that the restriction concerned was "by object". However, the court did not set aside the GC's judgment insofar as it upheld a finding of restrictive effect. The ECJ also dismissed the EC's appeal as regards failure to conduct a full examination of GSK's arguments concerning art.101(3) TFEU.[252]

In 2010, GSK formally withdrew its 1998 request for negative clearance or exemption, noting that it had applied the pricing scheme merely until October 1998 (some seven months). GSK had then suspended it in light of intervention by the Spanish Competition Authority and pending the EC decision and appeals.

Two years later, the EC opened a different investigation on alleged dual pricing practices in Spain engaged in by undertakings other than GSK.

During the EC's investigation, in 2013, EAEPC asked the EC to adopt a decision on its 1999 complaint as regards GSK and to "fulfil its obligation to re-examine the *Glaxo* case as ordered by the European Courts".[253]

In 2014, the EC adopted a decision rejecting the complaint based, among other things, on the lack of sufficient EU interest, the lack of implementation of the conduct at issue (GSK's conduct having ceased in October 1998) and the lack of persistent effects. The EC also noted that it was not required to adopt a new decision in the *Glaxo* case.

In 2014, EAEPC brought an action for annulment before GC against that decision.

[251] With thanks to Maria Tsoukala. *European Association of Euro-Pharmaceutical Companies (EAEPC) v European Commission* (T-574/14) EU:T:2018:605.
[252] *EAEPC* EU:T:2018:605 at [8]–[10].
[253] *EAEPC* EU:T:2018:605 at [13].

The GC's ruling

The GC rejected the EAEPC's claims. Notably, the GC stated that the EC was no longer under an obligation to take measures as regards GSK's application since GSK had withdrawn it.[254] Neither could the EC be obliged to continue proceedings to a final decision as regards its partially annulled 2001 decision (in other words, to consider GSK's art.101(3) TFEU arguments and conclude, issuing a new decision).[255]

However, the court noted that, in its decision rejecting the EAEPC complaint, the EC had falsely characterised the 2001 decision as "null and void" after the European Court rulings, whereas it had only been partially annulled. Further, the EC's wording concerning the investigation which it had to carry out on the basis of the 1999 complaint was ambiguous. As a result, the court ruled that each party should bear its own costs, rather than awarding them to the EC.

Inspections

Box 6

- **Court cases—Inspections—Czech Railways**
  - — EC only entitled:
    - * To inspect for evidence related to a possible infringement which it has reasonable grounds to suspect.
    - * To ascertain what is justified, look at the alleged infringement, e.g. for predatory pricing, evidence on fixed and variable costs, their allocation and the strategy of the alleged infringer.

Czech Railways

In June 2018, the GC issued two judgments concerning inspections of České dráhy (CD), the Czech railways incumbent. The context was liberalisation of the Czech railways and whether the incumbent had taken measures to block market entry.

The Falcon inspection

In the first inspection, called the "Falcon inspection", the issue was whether the EC could lawfully carry out the inspection as regards alleged predatory pricing on a major route in the Czech Republic (Prague-Ostava), including inspecting: (1) for other infringements of art.102 TFEU on other routes; and (2) before 2011 (when a rival operator started services).

CD appealed against the inspection, arguing that the EC had exceeded its inspection mandate.[256] The GC partially annulled the EC's inspection decision.

The court noted that the EC could inspect for predatory practices on the route in question, including before 2011, since an infringement might have started before

[254] *EAEPC* EU:T:2018:605 at [57]–[59], [66].
[255] *EAEPC* EU:T:2018:605 at [71], [80]–[82].
[256] *České dráhy a.s. v European Commission* (T-325/16) EU:T:2018:368.

a new operator offered its services.[257] However, the EC could not lawfully do so as regards other infringements on other routes.[258]

The court noted that the EC had evidence concerning the alleged infringement, including documents from previous Czech inspections in parallel proceedings and, in particular, an economic report. This gave the EC reasonable grounds to investigate predatory pricing on the route concerned but not to inspect beyond that.[259] The EC sought evidence on the fixed and variable costs of CD, their allocation[260] and on the strategy of CD.[261]

The judgment builds on those in *Nexans*[262] and *Deutsche Bahn*[263] in ruling that the EC is only entitled to inspect in order to check for evidence related to a possible infringement which it has reasonable grounds to suspect.

The Twins inspection

During the Falcon inspection, the EC found certain documents which it used as the basis for another inspection, called the "Twins inspection", related to a different infringement. This time the EC sought to inspect whether an infringement of art.101(1) TFEU had occurred, insofar as operators in the Czech, Slovak and Austrian Republics would have concerted to deny the sale to new rail operators of second-hand rolling stock.

Again, CD challenged the inspection. The court disagreed, finding it lawful.[264]

First, the GC noted that the EC's Falcon inspection decision was lawful, even if its scope had been partially annulled.[265]

Secondly, the court found that the EC was entitled to rely on evidence of an infringement found incidentally, while investigating another infringement, applying *Deutsche Bahn*.[266] Here, the EC had taken three documents which could be relevant to establishing the alleged predatory pricing infringement, insofar as they related to the structure of CD's costs and its strategy, the costs of CD and its profits.[267]

Thirdly, the EC was entitled to rely on suggestions of another infringement in the documents even if investigating a possible infringement contrary to art.102, not art.101 TFEU.[268]

Comment

These judgments are compulsory reading for those likely to be managing dawn raids, whether from the EC's side or that of the company investigated.

Both sides need to be careful of mandates stating that the EC is seeking to "investigate 'x', *in particular including* 'y'", when the issue to be investigated is

[257] *České dráhy* EU:T:2018:368 at [67], [70], [97].
[258] *České dráhy* EU:T:2018:368 at [89].
[259] *České dráhy* EU:T:2018:368 at [67], [70], [79]–[80], [89], [91].
[260] *České dráhy* EU:T:2018:368 at [60]–[65].
[261] *České dráhy* EU:T:2018:368 at [11], [74]–[78]. (In other words, relying on *Konkurrensverket v TeliaSonera Sverige AB* (C-52/09) EU:C:2011:83; [2011] 4 C.M.L.R. 18.)
[262] *Nexans France SAS v European Commission* (T-135/09) EU:T:2012:596; [2013] 4 C.M.L.R. 6.
[263] *Deutsche Bahn AG v European Commission* (C-583/13 P) EU:C:2015:404; [2015] 5 C.M.L.R. 5.
[264] *České dráhy a.s. v European Commission* (T-621/16) EU:T:2018:367.
[265] *České dráhy* EU:T:2018:368 at [41]–[42].
[266] *České dráhy* EU:T:2018:368 at [37]; see *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5.
[267] *České dráhy* EU:T:2018:368 at [31]–[34], [66]–[71], [74], [77]–[78].
[268] *České dráhy* EU:T:2018:368 at [44]–[47].

in fact *only* "y". Then the issue is to think about what documents may be reviewed to investigate "y". It may be wider than expected but it still has to be justified.

Alcogroup

In April 2018, the GC dismissed an action for annulment by Alcogroup and its subsidiary Alcodis (Alcogroup) in relation to EC inspections carried out at their premises in relation to the Oil and Biofuels, and Bioethanol cases.[269] The court found the application inadmissible.

Background

Alcogroup is mainly involved in the production, distribution and trading of ethanol for food, industry and biofuel applications. It was first subject to an on-site inspection in October 2014, related to the EC's investigation in the biofuels sector concerning *ethanol benchmarks* (the "first investigation").[270] After this inspection, Alcogroup and its external counsel exchanged numerous documents and emails, which were marked "legally privileged".

Subsequently, the EC carried out onsite inspections as part of an EC investigation in the *bioethanol sector* (the "second investigation"), a separate case.[271] Alcogroup was inspected in March 2015.

On the first day of the second investigation at Alcogroup's premises, Alcogroup's counsel requested from the EC respect for the confidentiality of emails and documents related to Alcogroup's defence in relation to the first investigation. It appears that the EC undertook electronic searches of Alcogroup's servers, hard disks and devices, and copied documents using the "Nuix" software before individual verification of the documents.[272]

On the second day, the EC started an individual assessment of the documents and saved 59 series of documents at the end of the day. It appears that five documents labelled "legally privileged" had been included in the 59 batches. Alcogroup objected and the emails and documents were excluded from the EC's file.

On the third day, the EC inspectors told Alcogroup's counsel that, if one document was labelled "for export" (i.e. to be taken by the EC), the Nuix software automatically took the related "tree of the whole family of documents", not just the individual document.[273] This explained how the five documents had been gathered previously.

The EC also excluded from the scope of its search 22,000 documents which contained the key words searched by the EC but were marked "legally privileged". The EC put them in a separate file and agreed with Alcogroup's counsel to review the 22,000 documents individually in their presence. During the individual verification, the counsel masked the reading frame of the Nuix software. One document was put under seal as confidential.

[269] With thanks to Geoffroy Barthet. *Alcogroup and Alcodis v European Commission* (T-274/15) EU:T:2018:179.
[270] Case AT.40054—*Ethanol benchmarks*, EC Press Release MEMO/13/435, 14 May 2013.
[271] Case AT.40244—*Bioethanol*, EC Press Release MEMO/15/4821, 21 April 2015.
[272] *Alcogroup* EU:T:2018:179 at [9]–[11].
[273] *Alcogroup* EU:T:2018:179 at [16].

In the course of the fourth day, however, this method was considered too "fastidious" and the EC was authorised to look summarily at the 22,000 documents marked "legally privileged", after excluding the documents drafted after the beginning of the first inspection. In addition, the EC accepted not to review certain documents marked "legally privileged", even summarily.[274]

The Alcogroup counsel still found a document which they considered privileged in the list to be taken by the EC.

Following the second inspection in April 2015, Alcogroup wrote a letter to the EC claiming that a large number of documents established for its defence in relation to the first investigation were consulted by the EC inspectors during the second inspection. According to Alcogroup, this: (1) vitiated the first and second investigations; and (2) amounted to a violation of the right to a fair trial and of the right of inviolability at home, as well as the principles of sound administration and the protection of legitimate expectations. Alcogroup therefore asked the EC to suspend any investigative act.[275]

In May 2015, the EC replied that the claims of Alcogroup were unfounded and that there was no violation of Alcogroup's rights. Notably, the EC stated that the labelling of the documents did not necessarily mean that the inspectors had learned what was in them.[276] The EC therefore refused to suspend the investigative acts.

The GC's ruling

Alcogroup then appealed against the second inspection decision and the EC letter. Three Belgian Bar Associations intervened in support. Alcogroup alleged violation of the right to a fair trial and of the right of inviolability at home as well as the principles of sound administration and proportionality.

The main points are as follows:

First, as regards the claim for annulment of the second inspection decision, Alcogroup referred to the *Deutsche Bahn* judgment[277] and argued that the implementation of an inspection decision might affect the validity of the inspection decision.[278]

However, the GC rejected this, noting that *Deutsche Bahn* concerned the seizure of documents falling outside the scope of the inspection, which were used as a basis for subsequent inspection decisions. The GC ruled that the way an inspection is carried out may call into question the validity of a subsequent inspection decision. However, the fact that an inspection was carried out unlawfully may not call into question by itself the validity of the decision that authorised the inspection.[279] So, challenges to the way the second inspection was carried out had no impact on the validity of the decision to authorise that inspection.

Secondly, Alcogroup argued that in the second inspection the EC should have foreseen precautionary measures so that its investigators would not have checked the documents relating to the Alcogroup's defence in relation to the first investigation.

[274] *Alcogroup* EU:T:2018:179 at [19]–[20].
[275] *Alcogroup* EU:T:2018:179 at [24].
[276] *Alcogroup* EU:T:2018:179 at [25].
[277] *Deutsche Bahn* EU:C:2015:404; [2015] 5 C.M.L.R. 5.
[278] *Alcogroup* EU:T:2018:179 at [58].
[279] *Alcogroup* EU:T:2018:179 at [63].

The GC rejected this, noting that the alleged violations did not follow from the absence of precautionary measures in the second inspection decision but arose from the way the inspection was carried out, which was irrelevant to the action for annulment against the second inspection decision. The GC added that Alcogroup did not identify any rule providing for an obligation for the EC to include precautionary measures regarding the protection of legal privileged documents in its inspection decisions.[280]

The GC concluded that the second inspection did not produce any of the legal effects alleged by Alcogroup. The GC therefore ruled that the claim for annulment of the second inspection decision was inadmissible.[281]

Thirdly, as regards Alcogroup's claim for annulment of the EC's letter of May 2015, Alcogroup argued that the situation in the inspections was comparable to that in the *Akzo* case.[282] The letter was an act denying Alcogroup's claim to confidentiality of the documents concerned, which could be challenged.

The GC disagreed. The court recalled that not every letter from an EU institution in response to a recipient's request is an act whose legality may be reviewed.[283] Challengeable acts are those which produce binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in his legal position.[284] Where an act has been adopted following a procedure involving several stages, only those measures which definitively determine the position of the institution upon the conclusion of that procedure are open to challenge, and not intermediate measures whose purpose is to prepare for the final decision.[285]

The GC considered that Alcogroup's letter in April 2015 was a request to suspend *any* investigative act owing to the alleged violation of the confidentiality of the correspondence exchanged between a lawyer and his client.[286] Hence, the EC's letter in response had to be considered as if it were a refusal to interrupt definitively the investigative acts.[287]

However, the court held that the EC's refusal could not be considered as the final stage of the administrative procedure, but only as a *preliminary act* because it was likely that the investigations would continue and final acts would be adopted which Alcogroup could challenge.[288] To find otherwise would allow any company inspected to ask for the definitive end of an investigation against it and then attack the EC's refusal.[289] So Alcogroup's claim for annulment of the EC's letter was inadmissible as well.

The court found that the EC's letter here was not the same as that in the *Akzo* case. Here, the EC had confirmed that the relevant documents had not been read. Even if seized by the EC, they had not been added to its file, except for one held under seal, which had been returned afterwards. This was different from *Akzo*, where the EC had taken documents without putting them into a separate sealed

[280] *Alcogroup* EU:T:2018:179 at [64].
[281] *Alcogroup* EU:T:2018:179 at [65].
[282] *Akzo Nobel Chemicals Ltd v European Commission* (C-550/07 P) EU:C:2010:512; [2010] 5 C.M.L.R. 19.
[283] *Global Steel Wire SA v European Commission* (C-454/16 P) EU:C:2017:818.
[284] *Alcogroup* EU:T:2018:179 at [73].
[285] *Kingdom of the Netherlands v Commission of the European Communities* (C-147/96) EU:C:2000:335; and *IBM Corp v Commission of the European Communities* (60/81) EU:C:1981:264; [1981] 3 C.M.L.R. 635.
[286] *Alcogroup* EU:T:2018:179 at [77].
[287] *Alcogroup* EU:T:2018:179 at [78]–[79].
[288] *Alcogroup* EU:T:2018:179 at [80].
[289] *Alcogroup* EU:T:2018:179 at [81].

envelope and the EC had then taken a decision refusing to return the documents which Akzo claimed to be confidential and to confirm their destruction.[290]

The court added that Alcogroup could challenge the final acts in the two investigations (although it appeared that by then the second one was already closed) or bring a claim based on non-contractual liability against the EC.[291]

Comment

It appears therefore that, under review of "admissibility", Alcogroup may have had their day in court. However, this remains a controversial area for defence counsel who do not feel comfortable with EC inspectors involved in the case checking legal privilege; and do not consider challenges to the final act or in damages an adequate and timely remedy.[292] It would be better to see legal privilege issues reviewed by an independent team, under the control of the Hearing Officer.

In Part 2, to be published in the next issue, John Ratliff will outline:

- Various European Commission decisions:
  - On cartels.
  - On the *International Skating Union*'s rules banning skaters from participating in non-authorised events.
  - On resale price maintenance by electronics manufacturers, involving EC fine reductions for co-operation outside cartel leniency.
  - Applying art.102 TFEU to the digital economy, including a €977 million fine on *Qualcomm* re requirements agreements; and a €4.34 *billion* fine on *Google* re practices to reinforce the position of Google Search in smartphones using the Android operating system.
  - In the energy sector, including commitments by *Gazprom*.
- Selected policy issues: "fairness" in competition; developing EU policy on digital economy issues; and a recent report on competition and agriculture in the EU.

[290] *Alcogroup* EU:T:2018:179 at [86]–[90].

[291] *Alcogroup* EU:T:2018:179 at [91]–[92].

[292] For those interested, two other cases may be noted: *Westfälische Drahindustrie GmbH v European Commission* (T-393/10 INTP) EU:T:2018:293, concerning interest payable on a fine; or *Ori Martin SA v Court of Justice of the European Union* (C-463/17 P) EU:C:2018:411, in which a party which had lost its appeal in the *Prestressing Steel* cartel case (COMP/38.344) sought damages from the ECJ for inadequate reasoning in a judgment.