Major Events and Policy Issues in EU Competition Law 2019–2020: Part 1

John Ratliff*

WilmerHale, Brussels

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Abstract

John Ratliff and his colleagues set out their annual review of major events in EU Competition law in 2019–2020, dealing with EC and national competition authority responses to the COVID-19 crisis; and various legislative/European Commission practice developments (including the review of the Vertical and Horizontal Restraints Block Exemptions and Guidelines, the EC's Market Definition Notice, and draft Dutch sustainability guidelines). They then review European Court judgments. Of particular interest are: (i) European Court of Justice rulings on whether lenders can claim damages for cartel infringements (Otis); (ii) "pay-for-delay" assessment where distribution agreements are entered into with generic manufacturers as part of settlements (Generics); (iii) multilateral interchange fees (MIFs) (Budapest Bank); and (iv) General Court judgments on inspections in the French supermarket cases. They also review various judgments on cartel appeals, in particular as regards the Power Cables cartel.

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 2019 until the end of October 2020.[2]

The paper is divided into an overview of:

- legislative/EC practice developments;
- European Court judgments;
- European Commission decisions;

* With many thanks to Jessy Siemons and Katrin Guéna for their general help in the production of this paper, and to my other 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, [2003] OJ L1/1. References to the "ECHR" are to the European Convention of Human Rights and references to the "CFR" are to the EU Charter of Fundamental Rights.

[2] The views expressed in this paper 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 20 January 2021]. 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*.

- sectoral review; and
- policy issues.

This article has been edited by John Ratliff and written by Geoffroy Barthet, Édouard Bruc, Andrés Betancor Jiménez de Parga, Katrin Guéna, Marilena Nteve, John Ratliff, Jessy Siemons, Lukas Šimas, Su Şimşek, Georgia Tzifa and Alessia Varieschi.

Legislative/EC practice developments and European Court cases (on general issues, cartel appeals, inspections and rejections of complaints) are included in Part 1. European Commission Decisions and the other sections will be published in the next issue of the I.C.C.L.R.

Box 1

- **Major themes/issues in 2019/20**
  - Antitrust in the pandemic crisis: short-term cooperation exemptions
  - The EC's agenda on the Digital Economy moves forward: a "new *ex ante* competition tool"?
  - Sustainability (Horizontal Restraints Review/NCA positions)
  - EU Court judgments:
    - Important cases on "pay-for-delay", MIFs and inspections
    - *Power Cables* cartel appeal ECJ judgments
  - Few new EC cartel cases
  - Article 101 TFEU EC cases: film and character merchandising: active/passive, territorial/customer, and offline/online restrictions
  - Article 102 TFEU EC cases:
    - *Aspen* (excessive pricing)
    - *Broadcom* (exclusivity/bundling)

Clearly this has not been a normal year. The following are the main themes:

First, the year has been dominated by the COVID-19 crisis, with a great deal of the EC's work directed to State aid, which is outside the scope of this article. As regards the antitrust aspects of the crisis, it has been a very complex picture, as many markets have been affected by the crisis and not functioning "normally". There have been two main reactions by competition authorities as regards antitrust: (i) both the EC and several NCAs have issued guidance on lawful short term cooperation to help deal with the pandemic; and (ii) some NCAs have also intervened on perceived excessive pricing issues.

Second, as we started the year, the EC had an important legislative agenda, on which it has continued to work. Notably, the EC was considering what it should do about issues raised in the "Digital Economy". We are waiting now to see the EC's proposals, possibly including a new "*ex ante* competition tool" to address specific practices. Digital and online issues are also central to the current reviews of the EC's Vertical and Horizontal Restraints BEs and guidelines. There has also been work on the EC's Market Definition Notice, in particular in light of globalisation and digitalisation.

Third, another big issue this year has been sustainability, with the new Commission committed to its "Green Deal". Sustainability came up already in the context of the review of the EC's Horizontal Restraints guidelines.[3] However, the topic has really taken off through the year, with NCAs advocating measures to support action to help against climate change, supported by judges, academics and practitioners. Notably, the Dutch competition authority has put forward draft guidelines on sustainability. The EC is now also seeking contributions on how sustainable issues should be dealt with in EU competition policy.

Fourth, turning to the more normal work of the year, the European Courts have issued fewer judgments than in some years. However, there have been important rulings from the ECJ on the scope of damages claims, pay-for-delay and MIFs. Recently, there have also been important judgments by the GC on the rules applicable to EC inspections. The courts have continued their normal review work concerning cartel appeals, notably with many judgments related to the *Power Cables* cartel before the ECJ.

Fifth, there have been few new EC cartel decisions. That, in itself, is not that unusual, given that there has been a change of Commission. There are also a number of cases coming through. However, some think that it is a result of the many damages claims being brought, leading to fewer immunity and leniency applications to the competition authorities.

Sixth, there have been more interesting EC decisions on restrictions in relation to film and character merchandising, with active/passive, territorial/customer and offline/online restrictions in non-exclusive IP licences. These cases are textbook cases for compliance training. They also show how difficult some suppliers find it to achieve the sort of distribution within the rules that they would like, in order to cover all aspects of the market.

Finally, there have been two important EC art.102 TFEU decisions: *Aspen*, on excessive pricing in the pharma sector, where the EC accepted commitments by Aspen to reduce its prices significantly; and *Broadcom*, which it may be recalled last year was the subject of interim measures in relation to certain exclusivity and bundling practices. The EC has now accepted commitments in the main proceedings.

These are all described below in more detail, or in Part 2 of this article, in the next issue of the I.C.C.L.R.

Legislative/EC Practice Developments

Box 2

- **Legislative/Practice Developments**
  - Consultations on EC Horizontal Restraints BEs (R&D and Specialisation) and EC Horizontal Guidelines
  - NCA initiatives on sustainability (Draft Dutch Guidelines)
  - Review of EC Vertical Restraints BE and EC Vertical Guidelines
  - Review of EC Market Definition Notice

[3] See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 1", [2020] I.C.C.L.R. 109, 121.

- Extension of the Liner Consortia Shipping BE
- EC Communication on Protection of Confidential Information in Court Proceedings
- COVID-19 Temporary Antitrust Framework for Essential Cooperation:
    * Medicines for Europe comfort letter
    * NCA action
    * Some measures related to health issues; others to economic effects
    * (Plus excessive pricing interventions)

Consultation on the EC Horizontal Restraints BE and the EC Horizontal Guidelines

Between November 2019 and February 2020, the EC ran a public consultation[4] on the evaluation of the Research & Development Block Exemption (R&D BE)[5] and the Specialisation Block Exemption (Specialisation BE),[6] together referred to as the "Horizontal Block Exemptions" (HBEs). The public consultation also covered the EC's guidelines on horizontal cooperation agreements (HG).[7] The HBEs will expire on 31 December 2022.

In the course of the year, the EC has published a factual summary of the contributions received in the public consultation and a summary of the views of the NCAs on the evaluation of the HBEs and the HG.[8]

As regards the public consultation, the EC received 77 contributions based on an online survey. These are available on the EC's website.

Stakeholders identified several major trends and developments that affected the application of the HBEs and the HG. Among these developments are: climate change (i.e. increased demand for sustainable and environmentally friendly products), digitalisation (i.e. huge reliance on data and algorithms, emergence of platforms, artificial intelligence, Internet of Things, FinTech), globalisation (i.e. increased competition with companies based in other jurisdictions with more relaxed competition law rules), standardisation and the emergence of purchasing alliances and retail trade platforms.

As noted last year a major issue being raised is sustainability, where some argue that there should be more positive guidance in competition policy.

Draft Dutch sustainability guidelines

One interesting development is that the Netherlands Authority for Consumers and Markets (ACM) published *Draft Guidelines on Sustainability Agreements* ("Draft Guidelines") in July 2020,[9] which were under consultation until October 2020.

[4] With thanks to Marilena Nteve. EC, "Review of the Two Horizontal Block Exemption Regulations" is available at: *https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html* [Accessed 13 January 2021].

[5] EC Regulation 1217/2010, [2010] OJ L335/36.

[6] EC Regulation 1218/2010, [2010] OJ L335/43.

[7] EC Guidelines on horizontal co-operation agreements, OJ C11/1, 14 January 2011.

[8] EC, "Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements", available at: *https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf* [Accessed 13 January 2021].

[9] With thanks to Marilena Nteve. Authority for Consumers and Markets (ACM), "Draft guidelines on 'Sustainability Agreements'" 9 July 2020 ("Draft Guidelines"), available at: *https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements* [Accessed 13 January 2021].

In view of their topicality, they are outlined here.

The ACM points out that there is often some tension between competition law and sustainability. Notably, the ACM blocked an agreement between generators to close down five coal plants in 2013,[10] as well as an animal welfare agreement of 2015, the "Chicken for Tomorrow" initiative.[11] However, in light of recent calls for action in relation to climate change, the ACM advocates that competition law can stimulate and facilitate sustainability. The objective of the Draft Guidelines is therefore to increase opportunities for collaboration between businesses, and to provide guidance.

The Draft Guidelines distinguish between permitted sustainability agreements and sustainability agreements that would require assessment.

First, the ACM identifies five categories of permitted sustainability agreements:[12]

(1) non-binding agreements incentivising undertakings to make a positive contribution to a sustainability objective (e.g. collective intentions, such as a reduction of CO_2 emissions, where individual undertakings would determine their own contributions and the way in which they will realise them);

(2) codes of conduct (e.g. joint standards or certification labels). Where the participation criteria would have to be transparent, reasonable and non-discriminatory, while alternatives of equal standing would have to remain possible;

(3) agreements that aimed at improving product quality, while products that are produced in a less sustainable manner are no longer sold (e.g. more efficient packaging);

(4) initiatives where new products or markets are created, and where a joint initiative is needed to acquire sufficient production resources, including know-how, or to achieve sufficient scale; and

(5) agreements regarding compliance with domestic laws (e.g. labour law, environmental protection, fair-trade rules);

Second, the ACM suggests that where an agreement restricts competition to an appreciable extent, it is up to the undertakings concerned to demonstrate that the benefits of the agreement can offset the disadvantages, under the four cumulative criteria laid down in s.6(3) of the Dutch Competition Act and in art.101(3) TFEU, namely: (i) the agreement offers efficiency gains, *including sustainability benefits*; (ii) the users of the product concerned are allowed a fair share of the benefits; (iii) the restriction of competition is necessary; and (iv) competition is not eliminated.

As regards the first criterion, the ACM emphasises that only objective benefits would be taken into account.[13]

[10] ACM, "ACM analysis of closing down 5 coal power plants as part of SER Energieakkoord", 26 September 2013, available at: *https://www.acm.nl/en/publications/publication/12082/ACM-analysis-of-closing-down-5-coal-power-plants-as-part-of-SER-Energieakkoord* [Accessed 13 January 2021].

[11] ACM, "Industry-wide arrangements for the so-called Chicken of Tomorrow restrict competition", 26 January 2015, available at: *https://www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition* [Accessed 13 January 2021].

[12] Draft Guidelines, paras 19–23.

[13] Draft Guidelines, paras 28–34.

As regards the second criterion, the ACM envisages a broad concept of users, that would include both direct and indirect, current and future ones.[14] The ACM suggests that there should be a deviation from the traditional fair share principle, that direct users should be compensated for the harm caused, if two principle criteria are met: (i) the agreement aims to prevent or limit any obvious environmental damage; and (ii) the agreements helps, in an efficient manner, to comply with an international or national standard to prevent environmental damage to which the government is bound. In this case, it can be fair not to compensate users fully, because they will reap the benefits in the same way as the rest of the society. However, there will be no deviation from the fair share principle in relation to other sustainability agreements.[15]

The ACM also identifies situations where no quantification of benefit is needed, i.e. the weighing of the pros and cons of a sustainability agreement in monetary terms. That would be the case: (i) if the undertakings involved have a limited, combined market share of no more than 30%; or (ii) if the benefits of the agreement are clearly larger than the harm to competition.[16] In any other case, a quantative assessment would be necessary. As regards environmental-damage agreements, "shadow prices" based on prevention costs will be used when making social cost-benefit analyses.[17] In the case of other sustainability agreements, the consumers' willingness to pay would serve as a value.[18]

In terms of enforcement, the ACM's approach is that businesses would undertake a self-assessment, and in case of uncertainty, they are invited to contact the ACM.[19] If an agreement is not compatible with the Dutch Competition Act, adjustments may be agreed upon with the ACM, or following an investigation. Notably, no fines would be imposed if the agreements followed the Guidelines in good faith as far as possible.[20]

Finally, it is suggested that undertakings may choose to submit their initiative to the legislature, and seek to have it converted into regulation, or in the future, collaborate with the Minister of Economic Affairs and Climate Policy on the basis of the Dutch Act on Room for Sustainability Initiatives.[21]

It is an open question whether this sort of measure is compatible with EU law. The important point is the degree of advocacy, at a time when the EU has made achieving action against climate change a core value of its agenda, and is pursuing its own "Green Deal". Interestingly, the EC has also now started a consultation on "how EU competition rules and sustainability policies can work together".[22]

[14] Draft Guidelines, para.36.
[15] Draft Guidelines, paras 38 and 40–43.
[16] Draft Guidelines, paras 46–48.
[17] Draft Guidelines, paras 50–52.
[18] Draft Guidelines, para.53.
[19] Draft Guidelines, paras 60 and 61.
[20] Draft Guidelines, para.62.
[21] Draft Guidelines, paras 63–67.
[22] EC, "Competition policy contributing to the European Green Deal", available at: *https://ec.europa.eu/competition/information/green_deal/index_en.html* [Accessed 13 January 2021].

There are also other initiatives at NCA level, notably in Greece,[23] and in the OECD with a new paper on the topic.[24]

Review of EC Vertical Restraints BE and the EC Vertical Guidelines

In October 2018, the EC launched a review of the Vertical Block Exemption (VBE) and of the accompanying Vertical Guidelines.[25] In September 2020, the EC published a 232-page Staff Working Document summarising its findings following the evaluation phase of the review.[26]

The EC received 164 contributions to the public consultation submitted through its online questionnaire and 13 position papers outside the online tool.[27] The EC also has published a targeted NCAs consultation.[28] There has also been a stakeholder workshop[29] and an external evaluation support study.[30]

Since May 2017, the EC has adopted nine infringement decisions and two commitment decisions concerning vertical restrictions.[31] Also, between June 2010 and January 2020, there were 391 reported NCAs cases involving vertical restraints.[32]

In its Staff Working Document, the EC identifies multiple issues, including many that were considered in the last review of the VBE and the Vertical Guidelines. We highlight here some of the more topical points:

First, the issue of the *brick-and-mortar requirement* and *online sales* were again subject to various views. Some argued that it is necessary to provide offline distributors with the necessary incentives to invest in promoting a product by preventing free-riding by online distributors that focus mainly on price and do not offer comparable pre-sales services. Others argued that this requirement excludes pure online players from distribution. The evaluation study showed that distribution

[23] Hellenic Competition Commission, "Press Release—Initiative 'Competition Law and Sustainability'", 17 September 2020, available at: *https://www.epant.gr/en/enimerosi/press-releases/item/1089-press-release-initiative-competition-law-and-sustainability.html* [Accessed 13 January 2021].

[24] Julian Nowag, "Sustainability and Competition", OECD Competition Committee Discussion Paper, 2020, available at: *http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf* [Accessed 13 January 2021].

[25] With thanks to Marilena Nteve, Lukas Šimas, Geoffroy Barthet and Édouard Bruc. EC, "Consultation strategy for the evaluation of the Vertical Block Exemption Regulation", available at: *https://ec.europa.eu/competition/consultations/2018_vber/consultation_strategy.pdf* [Accessed 13 January 2021].

[26] EC Staff Working Document on the evaluation of the Vertical Block Exemption Regulation, 8 September 2020, SWD(2020)172 final ("Staff Working Document").

[27] See EC, "Factual summary of the contributions received in the context of the open public consultation on the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010", available at: *https://ec.europa.eu/competition/consultations/2018_vber/factual_summary.pdf* [Accessed 13 January 2021].

[28] EC, "Summary of the contributions of the National Competition Authorities to the evaluation of the Vertical Block Exemption Regulation (EU) 330/2010", available at: *https://ec.europa.eu/competition/consultations/2018_vber/vber_ncas_summary.pdf* [Accessed 13 January 2021].

[29] EC, "Summary of the stakeholder workshop on the evaluation of the Vertical Block Exemption Regulation (EU) 330/2010", available at: *https://ec.europa.eu/competition/consultations/2018_vber/workshop_summary.pdf* [Accessed 13 January 2021].

[30] The support studies included four stakeholder surveys aimed to collect evidence on specific restrictions, such as resale price maintenance and parity clauses, in Germany, France, Italy, Sweden, Poland and Hungary, mainly from stakeholders that had not participated in the public consultation; and a consumer survey aimed to collect evidence on the purchasing behaviour of European consumers. See EC, "Support studies for the evaluation of the VBER: Final Report", available at *https://ec.europa.eu/competition/publications/reports/kd0420219enn.pdf* [Accessed 13 January 2021].

[31] Staff Working Document, pp.43–46.

[32] Staff Working Document, pp.47–48.

has evolved towards an "omni-channel experience" where free-riding can occur in both directions.[33]

Concerns were also expressed as regards the *equivalence principle* in para.56 of the EC Vertical Guidelines, which is meant to ensure that manufacturers do not dissuade distributors from selling online by applying dissimilar criteria between online and offline sales, suggesting that online and offline distribution are inherently different environments. However, other respondents maintained that the equivalence principle benefits consumers by resulting in more competition and choice.[34]

Clearly, this remains a hot topic as online sales have grown enormously in recent years and traditional distribution has declined. Online platform distribution is also a major issue.

Second, as regards *selective distribution*, the Staff Working Document notes its increased use at different levels of the vertical supply and distribution chain.[35] Stakeholders expressed very diverse opinions about the effects of selective distribution systems. Some see efficiencies in the price and non-price aspects, but others fear a means to implement resale price maintenance.[36]

Third, the Staff Working Document notes the increased use of *parity clauses* over the last 10 years.[37] However, there are divergent views on the possible effects, with some arguing in favour of such clauses due to the improvement of consumer welfare and the flow of information (amongst other reasons). Others highlighted the reduction of innovation, the impediment of entry and expansion of new and small businesses, and the risk of facilitating collusion.[38] One issue is also whether an EU-wide position can be clarified, given the variations in some NCA positions.[39]

Other issues raised in the Staff Working Document include the market share thresholds, exclusive distribution, resale price maintenance, non-compete obligations, dual distribution, data sharing, agency and franchising agreements.

The next phase of the EC's review will be the launch of an impact assessment that will look into the issues identified. The EC plans to publish a revised draft of the VBE and Vertical Guidelines for comments next year. The VBE expires on 31 May 2022.

Review of EC Market Definition Notice

In April 2020, the EC initiated an evaluation of its Market Definition Notice ("the Notice") from 1997[40] to evaluate whether to update it.[41] The EC received feedback on its roadmap for the consultation in April and May and then launched a public consultation in June. Responses were invited by October. The EC aims to publish the results of the evaluation in 2021.[42]

[33] Staff Working Document, pp.200–201.
[34] Staff Working Document, pp.202–203.
[35] Staff Working Document, p.193.
[36] Staff Working Document, pp.194–196.
[37] Staff Working Document, p.181.
[38] Staff Working Document, pp.183–184.
[39] Staff Working Document, p.184.
[40] OJ C372/5, 9 December 1997.
[41] With thanks to Su Şimşek. EC, "EU competition law—market definition notice (evaluation)", available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law* [Accessed 13 January 2021].
[42] IP/20/1187, 26 June 2020.

The EC is evaluating whether the Notice is still "fit-for-purpose" in view of the developments since 1997, particularly on the following points:

- whether the Notice is accurate and up to date;
- whether it sets out a clear and consistent approach to market definition in competition cases across industries; and
- whether it is easily accessible.

Before the EC's launch of the consultation, Executive Vice-President Vestager emphasised the new challenges with market definition in a speech in December 2019 explaining the need for a review of the Notice.[43] Two central issues appear to be globalisation and digitisation. In other words, since 1997, globalisation and digitisation have lowered barriers to entry and made competitive constraints arising from indirect or potential competition more frequent and immediate in many industries. Depending on the market conditions, these indirect constraints can have a marked effect on price.

As regards globalisation and the lowering of trade barriers, some argue that this should affect the geographic scope of markets, either leading to wider definition of what is "the market", or a greater recognition of potential competition, direct and indirect, from outside the traditionally defined market.

Furthermore, digitisation challenges traditional product market definition, particularly with regard to products that consumers use for free, and for platforms that provide an "ecosystem" of services that are designed to work together. Some argue that the EC should consider more whether consumers are "locked in" one ecosystem and its implications for product market definition.

Extension of the Liner Shipping Consortia BE

In March 2020, the EC published a Regulation extending the Liner Shipping Consortia Block Exemption ("Consortia BE") until April 2024.[44] 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%.

The EC recalled that agreements respecting the Consortia BE's conditions achieve cost reductions due to economies of scale, rationalisation of services, and better vessel utilisation. Those cost reductions are also to the benefit of consumers.

The current Consortia BE was adopted in 2009[45] and extended in 2014 until April 2020. The EC had launched a public consultation in September 2018 on the renewal of the Consortia BE.[46] Based on the consultation's results and its own evaluation, the EC decided to extend the Consortia BE, considering that the conditions that led to the adoption of the Consortia BE in 2009 remained sufficiently similar to justify an extension.

[43] Margrethe Vestager, "Defining markets in a new age", speech at the Chillin' Competition Conference, Brussels, 9 December 2019. Also see Margrethe Vestager, "Speech to the Competition Day", 7 September 2020. Transcripts are available on the EC's website.

[44] With thanks to Katrin Guéna. EC Regulation 2020/436, [2020] OJ L90/1.

[45] See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2008-2009: Part 1", [2010] I.C.C.L.R. 101, 104.

[46] See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2017-2018: Part 1", [2019] I.C.C.L.R. 121, 124.

The Protection of Confidential Information in Private Enforcement by National Courts

In July 2020, the EC published a Communication,[47] providing practical guidance to national courts in establishing effective measures as regards the protection of confidential information in the context of disclosure throughout and after the end of legal proceedings.

The Communication is not binding on national courts and does not amend any procedural rules applicable to civil proceedings in the different EU Member States. It is designed to deal with the issue that in actions for private enforcement of EU competition law, national courts are likely to receive requests for disclosure of evidence containing confidential information. National courts are therefore facing practical questions on how to effectively protect confidential information without jeopardising the interests of claimants in substantiating their claims.

The main points of interest are the following:

First, the Communication states that national courts, at the request of an interested party, may order disclosure of evidence not readily accessible to the party that bears the burden of proof provided that: (i) the damages claim is plausible; (ii) the evidence sought is relevant; and (iii) the disclosure request is proportionate.[48]

Second, the Communication notes that national courts generally decide what may constitute confidential information on a case-by-case basis pursuant to national and EU rules and relevant case law according to which:[49]

- the confidential information must be known only to a limited number of persons;
- the disclosure must be liable to cause serious harm to the person who provided it or to third parties; and
- the interests liable to be harmed by the disclosure of confidential information must be, objectively worthy of protection.

However, the EC notes that there are some limitations.[50] A national court cannot order disclosure of "grey list documents", including information specifically prepared for proceedings before a competition authority, information that the competition authority has drawn up and sent to the parties during its proceedings and settlement submissions that have been withdrawn, and "black list documents", including leniency statements and settlements submissions.

Third, the Communication notes the following measures to protect confidentiality, which it is suggested national courts may decide to use on a case-by-case basis, depending on several factors, such as the specific circumstances of the case, the type of information requested, the extent of the disclosure, the parties and relationships concerned, any administrative burdens, and the cost implications:[51]

[47] With thanks to Alessia Varieschi. EC Communication of 22 July 2020, "Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law"; OJ C242/1, 22 July 2020.
[48] EC, "Communication on the protection of confidential information"; OJ C242/1, paras 10–14.
[49] EC, "Communication on the protection of confidential information"; OJ C242/1, paras 18–20.
[50] EC, "Communication on the protection of confidential information"; OJ C242/1, para.15.
[51] EC, "Communication on the protection of confidential information"; OJ C242/1, paras 30–32.

- *redaction*, meaning editing copies of documents by removing the confidential information, which may be effective when the volume of confidential information is limited or when it concerns market data or figures;[52]
- *confidentiality rings*, whose members may be external advisers or in-house legal counsel and/or other company representatives, effective to ensure disclosure of quantitative data or very strategic commercial information which it is difficult to redact or summarise in a meaningful way; and[53]
- *appointment of experts*, which national courts may be able to appoint from a list of court approved experts, or from a list of experts proposed by the parties, whose assignment may be to draft a non-confidential summary of the information to be made available to the party requesting disclosure.[54]

Finally, to ensure the protection of confidential information throughout the proceedings and after them, the Communication provides for:[55]

- holding *in camera* (not publicly) those parts of the hearings where confidential information might be discussed;
- anonymising any information that could identify the source of the information, or to redact from the publicly available version of the ruling those parts referring to confidential information; and
- restricting access to court records either as regards a part or the entirety of a file.

Use of techniques like this is well known in some courts. However, for others they may be rather new.

COVID-19: EU Framework for Essential Cooperation

In April 2020 the EC published a "temporary antitrust framework" for assessing business cooperation to ensure the supply of "essential scarce products and services" during the COVID-19 outbreak ("Temporary Antitrust Framework", or TAF).[56]

These measures for essential cooperation are summarised below. Notably, we outline the conditions for their application and the procedure that companies can use to obtain EU guidance on whether their cooperation is lawful. We also note the first example of cooperation under the TAF: a "comfort" (no-action) letter to a trade association, Medicines for Europe ("Comfort Letter").[57] We also note some other actions taken by the EC and NCAs.

[52] EC, "Communication on the protection of confidential information"; OJ C242/1, paras 36–49.
[53] EC, "Communication on the protection of confidential information"; OJ C242/1, paras 50–85.
[54] EC, "Communication on the protection of confidential information"; OJ C242/1, paras 86–97.
[55] EC, "Communication on the protection of confidential information"; OJ C242/1, paras 101–110.
[56] With thanks to Su Şimşek and Alessia Varieschi. EC Communication of 8 April 2020, "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak" (TAF), OJ C116 I/7.
[57] The EC Comfort Letter of 8 April 2020 to Medicines for Europe, available at: *https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf* [Accessed 13 January 2021].

EU Temporary Antitrust Framework for Cooperation

While most relevant to suppliers of medicine and medical equipment, the principles laid down in the TAF may apply also to cooperation in other sectors of industry deemed essential to combat the pandemic.

The EC notes first that cooperation between businesses may ensure the continued supply and distribution of essential scarce products and services during the COVID-19 crisis.[58] As a rule in EU law, companies must assess the legality of their agreements and practices themselves taking account of the EC's regulations and guidelines. To facilitate this self-assessment of cooperation projects in the pandemic and their swift implementation, the EC sets out the main criteria that it uses to assess compliance with EU competition law.

However, the EC has also set up an exceptional procedure to provide comfort letters to companies as to specific cooperation projects.

The EC explains that it expects cooperation in the health sector to be in various forms, some of which may raise varying degrees of competitive concern. Independent entities such as a trade association, an independent advisor, an independent service provider or a public body may be suited to coordinate cooperation between companies in the health sector.[59] In the EC's view, such an independent entity can:

- coordinate joint transport for input materials;
- contribute to identifying essential scarce medicines in view of forecasted production;
- aggregate production and capacity information (while avoiding exchanges of individual company information);
- estimate demand on an EU Member State level and identify supply gaps; or
- share aggregate supply gap information and request individual companies to indicate confidentially whether they can meet supply gaps.

While the EC indicates that such activities do not raise antitrust concerns, the EC emphasises that safeguards must be in place to avoid companies sharing confidential information with competitors.[60]

The TAF expressly covers medicines and medical equipment used for testing and treatment of COVID-19 patients, and products that are necessary to mitigate the effects of and eradicate the pandemic.[61] However, the EC notes that cooperation may need to go further in order to avoid under-production of other vital medicines.[62]

In the TAF, the EC states that, while coordinating output or exchanging commercially sensitive information normally would raise concerns under EU competition rules, such cooperation can be acceptable and not an enforcement priority in the current exceptional circumstances, if three criteria are met. The cooperation must be:

[58] TAF, para.3.
[59] TAF, para.12.
[60] TAF, para.13.
[61] TAF, para.4.
[62] TAF, para.14.

- necessary to increase output or avoid a shortage of essential products;
- temporary in nature and not exceed the duration of the COVID-19 outbreak; and
- not more than strictly necessary to achieve the objective of addressing or avoiding shortage of supply.

In the TAF, the EC notes that companies should document all exchanges of information and agreements in this context. Documenting permissible exchanges of information between competitors is generally a best practice in any event.

The EC also states that it will take into account whether a public authority has encouraged or required the cooperation.[63]

Comfort Letters

Given the need for swift implementation of projects to address the supply of essential products, and to increase the degree of legal certainty, the EC stated in its communication that the EC is willing to provide exceptional discretionary guidance through comfort letters[64] (i.e. a letter in which the EC indicates that it does not intend to take any action against companies).

In April 2020, the EC issued a comfort letter to Medicines for Europe (formerly known as the European Generics Medicines Association).[65] Medicines for Europe, representing manufacturers of prescription medicines, had developed a project which would assess the large demand spikes for intensive care unit (ICU) medicines for the treatment of COVID-19 patients on a country basis to ensure the supply of such medicines where they are most needed.[66] The project would require coordination among manufacturers to increase production and to improve supply in an expedient and effective manner.[67]

The Comfort Letter allows a set of cooperative practices, namely cross-supply of active pharmaceutical ingredients, jointly identifying where to best switch production to a certain medicine and/or to increase capacity. The cooperation also entails rebalancing and adapting capacity utilisation, production and supply, on an ongoing basis.[68] The EC is providing a forum for the pharmaceutical companies to exchange information and will have a steering role in the process.

In addition to the conditions in the TAF, the EC has also required the following safeguards:

- the project must be open to all interested participants;
- minutes of meetings and copies of any agreement between the coordinating companies must be shared with the EC;
- medicines for Europe, or a third party, must collect and share only indispensable and aggregate information with the company participants; and

[63] TAF, paras 15–16.
[64] TAF, paras 17–18.
[65] EC Press Release IP/20/618, "Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak" (8 April 2020).
[66] Medicines for Europe Press Release, "Medicines for Europe welcomes European Commission decision to enable secure supply of hospital medicines" (8 April 2020).
[67] Comfort Letter, p.1.
[68] Comfort Letter, p.2.

- the project must end when the risk of shortages due to the pandemic ends or when the EC informs the Medicines for Europe that the risk is overcome.[69]

The EC assessed that the proposed cooperation addressed the risk of a shortage of critical hospital medicines for the treatment of COVID-19 patients. The EC concluded that this temporary cooperation was justifiable under EU competition law, given its objective and the envisaged safeguards to avoid antitrust issues.[70]

The EC also warned that any discussion that was not necessary to achieve the objectives of the project, including prices, will be subject to strict antitrust enforcement.[71] The EC required the participating companies not to increase prices beyond what is justified by possible increases in costs.[72]

Other EC and European NCA Action

The TAF follows a joint statement of the ECN[73] and numerous statements from NCAs on similar issues,[74] but it is more specific. Others have also set out guidance since.[75]

Some initial exemption measures target the smooth supply of essential products. In the UK, the Secretary of State for Business, Energy and Industrial Strategy has made several exclusion orders to enable coordinated response to COVID-19 in various sectors, including groceries, dairy produce and health services.[76] The Dutch Competition Authority also considered that collaboration between hospitals, hospital pharmacies, and pharmaceutical wholesalers was necessary to prevent or reduce any shortages of essential drugs.[77]

Other exemptions from the application of antitrust rules target mitigating the economic effects of COVID-19. For example, the German Competition Authority has declared that it would not investigate further the crisis management measures in the automotive industry following a presentation by the German Association of the Automotive Industry.[78]

These are just examples of what has been going on.

In May 2020, the EC also adopted a package of exceptional measures to support the agricultural and food sectors most hard hit by the COVID-19 crisis, which

[69] Comfort Letter, p.3.
[70] Comfort Letter, p.2.
[71] Comfort Letter, p.3.
[72] Comfort Letter, p.3.
[73] ECN Joint Statement, "Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis" (23 March 2020), available at: *https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf* [Accessed 13 January 2021].
[74] See e.g. UK Competition and Markets Authority ("UK CMA") Press Release, "COVID-19: CMA approach to essential business cooperation" (19 March 2020); and Norwegian Ministry of Trade and Industry Press Release, "The airlines are given the go-ahead to cooperate (*Flyselskapene gis klarsignal til å samarbeide*)" (18 March 2020).
[75] See e.g. UK CMA Guidance of 25 March 2020, "CMA approach to business cooperation in response to COVID-19"; and the Luxembourg Competition Authority Press Release, "COVID19: Guidance document addressed to companies (*Covid-19: Document d'orientation à destination des entreprises*)" (1 April 2020).
[76] UK Department for Business, Energy & Industrial Strategy Guidance, 21 May 2020, last updated on 10 July 2020, "Competition law exclusion orders relating to coronavirus (COVID-19)".
[77] Dutch Competition Authority Press Release, "ACM: room for collaboration involving the distribution of essential drugs for COVID-19 patients" (26 May 2020).
[78] German Competition Authority Press Release, "Crisis management measures in the automotive industry—Bundeskartellamt supports the German Association of the Automotive Industry (VDA) in developing framework conditions under competition law aspects" (9 June 2020).

complemented the EC's previous support actions.[79] These measures included *temporary antitrust cooperation exemptions for producers of potatoes, dairy, and live plants and flowers*[80] on the basis of art.222 of the Common Markets Organisation Regulation.[81] Then, in July 2020, the EC also adopted *exceptional measures for the wine sector* considering the financial consequences of the health crisis, again with a temporary derogation from the EU competition rules.[82]

Whilst regulator flexibility in all these situations is most welcome, it is also clear that those involved need to think carefully about what may happen when the justification for the cooperation has fallen away, in particular in cases of economic crisis measures. There may be a need for careful review of what is known by whom to ensure a return to fully independent competitive decision-making (and this may affect current decisions in the crisis).

Excessive Pricing and the COVID-19 Pandemic

Excessive pricing practices also have been in the spotlight during the COVID-19 crisis. Notably in March 2020, the ECN published a joint statement in which it stated that,

> "it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices".[83]

NCAs in numerous Member States have been closely monitoring price increases of products deemed essential in the context of the COVID-19 crisis, such as face masks, protective gloves, sanitising gel and basic food products. Some competition authorities went further and launched investigations into potential cartels and excessive pricing practices.

For example, in May 2020, the Italian Competition Authority (ICA) opened a preliminary investigation into major retail operators in order to acquire data on the evolution of the prices of basic food products, detergents, disinfectants and gloves. In its Press Release,[84] the ICA mentioned that it sought to identify any practices which attempted to profit from the health emergency based on price increases. In March 2020, the Polish Competition Authority started an investigation into wholesalers supplying personal protective equipment to hospitals.[85] The

[79] With thanks to Andrés Betancor Jiménez de Parga. EC Press Release IP/20/788, (4 May 2020).

[80] See EC Implementing Regulation 2020/593 authorising agreements and decisions on market stabilisation measures in the potatoes sector, [2020] OJ L140/13; EC Implementing Regulation2020/594 authorising agreements and decisions on market stabilisation measures in the live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage sector, [2020] OJ L140/17; EC Implementing Regulation 2020/599 authorising agreements and decisions on the planning of production in the milk and milk products sector, [2020] OJ L140/37.

[81] EU Regulation 1308/2013 establishing a common organisation of the markets in agricultural products and repealing EEC Regulations 922/72 and 234/79, EC Regulations 1037/2001 and 1234/2007, [2013] OJ L347/671.

[82] EC Press Release IP/20/1267, "Coronavirus: Commission adopts new exceptional support measures for the wine sector" (7 July 2020).

[83] European Competition Network, "Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis" (2020).

[84] Italian Competition Authority, DS2620—*Emergenza Coronavirus, avviata indagine su aumento dei prezzi dei beni alimentari e di detergenti, disinfettanti e guanti* (2020), available at: *https://www.agcm.it/media/comunicati-stampa/2020/5/DS2620* [Accessed 20 January 2021]

[85] Polish Competition Authority, "UOKiK's proceedings on wholesalers' unfair conduct towards hospitals" (4 March 2020), available at: *https://www.uokik.gov.pl/news.php?news_id=16277* [Accessed 13 January 2021].

investigation covered abuse of dominance and price fixing. The UK Competition and Markets Authority (CMA) also indicated that it would be pursuing companies

> "seeking to take advantage of the current situation by colluding to keep prices high or, if they have a dominant position in a market including a dominant position conferred by the current circumstances, by unilaterally exploiting that position".[86]

Comment

Clearly, determining whether a price is excessive and unfair in a temporary situation can be a difficult task. It may be that some of these interventions have been more political signalling and advocacy to stop price increases, rather than concerns about real antitrust infringements. A particular issue has been that in some cases what were ordinary supply markets have been suddenly transformed into auction markets (as wholesalers bid for supplies in worldwide markets and then passed on the increased costs to pharmacies and other end-users).

European Court Cases

General

Box 3

- **Court Cases—General**
  - *Otis*
    - The right to compensation for anti-competitive damage is not limited to suppliers and customers on the markets concerned; it also extends to lenders which incurred loss
    - Necessary for full effectiveness of EU rights

Otis

In February 2007, the EC imposed a total fine of €992 million on Otis, Schindler, Kone and ThyssenKrupp, among others, for participating in cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxemburg and the Netherlands.

In Austria, fines were also imposed as a result of the companies' anti-competitive behaviour on the Austrian market by an Austrian Competition Court ruling.

In February 2010, the Province of Upper Austria ("The Province") applied for compensation from the companies concerned before the national courts. The Province claimed that it granted promotional loans for the financing of building projects, being a certain percentage of the total construction costs, to numerous persons. The costs connected with the installation of lifts were increased as a result of the cartel, which in turn resulted in grants of higher loans. The Province argued

[86] CMA, "CMA approach to business cooperation in response to COVID-19" (25 March 2020), p.7, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-.pdf* [Accessed 13 January 2021].

that if the cartel had not existed, it would have granted smaller loans and it could have invested the difference at the average rate for federal loans.

The action was rejected by the Commercial Court of Vienna. However, the Higher Regional Court annulled that judgment. The concerned companies then appealed to the Austrian Supreme Court, which decided to stay proceedings and to refer a question on the scope of liability in EU competition law to the ECJ for a preliminary ruling.[87]

The question was whether the predecessors of art.101 TFEU and art.101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the affected market, but who provide subsidies to buyers of the products offered on that market, may seek compensation for the losses they suffered as a result of the fact that, since the amount of those subsidies was higher than it would have been without that cartel, those persons were unable to use that difference more profitably.

The Austrian Supreme Court explained that, according to Austrian law, there was not sufficient connection between the loss of the Province and the "objective of the prohibition" on cartels, which is to maintain competition in the market affected by the cartel.[88]

The ECJ upheld the Province's right to sue.

First, with regard to the personal scope of protection of art.101(1) TFEU, the Court recalled that the full effectiveness of art.101 TFEU and, in particular, the practical effect of the prohibition laid down in art.101(1) TFEU would be put at risk if it were not open to any individual to claim damages for loss caused by a contract or by conduct liable to restrict competition.[89] Any person may claim such compensation if there is a causal relationship between the harm suffered and an agreement or concerted practice caught by art.101 TFEU.[90]

Second, the Court noted that national rules governing the exercise of the right to claim such compensation must not jeopardise the effective application of art.101 TFEU and must therefore recognise such a right.[91] The full effectiveness of art.101 TFEU and effective protection against the adverse effects of infringements of competition law would be seriously undermined if the possibility of requesting compensation for loss caused by a cartel were limited to suppliers and customers of the market affected by the cartel. That would systematically deprive potential victims of the possibility of requesting compensation.[92]

Third, the Court stated that any loss which has a causal connection with an infringement of art.101(1) TFEU must be capable of giving rise to a claim for compensation. It is not necessary that the loss suffered has a specific connection with the "objective of protection" pursued by art.101 TFEU (although it might be that cartel participants might not be liable for all the loss that they could have caused).[93]

[87] With thanks to Marilena Nteve. *Otis GmbH v Land Oberösterreich* (C-435/18) Judgment of 12 December 2019, EU:C:2019:1069; [2020] Bus. L.R. 37 at [19]; ECJ Press Release 155/19, 12 December 2019.
[88] *Otis* EU:C:2019:1069; [2020] Bus. L.R. 37 at [14]–[16].
[89] *Otis* EU:C:2019:1069; [2020] Bus. L.R. 37 at [22].
[90] *Otis* EU:C:2019:1069; [2020] Bus. L.R. 37 at [23]
[91] *Otis* EU:C:2019:1069; [2020] Bus. L.R. 37 at [25]–[26].
[92] *Otis* EU:C:2019:1069; [2020] Bus. L.R. 37 at [27].
[93] *Otis* EU:C:2019:1069; [2020] Bus. L.R. 37 at [30]–[31].

Persons not acting as suppliers or customers on the market affected by the cartel must be able to request compensation for loss resulting from the fact that, as a result of that cartel, they were obliged to grant subsidies which were higher than if that cartel had not existed and consequently, were unable to use that difference more profitably.

Finally, it was for the referring court to determine whether the Province had actually suffered such loss, by verifying, in particular, whether the Province had the possibility of making more profitable investments and, if so, whether it had adduced the necessary evidence of a causal connection between that loss and the cartel.[94]

So this is a classic ruling applying *Courage and Crehan*[95] and *Kone*.[96] However, it is controversial with some, who are concerned that the extent of damages liability is deterring companies from coming forward to denounce cartels, while obtaining immunity from competition authority fines.

Box 4

- **Court Cases—General**
  - *Generics*
    - ECJ ruling on pay-for-delay
    - Process patents not insurmountable barriers to entry, preventing potential competition
    - How to assess settlements giving generics distribution agreements for a limited volume of paroxetine?
    - ECJ:
      - For restriction by object need to assess context, including possible pro-competitive effect of conduct
      - If "plain" that value transfers pursue a commercial objective not to engage in competition on the merits: Restriction by object
      - For restriction by effect not necessary to assess if generic probably would have won IP litigation
      - Abuse of dominance if significant exclusionary effects beyond the specific anti-competitive effects of each agreement
      - Efficiency justification possible, including the weighing-up of positive and negative effects

Generics UK and Others v CMA—Paroxetine

In January 2020, the ECJ delivered its judgment in *Generics UK v Competition and Markets Authority*.[97] This was on a reference for a preliminary ruling from the Competition Appeal Tribunal (CAT) and concerned patent dispute settlement agreements.

[94] *Otis* EU:C:2019:1069; [2020] Bus. L.R. 37 at [32]–[33].

[95] *Courage Ltd v Crehan* (C-453/99) Judgment of 20 September 2001, EU:C:2001:465; [2001] 5 C.M.L.R. 28.

[96] *Kone AG v OBB-Infrastruktur AG* (C-557/12) Judgment of 5 June 2014, EU:C:2014:1317; [2014] 5 C.M.L.R. 5.

[97] With thanks to Marilena Nteve, Lukas Šimas and Georgia Tzifa. *Generics (UK) Ltd v Competition and Markets Authority* (C-307/18), Judgment of 30 January 2020, EU:C:2020:52; [2020] 4 C.M.L.R. 14; ECJ Press Release 8/20, 30 January 2020.

Background The case concerns a medicinal product called paroxetine, which is a prescription-only anti-depressant medicine belonging to the group of "selective serotonin re-uptake inhibitors". In the UK, it was marketed by the company that developed it, GlaxoSmithKline (GSK) under the brand name "Seroxat".

Following the expiry of GSK's patent for the active ingredient of paroxetine in 1999 and the expiry of the period of data exclusivity in 2000, GSK obtained several secondary patents on production processes, such as the Anhydrate patent, which expired in 2016.

By mid-2000, on becoming aware of the plans of several generic companies to enter the UK market for paroxetine, GSK entered into three agreements with companies concerned, IVAX, GUK and Alpharma, covering the UK market.[98]

The first agreement between GSK and IVAX appointed the latter as "sole distributor" of paroxetine to a maximum volume of 770,000 packs, in return for an annual promotional allowance of £3.2 million paid by GSK.[99]

The GUK and Alpharma agreements took the form of patent settlements. GSK had initially commenced infringement proceedings against them with respect to the Anhydrate patent. The proceedings resulted in interim injunctions prohibiting the two generics from entering the market and in GSK's cross-undertaking in damages. Against this background, GSK undertook to purchase all of GUK's stock of generic paroxetine intended for sale in the UK for USD 12.5 million and to pay GUK an annual marketing allowance of £1.65 million.[100]

In return, GUK undertook not to manufacture, import or supply generic medicines manufactured under the patent at issue in the UK and not to persist in challenges to the Anhydrate patent. In addition, GUK undertook to enter into a sub-distribution agreement with IVAX for 750,000 packs of paroxetine.

The Alpharma settlement was similar, i.e. it included provisions for Alpharma to enter into a sub-distribution agreement with IVAX for a defined number of packs (the actual figures varied, but they were limited). GSK also agreed to pay £500,000 towards Alpharma's legal costs, £3 million for the launch by Alpharma of paroxetine in the UK, and a marketing allowance of £100,000 per month for a year.[101] Alpharma undertook not to supply generic paroxetine in the UK otherwise.

In February 2016, the CMA imposed a total fine of £44.99 million on GSK, GUK (and its parent company, Merck) and the Alpharma group (Actavis, Xellia and Alpharma LLC). The CMA concluded that GSK's overall contractual strategy was an abuse of dominant position. It also found that the GUK and Alpharma agreements infringed Chapter 1 of the UK Competition Act 1998 (the UK equivalent of art.101(1) TFEU). The CMA imposed no penalty as regards the distribution agreement with IVAX, since vertical agreements were not caught at the time by the relevant UK law.[102]

GSK, GUK and Alpharma appealed to the CAT, which decided to seek a preliminary ruling from the ECJ on various aspects of the case.

[98] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [11]–[14].
[99] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [12].
[100] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [13].
[101] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [14].
[102] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [15]–[17].

The ECJ's Judgment The preliminary ruling raised five main issues:[103]

(1) whether an originator manufacturer of medicines holding a process patent for the active ingredient and generic companies, which are preparing to enter the same market, are considered as potential competitors;
(2) whether patent dispute settlements between them constitute a restriction of competition by object;
(3) whether such patent dispute settlements constitute a restriction by effect;
(4) whether the original and the generic version of the medicine are part of the same relevant market; and
(5) whether the originator's overall strategy to enter into a set of patent dispute settlements with the generic companies, with the effect of keeping them temporarily outside the market is to be treated as an abuse of dominance.

The main points in the Court's judgment are as follows:

As regards the *first* issue (potential competition), the ECJ explained that, in order to qualify as a potential competitor under art.101 TFEU, an undertaking should have had, in the absence of the agreement in question, "real and concrete" chances to penetrate the market. The potential entry must neither be purely hypothetical nor a mere wish to enter the market. Conversely, there is no requirement to demonstrate that the potential entrant in fact will be capable of retaining its place on the market.[104]

It is necessary to assess whether each generic manufacturer has a "firm intention and inherent ability" to enter the market.[105] This is with regard to: (i) whether, at the time when the agreement was concluded, the generic company had taken the "necessary preparatory steps" to enter the paroxetine market (e.g. to obtain a market authorisation or to challenge the process patent held by the originator);[106] and (ii) whether there were "any insurmountable barriers to entry".

The ECJ then reviewed the related circumstances in the pharma sector, with related IP rights. The Court noted, in particular, that the existence of process patents is not such an insurmountable barrier (since a market entrant might challenge them, or enter "at risk" of litigation on such rights).[107] Nor did a presumption of validity of a patent, if applicable, prevent potential competition (again because it could be contested).[108]

The Court also noted that the intention of an originator manufacturer to make a value transfer to a generic manufacturer may be an indication of potential competition. The greater the transfer of the value, the stronger the indication.[109]

As regards the *second* question (whether such settlements could be restrictions by object), the ECJ noted that patent dispute settlement agreements cannot be considered in all cases to be a restriction by object, since they may not be the same

[103] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [20]–[21].
[104] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [36] and [38].
[105] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [54] and [58].
[106] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [43].
[107] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [45]–[46].
[108] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [48]–[50].
[109] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [56]–[57].

as market-sharing or market-exclusion agreements.[110] Notably, it may be that a generic company would, after assessing its chances of success in patent litigation, decide not to further question the validity of the originator's patent and settle its claims.[111]

A value transfer in itself (a reverse payment or non-pecuniary advantage from an originator to a potential generic market entrant) was also not sufficient to find a restriction by object, since it may be justified, appropriate and strictly necessary, having regard to the objectives of the parties (e.g. compensation of litigation costs).[112]

However, if it is "plain" from analysis of the settlement agreement that value transfers "cannot have any explanation other than the commercial interest" of both parties "not to engage in competition on the merits", the practice is to be characterised as a restriction by object.[113]

What matters is whether the net gain for the generic company is large enough to have induced it to refrain from entering the market in question. The net gain does not have to be greater than the profits which the generic would have made should it have successfully entered the market.[114]

The ECJ also noted that if the parties to a settlement agreement rely on its pro-competitive effects, those effects must be taken into account in the characterisation of a practice as a "restriction by object". They may call into question whether there is a sufficient degree of harm to competition to find a restriction by object.[115] However, any such benefits must be demonstrated, be relevant and specifically related to the agreement at issue.[116]

The Court also emphasised that such an assessment is part of determining the "objective seriousness" of the practice concerned and not part of a "rule of reason" assessment, involving the weighing-up of the positive and negative competitive effects of an agreement or practice.[117]

The mere existence of pro-competitive effects cannot as such preclude characterisation as "a restriction by object".[118] If demonstrated, relevant and specifically related to the agreement, the pro-competitive effects must still be "sufficiently significant" to justify a "reasonable doubt" as to whether the settlement agreement caused a sufficient degree of harm to competition and therefore as to its anti-competitive object.[119]

In this case, the ECJ concluded that the settlement agreements gave rise to pro-competitive effects that were "not only minimal, but probably uncertain".[120]

According to findings of the CAT, these agreements did not give rise to "meaningful competitive pressure" on GSK because, with the limited volume supplied the generic companies had no interest in competing on prices.[121] There

[110] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [76]–[77].
[111] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [84].
[112] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [85]–[86].
[113] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [87].
[114] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [87], [89], [93]–[94] and [111].
[115] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [103].
[116] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [105].
[117] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [104].
[118] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [106].
[119] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [107].
[120] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [108]. Referring to the Opinion of AG Kokott of 22 January 2020, where, amongst other things, she noted a 4% reduction in the average price of paroxetine (at [168]).
[121] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [109].

was also no apparent technical reason for the caps. Furthermore, the benefits were significantly less than the competitive benefits that would have followed if an independent generic company had placed its product on the market. Lastly, the CAT saw all this as a "controlled reorganisation" of the paroxetine market, rather than the introduction of competition.[122]

Such effects could not be sufficient to raise reasonable doubt as to whether the settlement agreements revealed a sufficient harm to competition to find a restriction by object.[123]

As regards the *third* issue (whether such settlements could be a restriction by effect), the Court stated that it is not necessary to establish that the generic company probably would have succeeded in the patent proceedings, or that the parties probably would have entered into a less restrictive settlement agreement, before concluding that there was a restriction of competition by effect.

Such issues are only some of the factors to be considered in the counterfactual assessment as to how the market will operate and be structured if the agreements in question were not concluded.[124]

As regards the *fourth* issue (whether generic products should be part of the relevant market), the ECJ noted first that the issue concerned products based on the same active ingredient, according to the findings of the referring court.[125]

The Court then noted that there could be sufficient interchangeability for generic products to be in the relevant market if the generic companies are in a position to enter the market "immediately or within a short period". They would also have to show sufficient strength to constitute a serious counterbalance to the originating manufacturer.[126] Therefore, if the generic companies had taken the necessary steps to achieve this (e.g. obtaining a market authorisation, concluding supply contracts with distributors), then both the original and the generic version of paroxetine could be considered as part of the same product market.[127]

As regards the *fifth* issue (whether GSK's "contract-oriented strategy" as a whole could amount to an abuse of dominance), the key point was whether an infringement of art.102 TFEU could be found, in addition to infringements of art.101(1) TFEU through the relevant agreements. The Court noted that if such an overall strategy were found, art.102 TFEU could apply.[128]

The Court stressed that, according to the CAT, GSK was aware that the entry of generic products would result in an appreciable reduction of its market share and an equally substantial reduction of the sale price of its product. Its strategy also could result in significant exclusionary effects, going beyond the specific anti-competitive effects of each of the reverse payment patent settlements agreements involved.[129]

However, the ECJ noted that GSK could still provide an efficiency justification for its conduct. The fact that there were financial implications of the IVAX agreement that were favourable to the UK national health system therefore had to

[122] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [109]–[110].
[123] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [110].
[124] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [113]–[114] and [119]–[122].
[125] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [125]–[126].
[126] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [131]–[134].
[127] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [133]–[134] and [138]–[140].
[128] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [147] and [172].
[129] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [155] and [157].

be included in the assessment, since the favourable and unfavourable effects under art.102 TFEU have to be objectively "weighed" to see if there is an abuse.[130] The fact that the effects were accidental also did not mean they should be excluded, since the relevant assessment was an objective one.

However, in this case, the Court noted that the benefits afforded were considerably less than those which would have arisen with the independent market entry of the generic products.[131]

Comment This is the first time that the ECJ has ruled on patent dispute settlement agreements. One sees already similarities with the approach being taken in the GC (e.g. in the *Servier* case which we described last year[132]).

It is interesting to see the Court emphasising the context in which an alleged restriction occurs once again. The Court makes it clear that settlement agreements can be "restrictions by object" where the only commercial explanation for related payments is pay to delay generic market entry.

However, since settlement agreements can be entered into for other valid reasons, the context has to be carefully reviewed, to assess whether the seriousness of any related harm is such as to find a restriction by object. This includes, amongst other things, potential pro-competitive aspects. It may be recalled that similar issues came up in the *KrKa* case[133] before the GC, insofar as the licence agreement there was entered into as part of a settlement.

Here the key point appears to have been that the distribution agreements were for limited quantities and therefore had limited effects.

The references to assessment of pro-competitive effects in assessing the context of a restriction to determine its seriousness, and to weighing up the favourable and unfavourable effects in assessing efficiencies, are both eye-catching. However, in both cases they appear driven by the specific circumstances here (and the questions of the referring court), rather than any aim to lay down new law.

Box 5

- **Court Cases—General**
  - *Budapest Banks*
    - Preliminary ruling on Hungarian MIF
    - A MIF could be an RBO *and* a restriction by effect
    - Need for close assessment of context
    - Issue whether MIF led to indirect price-fixing of Merchant Service Charges
    - ECJ: not clear on file that MIF agreement an RBO (but for referring court to assess)
    - Evidence of balancing concept in MIF

[130] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [165]–[167].
[131] *Generics UK* EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [171].
[132] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 1" [2020] I.C.C.L.R. 109, 135.
[133] *Krka Tovarna Zdravil dd v European Commission* (T-684/14), Judgment of 12 December 2018, EU:T:2018:918; [2019] 4 C.M.L.R. 14.

Budapest Bank

In April 2020, the ECJ delivered its judgment in *Gazdasagi Versenyhivatal v Budapest Bank Nyrt*.[134] This was on a preliminary reference from the Hungarian Supreme Court and concerned an agreement that introduced a uniform Multilateral Interchange Fee (MIF) applicable to transactions using Visa and MasterCard credit cards (the "MIF Agreement").

Background Between 1995 and 1996, the banks operating in the card sector in Hungary introduced a "multilateral cooperation procedure" (the "Forum") to discuss card payment cooperation issues. In August 1996, the same group of banks adopted a MIF Agreement which provided for a uniform charge. Subsequently, other banks joined the MIF Agreement and the Forum.

There were also discussions about a minimum level of uniform merchant service charge (MSC), but the related agreement was not signed.[135] However, the Court noted that the interchange fees covered by the MIF Agreement had an indirect effect on the amount of the MSC, insofar as the MIF fees operated as a lower limit in the reduction of MSCs. Further, pursuit of the objectives in the draft MSC agreement played a role in the conclusion of the MIF Agreement and in the calculation of the uniform scales for Visa and MasterCard.[136]

The Hungarian Competition Authority (HCA) concluded that 22 banks, Visa and MasterCard had entered into an anti-competitive agreement. It imposed a total fine of approximately HUF 1.9 million on Visa, MasterCard, and the seven banks that initially concluded the MIF Agreement.[137]

Visa, MasterCard and six of the banks challenged the HCA decision before the Hungarian courts. The High Court of Budapest annulled the decision, ruling that it is not possible for conduct to constitute a restriction by object and by effect at the same time. The HCA appealed to the Hungarian Supreme Court, which decided to stay its proceedings and refer various questions to the ECJ for a preliminary ruling.

The ECJ's Judgment The preliminary ruling dealt with two main issues: (i) whether the same conduct could constitute a restriction by object and by effect; and (ii) whether an agreement, such as the MIF Agreement, could constitute a restriction by object.[138]

The main points were as follows:

First, the ECJ explained that the alternative requirement laid down in art.101(1) TFEU, that an agreement is unlawful if it has the object or effect of restricting competition, only means that the object of the agreement must be examined first of all. Therefore, if the anti-competitive object of the agreement is established, it is not necessary to examine its effects.[139] However, this does not mean that the

[134] With thanks to Marilena Nteve. *Gazdasagi Versenyhivatal v Budapest Bank Nyrt* (C-228/18), Judgment of 2 April 2020, [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11.
[135] *Budapest Bank* (C-228/18) [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [4]–[10].
[136] *Budapest Bank* (C-228/18) [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [7].
[137] *Budapest Bank* (C-228/18) [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [11].
[138] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [15]–[24].
[139] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [33]–[34].

competition authority or court cannot conduct such a review if it considers it is appropriate.[140]

If review of the type of coordination does not reveal a sufficient degree of harm to competition, the effects of the coordination should be considered to see if there is an appreciable restriction.[141]

In the case of a potential restriction by object, the assessment is whether the restriction in its context is sufficiently harmful to be categorised as a restriction by object. In the case of a restriction by effect, the assessment is of the effects of the restriction against the "counterfactual" of what would have occurred without such an agreement.[142]

In both cases, it is necessary to adduce the necessary evidence for each type of restriction, and to specify to what extent the evidence relates to each type of restriction.[143]

Second, the ECJ recalled the law on how to review the context of a restriction "by object", in particular in the light of *Cartes Bancaires*.[144]

The Court emphasised notably that the fact that an agreement pursues a legitimate objective does not preclude a finding that it may constitute a restriction by object, as long as its anti-competitive objective is established.[145] Further, that the concept of restriction by object must be interpreted restrictively. If not, competition authorities would be exempted from the obligation to prove the actual effects on the market.[146]

Third, focussing on the MIF Agreement, the ECJ noted that there were three markets that may have been affected.[147]

- The "issuing market": the market for interbank services related to credit card-based transactions. This market was directly concerned by the MIF Agreement, as a uniform MIF was introduced.[148]
- The "acquiring market": the market for services provided to merchants in relation to credit card transactions. It was argued that the MIF Agreement indirectly determined the Merchant Service Charge ("MSC"), as it would not be set at a price level lower than the MIF. In addition, it was argued that the MIF limited competition between the banks providing these kind of services ("acquiring banks") to lower the MSC.[149]
- The "inter-systems market": the market services for credit card providers. It was argued that the MIF Agreement neutralised an element of price competition between Visa and MasterCard.[150]

[140] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [40].
[141] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [38].
[142] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [55]. See e.g. *Groupement des cartes bancaires (CB) v European Commission* (67/13 P) EU:C:2014:2204; [2014] 5 C.M.L.R. 22 and *MasterCard Inc v Commission* (C-382/12 P) EU:C:2014:2201; [2014] 5 C.M.L.R. 23, Judgments of 11 September 2014.
[143] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [43].
[144] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [51]–[54] ; *Cartes Bancaires* EU:C:2014:2204; [2014] 5 C.M.L.R. 22.
[145] *Budapest Bank* (C-228/18) [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [52].
[146] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [54].
[147] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [56].
[148] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [60].
[149] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [57]–[58].
[150] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [57] and [74].

The ECJ noted that the MIF Agreement did not directly set sale or purchase prices, but "standardised" one aspect of the cost structure of services related to the use of credit cards as a means of payment.[151] However, it was clear that indirect price-fixing could also be a restriction by object. The key issue was therefore whether such an agreement fell within the scope of indirect price-fixing caught by art.101(1) TFEU, in that it indirectly determined service charges.[152]

The Court noted that it could not be ruled out from the outset that there was a restriction by object, because the MIF Agreement neutralised just one aspect of competition between two card payment systems.[153]

The Court also noted that the levels of MIFs had increased and decreased over the years of their application and other fees were kept as before.

Further, the context of two-sided payment systems, with interaction between the relevant markets had to be taken into account. In particular, insofar as this involved requirements of balance between issuing and acquiring banks.[154] The ECJ concluded that the content of the MIF Agreement did not necessarily point to a finding of a restriction of competition by object.[155]

There was also evidence that the levels of costs fixed in the MIF were not enough to cover all the costs of the issuing banks. So the objective of the MIF could be seen not as designed to guarantee a minimum threshold for service charges, but as establishing a degree of balance between "issuing" and "acquiring" activities to ensure certain costs were covered, while avoiding undesirable effects from excessive levels of interchange fees.[156]

Neutralising competition between the two card payment systems could also have triggered competition on other features and transaction conditions.[157]

On the evidence available to the ECJ therefore, the Court considered that it could not be shown that the MIF Agreement revealed that degree of harm to competition in the market for credit card providers, nor in the market for services provided to merchants in relation to credit card transactions to qualify as a restriction by object.[158]

In addition, the Court noted that there was not "sufficiently general and consistent experience" that such an agreement had such harmful effects that justified dispensing with an examination of the specific effects of the agreement.[159]

In considering the competitive effects of the MIF, the Court also noted that there were arguments that, in the absence of the MIF Agreement, the interchange fees might have been even higher.[160]

Comment Overall, this judgment (and the findings of the referring court) underscore the difficulty of assessing these system fee structures as a restriction by object, given their complexity and multiple objectives. However, it is also

[151] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [61].
[152] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [62].
[153] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [63].
[154] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [66] and [71].
[155] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [65].
[156] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [73].
[157] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [74].
[158] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [77]–[78].
[159] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [79].
[160] *Budapest Bank* [2020] EU:C:2020:265; [2020] 5 C.M.L.R. 11 at [81]–[83].

unsurprising that they continue to attract attention, given their importance and nature.

Cartel Appeals

Box 6

- **Court Cases—Cartel Appeals**
  - Battery Recycling—*Campine*
    - GC found two "intervals" of 11 months in collusive contacts meant infringement was single and repeated, not single and continuous
    - More usual intervals were 1-4½ months
    - Absence of public distancing could not be sole basis for a finding of continuous participation

Battery Recycling—Campine

It may be recalled that in February 2017, the EC fined four recycling companies (Campine, Eco-Bat, Johnson Controls, Inc and Recyclex) for participating in a cartel with the objective of coordinating purchase prices of scrap lead-acid automotive batteries in Belgium, Germany, France and the Netherlands.[161] The infringement period lasted from September 2009 to September 2012. The fine imposed on Campine was €8.158.000.

Campine appealed.[162] The main points of interest raised in the GC's judgment in November 2019 are the following:

First, Campine disputed the EC's conclusion that it had participated in a single and continuous infringement. It noted that there were only few, sporadic and isolated contacts, as well as two long intervals that elapsed between them. Campine also argued that the fact that it had not publicly distanced itself from the cartel was not a sufficient basis for a finding that it continued to participate in it.[163]

Whereas the EC had found that the fact that Campine had taken part less frequently in some of the anti-competitive contacts was irrelevant. The two long intervals (which it said lasted 11 and 10 months) could not be considered as an interruption of the infringement.[164]

The Court agreed with Campine. The GC noted that if the participation of an undertaking in the infringement was interrupted, and the undertaking participated in the infringement prior to and after that interruption, the infringement may be categorised as repeated provided there is a single objective which it pursued both before and after the interruption. The EC could not impose a fine for the period during which the infringement was interrupted.[165]

[161] With thanks to Marilena Nteve. *Car Battery Recycling* Case AT.40018. EC Decision of 8 February 2017. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 2" [2019] I.C.C.L.R. 195, 201

[162] As did various other companies involved, whose cases were summarised in last year's paper. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 1" [2020] I.C.C.L.R. 109, 151.

[163] *Campine NV v European Commission* (T-240/17), Judgment of 7 November 2019, EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [219].

[164] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [264]–[266].

[165] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [273].

The Court also noted that in a case where, over a significant period of time, collusive contacts have taken place without a claimed cartel participant, the EC must adduce other evidence than a lack of public distancing from the cartel to show the continuity of participation of that company.[166]

The Court noted that Campine's participation was interrupted between February 2010 and January 2011 and between April 2011 and March 2012.

Further, in a specific assessment of whether the intervals in Campine's collusive conducts were particularly long, it noted that: (i) both intervals were in fact 11 months; (ii) the "usual" intervals between collusive contacts for Campine were only 1–4.5 months; and (iii) the longest interval in the cartel was also 4.5 months.[167] These intervals were also 22 months out of a cartel lasting 36 months.[168]

It therefore considered the infringement to be single and repeated.

Second, Campine argued that the EC had not correctly assessed its fine. Campine argued that it was only marginally involved in the infringement and that it was a small operator in the market with virtually no market share in Germany and France.[169] Further, Campine argued that it had only received a 5% reduction for mitigating circumstances, despite various factors including its secondary role in the cartel.[170]

The GC partially upheld Campine's arguments. The Court considered that the EC was entitled to set 15% as the amount of sales to be taken into account for such a cartel.[171] However, in line with its findings on duration, the Court modified the duration multiplier to 1.17 (instead of 3.01).[172]

The Court also agreed with Campine that the EC could not limit the amount of mitigation for Campine's secondary role in the infringement, on the basis that this was already taken into account through the lesser amount of Campine's purchases for the basic amount of the fine.[173] The Court considered that amounted to treating a small operator more severely than a larger market operator.[174]

The Court therefore set the reduction for mitigating circumstances at 8% in its unlimited jurisdiction,[175] and concluded that the final amount of the fine should be of €4.27 million.

Campine also raised various points about the way the EC had increased the fine insofar as it related to a purchasing cartel. The GC reiterated points made in the other judgments last year, upholding the EC's position.

Box 7

- **Court Cases—Cartel Appeals (2)**
  - *Power Cables*
    - Many ECJ judgments this year
    - Almost all appeals dismissed

[166] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [282].
[167] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [274] and [277].
[168] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [276].
[169] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [383].
[170] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [386].
[171] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [394].
[172] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [401].
[173] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [386].
[174] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [408].
[175] *Campine NV* EU:T:2019:778; [2020] 4 C.M.L.R. 4 at [413].

* Right of EC to take copies of hard drives and complete an inspection review in Brussels upheld (*Nexans*/*Prysmian*)
* ECJ agreed with *ABB* that GC had incorrectly reviewed evidence of an infringement as regards accessories
    - An "unsubstantiated presumption" (of infringement)
* ECJ also agreed with *NKT* on three points
    - Infringement of rights of defence to find NKT had been involved in cartel countries peripheral to the EEA, when allegation not in the SO
    - GC not entitled to treat the accessories infringement as a "non-essential characteristic" of the infringement, for which EC did not have to prove NKT's awareness
    - GC could not rely on an email related to activities on "export territories" as proving NKT participated in the underground power cables cartel in the EEA

– Smart card chips—*Infineon*

* Fine reduced on *renvoi* to GC on basis that number of collusive contacts involving Infineon was low
* (10 compared to 41 overall in cartel; with others on 32, 31 and 8)

Power Cables

In the course of the year, the ECJ generally dismissed further appeals against the GC's judgments rejecting appeals against the EC's decisions in the *Power Cables* cartel case.[176] However, the two appeals by *ABB*[177] and *NKT*[178] were partially upheld. They are described separately below. Procedural points raised by *Nexans* and *Prysmian* re. inspections are also noted below.

It may be recalled that in April 2014, the EC imposed a total fine of €302 million on 11 producers of high voltage submarine and underground power cables for their participation in a market-sharing cartel.[179] The EC found that the cartel consisted of two "configurations":

- the "*A/R cartel configuration*" that included European, Japanese and Korean producers. In this configuration, territories and customers were allocated based on the "home territory" principle, according to which the Japanese and Korean undertakings would refrain from competing for projects in the European home territory and *vice-versa*.

[176] With thanks to Su Şimşek, Marilena Nteve and Édouard Bruc. *LS Cable & System Ltd v European Commission* (C-596/18 P) EU:C:2019:1025; [2020] 4 C.M.L.R. 3, Judgment of 28 November 2019; *Silec Cable SAS v European Commission* (C-599/18 P) EU:C:2019:966; [2020] 4 C.M.L.R. 1, Judgment of 14 November 2019; *Brugg Kabel AG and Kabelwerke Brugg AG Holding v Commission* (C-591/18 P) EU:C:2019:1026, Judgment of 28 November 2019; *Viscas Corp v European Commission* (C-582/18 P) EU:C:2019:1133; [2020] 4 C.M.L.R. 8, Judgment of 19 December 2019; *Furukawa Electric Co Ltd v European Commission* (C-589/18 P) EU:C:2019:1134; [2020] 4 C.M.L.R. 9, Judgment of 19 December 2019; *Fujikura Ltd v European Commision* (C-590/18 P) EU:C:2019:1135; [2020] 4 C.M.L.R. 10, Judgment of 19 December 2019; *Nexans France SAS v European Commission* (C-606/18 P) Judgment of 6 July 2020, EU:C:2020:571; [2020] 5 C.M.L.R. 17; *Prysmian SpA v European Commission* (C-601/18 P), Judgment of 24 September 2020, EU:C:2020:751; [2020] 5 C.M.L.R. 21; and *Pirelli v Commission* (C-611/18 P), Judgment of 28 October 2020, EU:C:2020:868.

[177] *ABB Ltd v European Commission* (C-593/18 P), Judgment of 28 November 2019, EU:C:2019:1027; [2020] 4 C.M.L.R. 2.

[178] *NKT Verwaltungs GmbH v European Commission* (C-607/18 P), Judgment of 14 May 2020, EU:C:2020:385; [2020] 5 C.M.L.R. 12.

[179] *Power Cables* Case AT.39610. The EC summary is in OJ C319/10, 17 September 2014. The text of the decision is available on the EC's website.

The participants also coordinated as regards projects in third countries, save that the United States was not included; and

- the "*European cartel configuration*", in which territories and customers were allocated for projects within the European home territory.

As regards fines, the EC applied the methodology set out in point 18 of the EC Fining Guidelines.[180] In other words, the EC calculated the basis of the value of sales in the relevant geographic area wider than the EEA.

In calculating the proportion of sales, the EC set the initial amount at 15% for all undertakings due to the nature of the infringement, and increased it by 2% for the combined market share and the geographic reach of the cartel.

For the European undertakings, the EC then increased the fine percentage by another 2%. Therefore, the proportion applied on the value of sales was: (i) 19% for the European undertakings; and (ii) 17% for non-European undertakings.

The GC dismissed 15 appeals against the EC decisions.[181]

General On the further appeals to the ECJ, other than ABB and NKT described below, the main substantive arguments were all rejected as either wrong in law, correctly assessed by the GC or inadmissible as a new argument before the ECJ.

The main arguments of interest are set out below:

Economic Continuity Prysmian argued that the GC erred in law by upholding the decision which found Prysmian Cavi e Sistemi ("PrysmianCS") liable for the infringement from 1999 to 2009, even though the company was not founded until November 2001. Prysmian claimed that the GC infringed the principles of individual liability and legal certainty.

The ECJ disagreed, noting that when an entity that has committed an infringement of EU competition law is subject to a legal or organisational change, this change does not necessarily create a new entity free of liability for the unlawful conduct attributable to its predecessor in law provided that, at least from an economic point of view, the two entities are identical.[182] If undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective of suppressing conduct that infringes EU competition law and preventing its reoccurrence by means of deterrent penalties would be jeopardised.[183]

The GC (and the EC) were therefore entitled to find that the liability in the infringement of Pirelli Cavi e Sistemi ("PirelliCS"), which was operational in 1999, had been transferred to Pirelli Cavi e Sistemi Energia ("PirelliCSE"), which became PrysmianCS,[184] in accordance with the principle of economic continuity.[185] (The relevant business was sold by Prysmian to Goldman Sachs in 2005.)

[180] OJ C210/2, 1 September 2006.
[181] See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2017-2018: Part 1", [2019] I.C.C.L.R. 121, 149.
[182] *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [86].
[183] *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [86].
[184] *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [7].
[185] *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [90]–[92].

Public Distancing Both Silec and LS Cable argued that they did not have to publicly distance themselves from the cartel. Silec argued that such a requirement would only arise if it had participated in an anti-competitive meeting (which was not the case),[186] whereas LS Cable contended that its participation in a meeting in Tokyo did not demonstrate that it adhered to the "home territory principle". In addition, LS Cable pointed out that other participants considered it as an "outsider" and the South Korean territory as "pending" as regards the cartel.[187]

The ECJ rejected these claims. Notably, as regards Silec, the Court found that neither the EC nor the GC had relied solely on Silec's lack of public distancing to find Silec's participation in the cartel. Rather, they had considered it in combination with other evidence proving Silec's direct and continued participation in the cartel until November 2006.[188]

As regards LS Cable, the Court first found that the GC had not distorted the evidence in finding that LS Cable had begun to participate in the cartel in the Tokyo meeting. It was therefore for LS Cable to show public distancing from the cartel in the meeting, which it had not.[189]

LS Cable had also sought to raise a new argument that public distancing was not the only way to avoid liability through attendance at the meeting. LS Cable argued that its conduct after the meeting showed this. However, the Court ruled that this ground of appeal was inadmissible because it had not been made before the GC.[190]

Right of Defence and Access to File Brugg Kabel alleged a breach of the rights of the defence due to the EC's refusal to grant access to the other undertakings' replies to the SO, containing potentially exculpatory information.

The ECJ disagreed, recalling the rules on the case law on this issue. In other words, that it is first for the EC to carry out an initial assessment of the potentially exculpatory nature of the information contained in the replies to the SO, where one of the undertakings concerned requests access to such documents.

Second, appellants cannot be required to set out in their application detailed arguments to show that the outcome of the administrative procedure might have been different if they had had access to certain documents which were in fact never disclosed to them. However, an appellant has to adduce *prima facie* evidence that the undisclosed documents would be useful for its defence.

Third, if a document in the EC's possession, which may be categorised as exculpatory evidence is not communicated to that undertaking, the latter's rights of defence are breached if that undertaking shows that the document at issue could have been useful for its defence.

However, in this case, the GC had thoroughly verified that this was not the case.[191] Further, as has been held in other cases, there is no right to full and automatic access to the replies of other addressees of the SO.[192]

[186] *Silec* EU:C:2019:966; [2020] 4 C.M.L.R. 1 at [23].
[187] *LS Cable* EU:C:2019:1025; [2020] 4 C.M.L.R. 3 at [17].
[188] *Silec* EU:C:2019:966; [2020] 4 C.M.L.R. 1 at [53] and [56].
[189] *LS Cable* (C-596/18 P) EU:C:2019:1025; [2020] 4 C.M.L.R. 3 at [19]–[23] and [25].
[190] *LS Cable* (C-596/18 P) EU:C:2019:1025; [2020] 4 C.M.L.R. 3 at [30]–[32].
[191] *Brugg Kabel* EU:C:2019:1026 at [43]–[48].
[192] *Brugg Kabel* EU:C:2019:1026 at [40].

Burden of Proof Brugg Kabel also criticised the GC for confirming the EC's choice of the year 2004 as the reference year for the calculation of the fines, when Brugg Kabel had achieved an exceptionally high turnover that year, which was not representative compared to 2003 and 2005. Brugg Kabel argued that since the EC had not refuted or effectively challenged that submission, the GC should have upheld it.

The ECJ disagreed. The Court noted that in recital 975 of the contested decision, the EC rejected Brugg Kabel's argument that its fine could not be calculated on the basis of Brugg Kabel's sales in 2004.

Moreover, even if the EC had not explicitly reiterated that position before the GC, the latter was not obliged to conclude that Brugg Kabel had established that the sales made by that company during 2004 could not be used for the purpose of calculating the fine.[193]

Alleged Breach of the Principle of Personal Responsibility Viscas is a Japanese joint venture company established in October 2001, equally owned by Furukawa Electric (Furukawa) and Fujikura. The parent companies transferred certain activities relating to power cables to Viscas, while retaining sales in Japan to certain customers.[194]

The EC imposed a fine of €8.9 million on Furukawa for its direct participation in the cartel from February 1999 to September 2001 ("the first period"); and a fine of €35 million for its indirect participation through Viscas, jointly and severally with Fujikura, from Viscas' formation in 2001 to January 2009 ("the second period").[195]

Furukawa had argued before the GC that the EC incorrectly calculated the value of sales used to determine the basic amount of the fine by including: (i) the sales made by Viscas; and (ii) its own sales and those of Fujikura. However, the GC noted that the parent companies had not transferred all their activities covered by the cartel and that the parent companies and Viscas constituted a single undertaking throughout the second period, so the GC held that the EC could take into account the sales made by the three companies to calculate the basic amount. The GC, therefore, dismissed Furukawa's claim.[196]

Before the ECJ, Furukawa argued that the GC infringed the principle of personal responsibility by confirming the EC's decision that included Fujikura's sales in fining Furukawa for its participation in the cartel *during the first period*, since at that time Furukawa and Fujikura were not a single undertaking and participated in the cartel independently. Furukawa also alleged that the GC did not examine that point as regards the first period.[197]

The Court disagreed. *First*, the Court noted that the EC used the value of the sales made in 2004 for the purpose of calculating fines for the first period and the second period, and included the sales made to third parties by the joint venture and the parent companies .[198]

[193] *Brugg Kabel* EU:C:2019:1026 at [78].
[194] *Viscas* EU:C:2019:1133; [2020] 4 C.M.L.R. 8 at [9].
[195] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [12] and [18].
[196] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [20]–[23].
[197] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [29].
[198] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [31].

Second, the Court rejected Furukawa's claim that the GC had failed to state sufficient reasons for rejecting its argument concerning the first period. The ECJ noted that Furukawa's arguments were the same in respect of both the first and second periods, and considered that the GC was not required to distinguish between the two periods, since Furukawa itself had not relied on such a distinction in its arguments.[199]

Third, the Court noted that before the GC Furukawa had only raised the argument that it did not constitute a single entity with Viscas and Fujikura *in the second period*.[200] In its appeal to the ECJ, however, Furukawa argued that it did not constitute a single entity with Fujikura *during the first period*.[201] As a result, the new plea as inadmissible.[202]

Fourth, the Court noted that Furukawa had not challenged the EC's choice of 2004 as the reference year for fines, nor that for the first period the sales were to be apportioned between Furukawa and Fujikura based on their sales in the last business year before the formation of the Viscas JV. The fact that the calculation might have been done differently (as Furukawa had submitted) did not mean that the EC's approach in the case was unlawful.[203]

Alleged Breach of the Principle of Equal Treatment Viscas, Furukawa and Fujikura argued that the GC breached the principle of equal treatment by upholding the EC's use of point 18 of the EC Fining Guidelines, a method relevant for worldwide cartels, to both the European and the non-European cartel participants. They argued that the EC's application of the same method to all participants underestimated the importance of the European undertakings in the European configuration.[204]

They noted also that European cartels were normally fined pursuant to point 13 of the EC Fining Guidelines, a method in which the EC takes the value of sales in the EEA. Arguing that the value of sales for each European producer was thereby reduced by 44%, the appellants argued that the European undertakings were treated more favourably.[205] The appellants argued that the EC should have taken a "hybrid" or "composite" approach to avoid this.[206]

The Court disagreed. The ECJ considered that the non-European participants were in a different situation to the European producers. Both the EC and the GC had recognised this difference and found that the European undertakings' conduct had been more detrimental to competition.[207]

[199] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [32] and [33].
[200] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [35].
[201] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [36].
[202] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [36].
[203] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [37].
[204] *Viscas* EU:C:2019:1133; [2020] 4 C.M.L.R. 8 at [29]–[33]; *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [39]–[41].
[205] *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [43]–[44].
[206] *Viscas* EU:C:2019:1133; [2020] 4 C.M.L.R. 8 at [30]; *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [42].
[207] *Viscas* EU:C:2019:1133; [2020] 4 C.M.L.R. 8 at [49]–[53]; *Fujikura* EU:C:2019:1135; [2020] 4 C.M.L.R. 10 at [41]–[45]; *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [53]–[57].

The Court also recalled that the EC's fines sanctioned a single infringement in a single cartel composed of two configurations, and not each configuration of the cartel separately.[208]

The Court noted that the EC could take into account the respective weight of the participants in the cartel at various stages in the calculation of the fine, and did not have to do so necessarily when setting the basic amount. The Court held therefore that, contrary to the appellants' arguments, the alleged preferential treatment did not have to be determined in the light of hypothetical fines based on point 13 of the EC Fining Guidelines.[209]

Alleged Procedural Breaches: Copying Data without Prior Examination and Off-Site Examination of Evidence The EC conducted inspections on the premises of Nexans in France and Prysmian in Italy under Regulation 1/2003.[210] During the inspections, the EC made copy-images of data in hard drives and sets of emails without prior examination and took them to the EC's premises in Brussels.[211] The EC examined the copy-images of these documents in the EC's offices in the presence of Nexans' or Prysmian's lawyers, printed out those relevant for the investigation and gave a second paper copy and a list of these documents to the companies' lawyers. At the end of the examination process, the hard drives of the computers on which the EC's inspectors had worked were wiped.[212]

First, Nexans and Prysmian challenged the GC's interpretation of art.20(2)(b) and (c) of Regulation 1/2003, insofar as it allowed the EC to make copy-images of hard drives and sets of emails without a meaningful prior examination.[213] Under art.20(2) of Regulation 1/2003, officials are empowered, among other things, "*(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored*" and "*(c) to take or obtain in any form copies of or extracts from such books or records*". According to Nexans and Prysmian art.20(2) of Regulation 1/2003 describes a sequence of actions, requiring the EC to first examine books and records and only then take copies of those books and records.[214]

However, the ECJ rejected this interpretation. The Court considered the legal basis for making such copies not to be subparagraph (c) of art.20(2), but subparagraph (b), which allows the EC to examine the books and other records related to the business, regardless of the medium on which they are stored.[215] The Court noted that subparagraph (b) did not set out further details of such power,

[208] *Viscas* EU:C:2019:1133; [2020] 4 C.M.L.R. 8 at [54]–[55]; *Fujikura* EU:C:2019:1135; [2020] 4 C.M.L.R. 10 at [46]–[47]; *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [58]–[59].

[209] *Viscas* EU:C:2019:1133; [2020] 4 C.M.L.R. 8 at [57]–[58]; *Fujikura* EU:C:2019:1135; [2020] 4 C.M.L.R. 10 at [49]–[50]; *Furukawa* EU:C:2019:1134; [2020] 4 C.M.L.R. 9 at [61]–[62].

[210] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [14]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [10].

[211] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [17]–[18]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [11]-[13].

[212] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [19]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [14].

[213] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [49]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [42].

[214] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [51]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [43].

[215] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [60]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [54].

confirming that the EC had discretion regarding its examination procedures.[216] The ECJ concluded that the EC's right to make copies of sets of data, as an intermediate step in the examination of the data contained in those sets, was lawful, not an additional power granted to the EC.[217]

Second, Nexans and Prysmian argued that the EC's investigative powers must be interpreted narrowly, as an exception, and/or since they negatively affect the property rights of the companies under inspection.[218] The ECJ disagreed, provided that the rights of defence are ensured.[219] Such rights are safeguarded, according to the Court, where the EC assessed whether the data was relevant to the subject matter of the investigation, in compliance with the rights of defence, before placing such documents in the file, and deleted the remainder of the copied data. The ECJ concluded that the EC's right to make copies did not affect the procedural safeguards under Regulation 1/2003.[220]

Third, Nexans and Prysmian criticised the GC for finding that the EC was allowed to continue the inspection at its own premises in Brussels.[221] The ECJ disagreed, considering it even to be partly in the interests of the company investigated. The Court noted that the EC could do so only where it could legitimately take the view that "*it [was] justified in doing so in the interests of the effectiveness of the inspection or to avoid excessive interference in the operations of the undertaking concerned*".[222]

In Nexans' case, the EC had been on its premises four days, and then spent another eight working days reviewing the data in Brussels. In Prsymian, the EC had been onsite three days and spent three working days reviewing the data in Brussels. The Court concluded that this showed that taking the data to Brussels was justified. So the EC had not act unlawfully in continuing the inspection in Brussels.[223]

Finally, the ECJ added that where that continuation was capable of giving rise to additional costs, the EC may undertake that continuation only where it agreed to reimburse those costs, if a duly reasoned request to that effect is presented by the undertaking concerned.[224]

[216] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [61]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [55].

[217] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [63]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [56]–[57].

[218] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [52]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [46].

[219] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [64]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [58].

[220] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [64]–[65]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [57]–[59].

[221] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [69]–[72]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [46].

[222] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [87]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [70].

[223] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [88]–[89]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [71]–[72]. Interestingly, the power "to take or obtain, in any form, copies of or extracts from such books or records and, where they consider it appropriate, to continue making such searches for information and the selection of copies or extracts at the premises of the national competition authorities or at any other designated premise" is expressly recognised under art.6(1)(c) of the ECN+ Directive (EU Directive 2019/1, [2019] OJ L11/3).

[224] *Nexans* EU:C:2020:571; [2020] 5 C.M.L.R. 17 at [90]; *Prysmian* EU:C:2020:751; [2020] 5 C.M.L.R. 21 at [73].

ABB In November 2019 the ECJ partially allowed ABB's appeal.[225] Despite receiving full immunity and therefore no fine, ABB sought to annul the GC's judgment, insofar as the Court upheld the EC's decision that ABB had participated in a collective refusal to supply accessories and technical assistance to competitors not in the cartel, as regards power cables with voltages between 110 kV and 220 kV.

The ECJ agreed with ABB.[226] The GC had based its finding that ABB's conduct covered accessories on three points: (i) the projects that the infringement covered normally included power cable accessories; (ii) ABB had not contested that projects involving power cables with a voltage of 220 kV or higher normally included accessories; and (iii) projects for power cables with voltages from 110 kV to 220 kV were covered by the infringement.[227]

The Court therefore considered that the EC had not adduced any concrete evidence to support the claim that ABB participated in the collective refusal concerning accessories for underground power cable with voltages from 110 kV to 220 kV.

Moreover, rather than checking that the EC had met the requisite legal standard to prove this part of the infringement, the GC had relied on an "unsubstantiated presumption", leaving it to ABB to rebut the presumption of an infringement as regards the accessories.[228]

NKT In May 2020, the ECJ also partially upheld NKT's appeal against the GC's judgment upholding the EC's decision.[229]

It may be recalled that, according to the EC's decision, NKT participated in the cartel from July 2002 to February 2006. NKT was considered to be a fringe player in the cartel. For fining purposes, the basic amount for NKT was determined to be €4.32 million. However, this was reduced by 10% to €3.89 million for mitigating circumstances.

The three points on which the ECJ agreed with NKT were as follows:

First, NKT argued that the GC made an error of law in relation to the determination of the territorial scope of the infringement. In particular, in the SO the EC had excluded from the territorial scope of the case activities relating to sales in countries that are not EU or EEA members. However in its decision the EC included the allocation of projects in countries "peripheral to the EEA" on the basis that they had an impact on trade in the EU or in the EEA.

NKT argued that it could not have anticipated that it would be found to have infringed as regards such conduct when the allegation was not in the SO.[230] The ECJ agreed and concluded that there was an infringement of the rights of defence, capable of leading to the GC's judgment being set aside.[231]

Second, NKT argued that it had not been aware of the collective refusal to supply accessories and technical assistance to competitors. The EC had accepted that NKT

[225] With thanks to Alessia Varieschi. *ABB Ltd* EU:C:2019:1027; [2020] 4 C.M.L.R. 2.
[226] *ABB Ltd* EU:C:2019:1027; [2020] 4 C.M.L.R. 2 at [37].
[227] *ABB Ltd* EU:C:2019:1027; [2020] 4 C.M.L.R. 2 at [42].
[228] *ABB Ltd* EU:C:2019:1027; [2020] 4 C.M.L.R. 2 at [43]–[44].
[229] With thanks to Marilena Nteve. *NKT Verwaltungs GmbH v European Commission* EU:C:2020:385; [2020] 5 C.M.L.R. 12.
[230] *NKT Verwaltung* EU:C:2020:385; [2020] 5 C.M.L.R. 12 at [52]–[54].
[231] *NKT Verwaltung* EU:C:2020:385; [2020] 5 C.M.L.R. 12 at [56]–[58].

did not participate in that infringement, so the EC had to establish NKT's awareness of it, or that NKT could reasonably have foreseen it and the GC had to review that issue. Whereas the GC did not examine whether the EC had done so on the ground that the practice was only a "non-essential characteristic" of the infringement at issue.[232]

The ECJ noted that such an approach was not consistent with the case law, which did not distinguish between practices which are "essential" in the context of a single and continuous infringement and those that are not.[233] Therefore, the GC also made an error of law on this issue.

Third, the ECJ accepted NKT's argument that it had not been shown to have participated in relation to the allocation of underground power cable projects in the EEA and the exchange of information about such projects. NKT argued that it had only been involved in the "export territories" arrangement for these projects.

The ECJ noted that NKT had been held liable for participating in that allocation in the EEA and the exchange of information about such projects between July 2002 and February 2006. The GC had examined NKT's arguments by distinguishing three periods.

As regards the period between July 2002 and February 2004, the GC had relied on three pieces of evidence: a September 2002 email form Nexans, an exchange of emails of November 2002, and the notes of an R meeting in April 2003. NKT claimed that the GC distorted this evidence and failed in its obligation to state reasons.

In relation to the September 2002 email from Nexans, the ECJ found that it only related to the allocation of projects in the "export territories." Therefore, the GC could not have relied on this document to conclude that the EC had established NKT's participation in the allocation of underground power cable projects in the EEA for the period prior to November 2002, without infringing the presumption of innocence.[234]

As a result, the ECJ set aside the GC's judgment on these points and considered that it was appropriate to reduce the fine by €200.000.[235]

Smart Card Chips—Infineon

In July 2020, the GC reduced the fine on Infineon for its participation in the smart card chips cartel, from €82.8 million to €76.9 million.[236] It may be recalled that in 2018 the ECJ had set aside in part the GC's original judgment for incomplete assessment, and had referred the case back to the GC to reassess the proportionality of the fine imposed on Infineon (as a "*renvoi*" case).

The Court therefore had to consider Infineon's arguments as regards six contacts which the EC had found anti-competitive in its decision and the GC had not examined in the original judgment.[237]

[232] *NKT Verwaltung* EU:C:2020:385; [2020] 5 C.M.L.R. 12 at [164]–[165].
[233] *NKT Verwaltung* EU:C:2020:385; [2020] 5 C.M.L.R. 12 at [166].
[234] *NKT Verwaltung* EU:C:2020:385; [2020] 5 C.M.L.R. 12 at [234]–[235].
[235] *NKT Verwaltung* EU:C:2020:385; [2020] 5 C.M.L.R. 12 at [305]–[306].
[236] With thanks to Su Şimşek. *Infineon Technologies AG v European Commission* (T-758/14 RENV), Judgment of 8 July 2020, EU:T:2020:307; [2020] 5 C.M.L.R. 19.
[237] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [32].

In five of the six anti-competitive contacts, the GC found that the EC could conclude that Infineon had shared commercially sensitive information, such as forecasts of future demand,[238] business strategy in the face of a price decrease in the market,[239] and production capacities,[240] as well as information in relation to a competing third party and future sales levels.[241]

As regards one alleged contact, Infineon argued that the EC had no evidence to show that information on its pricing strategy had been directly communicated to a competitor by Infineon. According to Infineon, that information could have been obtained from other public sources or from a customer.[242]

The GC found that the evidence was inconsistent both as regards the alleged source of the information and the content of that information.[243] The GC concluded that its probative value was reduced and that the EC had not shown that an anti-competitive contact had taken place.[244]

So overall, the GC found a total of 10 anti-competitive bilateral contacts.[245]

As regards the assessment of the principle of proportionality, the GC considered various aspects of the infringement. In particular, that Infineon had participated in a limited number of anti-competitive contacts (10 as compared to 41 overall in the cartel) , and that this number was lower than the number of contacts found by the EC.[246] This was lower than other cartel participants (Samsung 32, Renesas 31), and slightly higher than those as regards Philips (8).[247]

The Court considered that overall the 20% reduction in the amount of the fine, which the EC had granted Infineon, did not sufficiently reflect the limited number of anti-competitive contacts involving Infineon.[248] The GC therefore granted an additional reduction of 5% to the fine imposed on Infineon, and set the fine at €76.9 million.[249]

Other

In October 2020, the ECJ also dismissed a further appeal by Silver Plastics in the *Retail Food Packaging* cartel case.[250]

Inspections

Box 8

- **Inspections**
  - *České dráhy*

[238] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [51].
[239] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [73].
[240] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [87].
[241] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [133].
[242] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [109].
[243] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [111]–[122].
[244] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [124].
[245] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [142].
[246] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [178].
[247] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [174]–[178].
[248] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [191]–[193].
[249] *Infineon Technologies* EU:T:2020:30732; [2020] 5 C.M.L.R. 19 at [198]–[199].
[250] *Silver Plastics and Johannes Reifenhäuser v Commission* (C-702/19 P) Judgment of 22 October 2020, EU:C:2020:857.

* Further appeal re. Czech Railways inspections dismissed by ECJ

– *French Supermarkets*

* EC inspections re. possible collusion in French purchasing alliances
* GC found EC had sufficiently serious indications of a concerted practice on two aspects, but not the third (possible collusion on future commercial strategies)
* Public exchanges in a "convention" lawful
* Company entitled to protect private information but had to raise issue before data taken (or no challengeable act)
* GC reviewed whether companies had immediate and effective legal recourse against the inspections and found "yes" (review against ECtHR standards)
* EC not required to record interviews before its investigation started

České dráhy—art.102 Inspections

This year the ECJ ruled on the appeal by České dráhy (CD), the incumbent Czech railways company, against the GC's ruling whereby that court generally upheld the EC's two inspections, although not allowing the EC to take some information. The Court rejected CD's appeal.[251]

There are two main points: *First*, the EC did not have to be more specific in its inspection decision, because the EC had information from an earlier Czech Competition Authority (CA) inspection. *Second*, in assessing whether there were sufficiently serious indications to justify an inspection, the EC did not have to consider arguments against a finding of infringement going to the substance of the case (which might be relevant later, but not to deciding whether to inspect or not).

Background It may be recalled that the EC inspected first to see if CD had been involved in predatory pricing on a key route in Czechia (Prague-Ostrava); and later to see if CD had been colluding to stop the supply of used transport carriages to rivals.[252] The Czech CA had carried out an investigation before that of the EC and the EC had seen the results before going.

On appeal the GC found the first inspection generally lawful (the "Falcon inspection").[253] The object, the legal issue being investigated and the scope were sufficiently clear. However, the Court stated that the EC could not seek information on other routes than Prague-Ostrava, because there was no indication of an infringement on them.[254] The EC was entitled to take costs information and documents related to CD's strategy in such an inspection.

As regards the second inspection (the "Twins inspection"), the GC rejected CD's claim that it was based on documents unlawfully obtained in the Falcon inspection.[255] There was a reference to possible collusion in the three documents which were lawfully taken insofar as they related to CD's costs and strategy.

[251] *České dráhy v European Commission* (Joined cases C-538/18 P and C-539/18 P) Judgment of 30 January 2020, EU:C:2020:53.

[252] See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2017-2018: Part 1", [2019] I.C.C.L.R. 121, 162.

[253] *Ceske drahy a. s. v European Commission* (T-325/16) Judgment of 20 June 2018, EU:T:2018:368; [2019] 4 C.M.L.R. 17.

[254] *České dráhy* EU:T:2018:368; [2019] 4 C.M.L.R. 17 at [15].

[255] *České dráhy v European Commission* (T-621/16) Judgment of 20 June 2018, EU:T:2018:367.

Appeal to ECJ—Falcon Inspection On appeal, CD argued that the GC had failed to consider that the EC already knew much from the Czech CA's investigation. CD therefore argued that the EC should have set out its suspicions more clearly in its inspection decision [256] (relying on *Heidelberg Cement*[257]).

The ECJ disagreed, noting that *Heidelberg Cement* was a case of an EC RFI two years after its own inspections and after other RFIs. The Falcon inspection was the first inspection by the EC and, in that situation, the EC was entitled to be less specific.[258] The fact that the EC had information from an NCA inspection did not mean that the EC had to give more detailed reasoning in its inspection decision. The information had not been gathered by the EC based on EU competition law, but by an NCA based on national competition law.[259]

CD also argued that there was insufficient evidence of an infringement of art.102 TFEU and that the evidence before the GC (and the EC) showing that should have been taken into account.[260] For example, CD's prices were above variable cost. CD argued that the GC should have considered other evidence to assess whether there was a plan to exclude competitors; and whether such an alleged plan could have excluded competitors, when at least one competitor made profits at lower prices than CD.

The ECJ disagreed. As to the legal standard for an inspection decision, the GC had checked correctly whether the EC had sufficiently serious indications of an infringement.[261] If there such indications, the EC was not required to go further and consider all the indications to the contrary. Such issues could be raised in the subsequent EC procedure or subsequently before the courts.[262]

CD also argued that the GC should have checked: (i) if the Prague-Ostrava route could be a substantial part of the internal market and argued that it was not, being only 0.16% of the total railways length in the EU; and (ii) whether only parts of that route were relevant markets.[263] The GC had also wrongly found that art.102 TFEU could be infringed, because Ostrava was near the Czech border with other Member States.

The ECJ again disagreed. The EC was not required to give a precise definition of the relevant market, or to show appreciable effect on trade between Member States in an inspection decision.[264]

The GC had ruled that the conditions of art.102 TFEU were satisfied, even if only parts of the Prague-Ostrava route were considered. The GC had considered possible effect on trade between Member States, notably because: (i) the Prague-Ostrava route was major (there being no direct motorway between the two cities); (ii) Ostrava was close to the Polish and Slovak frontier; (iii) CD's competitors also operated in other Member States (e.g. the Slovak Republic); and

[256] *České dráhy* EU:T:2018:367 [34] and [46]–[47].
[257] *HeidelbergCement AG v European Commission* (C-247/14 P) Judgment of 10 March 2016, EU:C:2016:149; [2016] 4 C.M.L.R. 28. See John Ratliff, "Major Events and Policy Issues in EC Competition Law, 2015-2016: Part 1", [2017] I.C.C.L.R. 119, 127.
[258] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [48]–[49].
[259] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [50].
[260] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [52]–[55].
[261] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [65].
[262] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [64].
[263] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [74].
[264] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [80].

(iv) the Prague-Ostrava route was part of competitors' transport routes to the Slovak Republic.

Appeal to ECJ—Twins Decision As regards the second inspection decision, CD argued that it was based on documents unlawfully taken by the EC in the Falcon inspection. The Court rejected this, confirming that in a predatory pricing case the EC is entitled to look for relevant information on the company's costs and strategy. The documents relevant to the Twins inspection had been lawfully obtained in the Falcon inspection, so the claim was rejected.[265]

French Supermarkets

In October 2020, the GC partially annulled EC decisions for onsite inspections of Casino, Guichard-Perrachon and its subsidiaries, Intermarché Casino Achats and its subsidiaries, and Les Mousquetaires and its subsidiaries. These companies are large retailers in the food and non-food distribution sector, based in France.[266]

Background It appears that the EC received information concerning exchanges of information between undertakings and associations of undertakings in the food and non-food distribution sector.

The EC made some investigations, including holding interviews with some 13 suppliers.[267] It appears that suppliers also complained that certain retailers had moved from one retail alliance to another, that some employees had moved between retailers and that there were local agreements, allowing for further movement of information between the retailers.[268]

Then, in February 2017 the EC adopted a series of decisions ordering several companies to submit to inspections pursuant to art.20(1) and (4) of Regulation 1/2003.[269]

During the inspections, the EC took copies of the content of computer equipment. Some of the companies then complained that the EC had taken private documents and challenged the right of the EC to make such inspections in the circumstances, seeking annulment of the inspection decisions before the GC.

The EC issued various inspection decisions covering three different suspected infringements. The first decision, in Case AT.40466, "Tute 1" covered the two first suspected infringements: (i) exchange of information between competitors regarding discounts obtained from suppliers and sales prices for certain products, notably in France; and (ii) exchange of information between competitors regarding their future commercial strategies. The second decision in Case AT.40467, "Tute 2", covered the third suspected infringement: another exchange of information re

[265] *HeidelbergCement* EU:C:2016:149; [2016] 4 C.M.L.R. 28 at [99]–[104].

[266] With thanks to Geoffroy Barthet. *Les Mousquetaires and ITM Entreprises v Commission* (T-255/17) EU:T:2020:460; *Casino, Guichard-Perrachon and AMC v Commission* (T-249/17) EU:T:2020:458; and *Intermarché Casino Achats v Commission* (T-254/17) EU:T:2020:459; all judgments of 5 October 2020. References made to specific paragraphs below relate to the judgment in *Les Mousquetaires*, unless otherwise indicated. See also GC Press Release 122/20, 5 October 2020.

[267] *Les Mousquetaires* EU:T:2020:460 at [176].

[268] *Les Mousquetaires* EU:T:2020:460 at [176].

[269] These articles set out the general power of the EC to carry out inspections and to the obligation on undertakings and associations of undertakings to submit to those inspections when ordered to do so by decision.

discounts obtained from suppliers and sales prices for other products, notably in France and Germany.

The GC Judgment The Applicants raised several pleas. Notably; (i) that art.20 of Regulation 1/2003 and any inspection based thereon was illegal; (ii) an alleged failure to state reasons for the inspections by the EC; and (iii) an alleged infringement of the Applicants' rights to the inviolability of their premises, insofar as the EC did not have sufficient grounds for the inspections. In *Les Mousquetaires* (T-255/17) the GC also had to rule on privacy claims.

Alleged Privacy Issues In *Les Mousquetaires*, the Applicants submitted a plea to annul the EC's alleged decision to seize and copy certain data, considering that it harmed the private lives of its employees or managers; and the EC's alleged decision to refuse to return such data.[270]

The GC stated first that *Les Mousquetaires* (as an undertaking) could raise privacy arguments for its employees, since all undertakings have a duty to ensure the protection of the persons whom they employ and of their private lives.[271]

However, the GC then ruled that the EC's alleged decisions were not challengeable acts. The GC noted that the Applicants did not make a request for protection prior to the copying of the allegedly private data. Rather, the Applicants had invoked the rights to privacy of their employees only after the data was copied, and after the equipment containing such alleged personal data was returned.[272]

The GC therefore concluded that the EC was not put in a position to adopt a decision rejecting the Applicants' privacy claims[273] and declared inadmissible the Applicants' claims. The Court found that the EC had not adopted a decision (express or implied) constituting an act producing binding legal effects which affected their interests, by bringing about a distinct change to the Applicants' legal position, i.e., an act open to challenge.[274]

As regards the request to return the data, the GC found that the Applicants had only indicated that numerous documents seized by the EC would harm their authors' privacy. Further, the Applicants acknowledged that, three months after the inspection, they were still reviewing some of the documents.[275]

The GC concluded that, in the absence of a sufficiently clear and precise request from the undertaking the EC had not been put in a position to define its position, and the Applicants had not received a response from the EC capable of being an act open to challenge.[276]

Companies in inspections are therefore put on notice that they have to object to the EC's seizure of allegedly private data in a timely, clear and precise way *before any such seizure*, if they wish to have a means to challenge the EC's act in taking it, before any final decision by the EC in the case.[277] Usefully however, the Court

[270] *Les Mousquetaires* EU:T:2020:460 at [30].
[271] *Les Mousquetaires* EU:T:2020:460 at [32] and [37].
[272] *Les Mousquetaires* EU:T:2020:460 at [41].
[273] *Les Mousquetaires* EU:T:2020:460 at [43].
[274] *Les Mousquetaires* EU:T:2020:460 at [45].
[275] *Les Mousquetaires* EU:T:2020:460 at [47].
[276] *Les Mousquetaires* EU:T:2020:460 at [47].
[277] *Les Mousquetaires* EU:T:2020:460 at [42].

confirms that there is a right of appeal in the event of a challengeable act as regards an alleged infringement of privacy rights.[278]

Alleged Lack of an Effective Remedy to an Unlawful Inspection An interesting plea raised by the Applicants was the alleged illegality of art.20 of Regulation 1/2003, insofar as the Applicants argued that art.20(4) of Regulation 1/2003 infringed their right to an effective remedy.[279]

The GC rejected that plea, but in the process reviewed the remedies that are available in the context of an inspection, against art.47 of the EU Charter of Fundamental Rights and the related case law of the European Court of Human Rights ("ECtHR") on Arts 6(1) and 13 of the European Convention of Human Rights.[280] It may be recalled that art.47 sets out the right to an effective remedy, including access to an impartial tribunal, with a fair hearing, in public, in a reasonable time.[281]

The Court recalled that, generally a challenge to the way in which an inspection is carried out should be part of any application to annul the EC's *final* decision in the case, insofar as the measures concerned will be intermediate steps to that final decision. However, acts of the EC taken in its preparatory procedure could be challenged where they resulted from a distinct special procedure and produced legal effects which would affect the legal interests of an Applicant.[282]

The main issues and potential remedies examined by the court may be summarised as follows:

Box 9

Issue	**Legal remedy**
– Inspection decision	– Action for annulment of the inspection decision
– Conduct of the inspection	– Action for annulment of the final decision closing the proceedings
– Decision imposing a fine on an undertaking for obstructing the inspection	– Action for annulment of the EC decision imposing a fine on the undertaking for obstructing the inspection
– Decision rejecting a claim for the protection of documents covered by legal privilege	– Action for annulment of that rejection decision which constitutes a challengeable act.
– Decision rejecting a claim for protection of documents covered by legal privilege	– In parallel with the action for annulment of that rejection decision, possibility to lodge an application for interim measures
– Decision rejecting a claim for protection of documents covered by privacy law	– Action for annulment of that rejection decision, provided that it constitutes a challengeable act
– Suspending the operation of the inspection	– Application for suspension

[278] *Les Mousquetaires* EU:T:2020:460 at [37] and [94].
[279] *Les Mousquetaires* EU:T:2020:460 at [71]–[72] and [76]–[77].
[280] *Les Mousquetaires* EU:T:2020:460 at [88]–[111].
[281] *Les Mousquetaires* EU:T:2020:460 at [78].
[282] *Les Mousquetaires* EU:T:2020:460 at [34]–[35].

– Illegal acts committed by the EC during the inspection, but in absence of a challengeable act	– Action for non-contractual liability against the EC, available even before the final decision, provided that the applicant suffered harm

The GC considered that the system for monitoring the manner in which inspections are carried out, comprising these legal remedies, met the four conditions provided by the case law of the ECtHR[283] for an effective remedy:

- the existence of effective judicial review of the facts and points of law (requirement of effectiveness);
- the possibility for an individual to obtain an appropriate remedy where an unlawful act has taken place (requirement of efficiency);
- the certainty of access to proceedings (requirement of certainty); and
- judicial review within a reasonable time (requirement of a reasonable time).

In *Casino, Guichard-Perrachon and AMC* (T-249/17) and *Intermarché Casino Achats* (T-254/17), the Applicants also argued the illegality of art.20(4) of Regulation 1/2003 claiming an infringement of the principle of equality of arms and the rights of the defence. Notably, the Applicants argued that the legal framework for the EC inspections does not allow them to access the EC's evidence justifying the inspection decisions.[284]

However, the GC recalled that, in accordance with settled case law, the EC cannot be required, at a preliminary stage, to specify the evidence justifying the inspection of an undertaking suspected of anti-competitive practices.[285] Such an obligation would undermine the effectiveness of the investigation.[286] It was enough that such evidence was available in proceedings on the legality of the inspection before the court.

As a result, the GC rejected the Applicants' plea of illegality of art.20(4) of Regulation 1/2003 in all cases.

Obligation to State Reasons The GC rejected the Applicants' plea alleging infringement of the obligation to state reasons insofar as the inspection decisions had not indicated clearly, amongst other things, the object and purpose of the inspections and the evidence justifying the inspection.

After review, the GC rejected these arguments, considering that the inspection decisions stated clearly and in sufficient detail the nature of and grounds for the inspection.[287]

Violation of the Right to Inviolability of Premises The Applicants' plea on this issue was two-fold.

First, they challenged the proportionality of the inspection decisions.[288] Notably, the Applicants argued that the inspection decisions did not provide an end date for

[283] *Les Mousquetaires* EU:T:2020:460 at [82].
[284] *Casino* EU:T:2020:458 at [82].
[285] *Casino* EU:T:2020:458 at [85] and [91].
[286] *Casino* EU:T:2020:458 at [86], [90]–[91] and [97].
[287] *Les Mousquetaires* EU:T:2020:460 at [131]–[132] and [136]–[138].
[288] *Les Mousquetaires* EU:T:2020:460 at [157].

the inspection. The GC disagreed, noting that the absence of an end date was in line with Regulation 1/2003 which only requires a starting date; and the case law, which requires that the inspection be carried out in a reasonable time. Here, the inspections had lasted less than five days.[289]

Regarding the choice of the inspection date, the Applicants criticised that the inspection was conducted just before the legal deadline for the conclusion of important commercial negotiations, arguing that this involved a disproportionate interference with their activities. However, the GC again disagreed, considering that the Applicants had not shown how this caused material inconvenience. Notably, the relevant managers were only deprived of their phones and laptops for a day and a half, the negotiations usually lasted some five months and the inspections finished two working days before the deadline.[290]

Second, the Applicants argued that the infringement of their rights to inviolability of their premises also resulted from the EC's lack of sufficiently strong evidence to justify its inspection decisions.

The GC therefore ordered the EC to produce the evidence, which the EC did in the time set by the Court.[291] However, a "complementary response" by the EC was rejected as inadmissible by the GC, due to lack of valid justification for its late lodgment.[292] This included an internal note from DG COMP regarding interviews conducted with suppliers before the opening of the investigation. The EC lodged this response note six months after the deadline set by the GC in its measure of organisation.[293] Further, the EC did not provide any justification for that delay, but merely apologised to the GC for the inconvenience.

There was also a challenge by the Applicants to the EC's interviews with suppliers, insofar as, amongst other things, the EC had not recorded them. However, the GC rejected this, noting that, although the EC was required to record interviews once its investigation had started, it was not required to do so before then.[294]

Then the GC reviewed the EC's admissible evidence in detail to assess whether it was sufficiently strong to justify the inspection.

The GC found that it was as regards a suspected concerted practice involving exchanges of information for the first and third suspected infringements (i.e. the two allegations as regards discounts from suppliers and sales prices for services to manufacturers of branded products).[295] In doing so, the GC held that the threshold for sufficiently strong evidence to justify an inspection was lower than that to find a concerted practice.[296]

However, the GC held that the EC failed to show that it had sufficiently strong evidence for the second suspected infringement (i.e. exchanges of information concerning the future commercial strategies of the companies).[297]

In particular, the GC considered that the presence of one competitor's director at a "Convention" at which Intermarché was presenting its commercial priorities

[289] *Les Mousquetaires* EU:T:2020:460 at [160]–[166].
[290] *Les Mousquetaires* EU:T:2020:460 at [169].
[291] *Les Mousquetaires* EU:T:2020:460 at [185].
[292] *Les Mousquetaires* EU:T:2020:460 at [186].
[293] *Les Mousquetaires* EU:T:2020:460 at [181].
[294] *Les Mousquetaires* EU:T:2020:460 at [196] and [200]–[205].
[295] *Les Mousquetaires* EU:T:2020:460 at [244]–[276].
[296] *Les Mousquetaires* EU:T:2020:460 at [242].
[297] *Les Mousquetaires* EU:T:2020:460 at [296].

in front of 400 suppliers, was not sufficient evidence of unlawful concerted practices.[298] The GC noted that the director was attending the Convention as a representative of INCA, a purchasing alliance between Casino and Intermarché. Further, that he was bound by confidentiality obligations vis-à-vis Casino in that role.[299] The GC also noted that the information disclosed was general, that journalists attended the Convention and that a detailed article was later published about it. The GC recalled that an exchange of public information could not infringe the competition rules.[300]

Finally, as regards concomitant requests by the retailers to their suppliers for so-called "innovation bonuses", the GC found that these practices were already covered by the first suspected infringement and that only two suppliers had flagged such practices to the EC.[301] This evidence was therefore not sufficient to justify the inspection.

As a result, the GC concluded that the EC did not have sufficiently strong evidence and therefore had infringed the principle of inviolability of premises as regards the second alleged infringement and annulled the first inspection decision to that extent.[302]

Rejection of Complaints

LL Carpenter

In March 2020, the GC dismissed an appeal by LL Carpenter ("Carpenter"), a Czech company which acts as an independent intermediary for the purchase of Subaru and Daihatsu cars for customers in the Czech Republic. Carpenter was also an independent repairer of such vehicles.[303]

Carpenter had filed two complaints against Subaru, one in 2010 with the Czech Competition Authority ("Czech CA") and another in 2012 with the EC. Carpenter complained that Subaru had rejected Carpenter's application to become an authorised distributor; and obstructed its activities as an intermediary, and for servicing Subaru cars (amongst other things).

In December 2014, the Czech CA closed its investigation. In June 2018, the EC also closed its investigation pursuant to art.13(2) of Regulation 1/2003. That provision states that where a competition authority of a Member State or the EC has received a complaint against an agreement or practice which has been dealt already with by another competition authority, it may reject it.

The main points of interest are as follows:

First, on appeal to the GC, Carpenter argued that the EC had wrongly rejected its complaint because recital 20 of the Motor Vehicle Block Exemption Regulation[304] prevented the EC relying on art.13(2) of Regulation 1/2003. Recital 20 requires the EC,

[298] *Les Mousquetaires* EU:T:2020:460 at [284]–[286].
[299] *Les Mousquetaires* EU:T:2020:460 at [285].
[300] *Les Mousquetaires* EU:T:2020:460 at [288]–[292].
[301] *Les Mousquetaires* EU:T:2020:460 at [298].
[302] *Les Mousquetaires* EU:T:2020:460 at [299]–[301].
[303] With thanks to Édouard Bruc. *LL-Carpenter s. r. o. v Commission* (T-531/18) Judgment of 12 March 2020, EU:T:2020:91.
[304] EC Regulation 461/2010, [2010] OJ L129/52.

> "to monitor, on a continuous basis, developments in the motor vehicle sector and take appropriate remedial action if competition shortcomings arise which may lead to consumer harm on the markets for the distribution of new motor vehicles or the supply of spare parts or after-sales services for motor vehicles".

However, the Court held that this did not preclude an NCA from dealing with complaints relating to those markets and taking action. As a result, to ensure that each case is dealt with by only one competition authority, it is important that the EC can reject complaints alleging harm in those markets on the basis of art.13(2) of Regulation 1/2003.[305] Further, art.13(2) covers all cases of complaints that have been examined by another competition authority under the EU competition rules. It is not limited to complaints which have already been the subject of a decision by another competition authority.[306]

Second, Carpenter argued that the EC had failed to examine evidence that it had provided to show that Subaru limited parallel trade in vehicles by prohibiting authorised distributors from selling vehicles to other companies.

However, the GC noted the EC had examined those issues. Neither the Vertical Restraints Block Exemption,[307] nor the Motor Vehicle Block Exemption[308] prevented Subaru from prohibiting its authorised distributors from selling Subaru vehicles to unauthorised entities.[309] In particular, under art.4(b)(iii) of the Vertical Restraints Block Exemption, a supplier of motor vehicles may restrict sales by members of a selective distribution system to unauthorised entities.[310]

Carpenter had not therefore shown that the EC had made a manifest error of assessment when it found that the likelihood of establishing the existence of an infringement of art.101 TFEU would be limited.[311]

Third, the GC held that an examination of the contested decision showed that the EC had mentioned the facts and legal considerations which are essential to the context of the contested decision. Notably: (i) the EC had explained its reasons for applying art.13(2) of Regulation/2003 in relation to some of the allegations; (ii) the EC had duly explained that the likelihood of establishing an infringement of the competition rules was low with regard to the other practices which had not been the subject of an examination by the Czech CA; and (iii) in particular, that it did not appear that the companies in question had put pressure on authorised distributors, not to sell vehicles to entities such as Carpenter.

The EC had also explained that a more thorough investigation of these practices would have required considerable resources, which it considered disproportionate, having regard to the low probability of establishing the existence of an infringement.

The Court concluded that the EC had sufficiently explained its reasons for not investigating the complaint further.[312]

[305] *LL-Carpenter* EU:T:2020:91 at [45].
[306] *LL-Carpenter* EU:T:2020:91 at [48].
[307] EC Regulation 330/2010, [2010] OJ L102/1.
[308] EC Regulation 461/2010, [2010] OJ L129/52.
[309] *LL-Carpenter* EU:T:2020:91 at [73].
[310] *LL-Carpenter* EU:T:2020:91 at [74].
[311] *LL-Carpenter* EU:T:2020:91 at [75].
[312] *LL-Carpenter* EU:T:2020:91 at [95].

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

- Various European Commission decisions on:
    - * Article 101 TFEU cartels
    - * Article 101 TFEU cases on film and character merchandising and territorial restrictions (*NBC Universal*, *Sanrio*, *Meliá Hotels International*)
    - * Article 102 TFEU cases such as *Aspen* (on excessive pricing); and *Broadcom* (on exclusivity/bundling)
    - * Art. 102 TFEU cases re. energy (such as *Transgaz* and *Bulgarian Energy Holding*), and digital/hi-tech (two cases involving *Qualcomm*; one on exclusivity payments, the other predatory pricing)
- The EC Sectoral review on The Internet of Things
- Selected policy issues including:
    - * Recent EC Initiatives for Digital Markets (including a "Digital Markets Act" and a "Digital Services Act")
    - * Competition Law and Foreign Subsidies