Major Events and Policy Issues in EU Competition Law 2020–2021: Part 1

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Abstract

John Ratliff and his colleagues set out their annual review of major events in EU Competition law in 2020–2021, dealing with legislative/European Commission (EC) practice developments (including the EC's proposed Digital Markets Act and drafts of the revised Vertical Restraints Block Exemption and Guidelines). They also note continuing EC and national competition authority developments on sustainability and competition law. Then they outline European Court judgments on EU Competition law. Of particular interest are rulings in: (i) Pometon, which deals with the position of non-settling parties in hybrid settlements in cartel cases; and (ii) Sumal/Mercedes Benz Trucks Espaňa, which deals with whether a plaintiff seeking cartel damages has to sue the named infringing group parent or can sue a subsidiary. Finally, they review judgments on cartel appeals, including cases on the payment of interest on appeals, whether leniency applicants can change position for fine reductions, and appeals in the capacitors 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 2020 until the end of October 2021.[2]

The article is divided into an overview of:

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

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[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 17 January 2022]. 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*.

- policy issues.

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Legislative/EC practice developments and European Court cases on general issues and cartel appeals are included in Part 1. European Court cases on other art.101 issues and art.102 TFEU, 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 2020/21**
  - Digital Markets Act proposals in the legislative process
  - Revision of the Vertical Restraints BE and Guidelines
    - Detailed drafts maturing with significant changes
  - Sustainability
    - See *Competition policy brief* of September 2021
    - *Car emissions* case, the NCAs keep going (and EU State aid/Green deal action)
  - Understanding EC accelerated procedures
    - Important EU Court cases
      - *Pometon* (hybrid settlements and impartiality)
      - *Groupe Canal+* (art.9 commitments and the interests of third parties)
  - *Sumal/Mercedes Benz Trucks España*
    - Single economic unit *in* a group responsible for cartel liability
    - A subsidiary can be sued for damages even if not named in an EC decision if specific link to the infringement (marketing the goods concerned)
  - *Bronner* NOT applied in *Baltic Rail* and *Slovak Telekom*
  - Still a very complex policy world, with
    - The COVID-19 pandemic not over
    - Digital/online impacts on industry and the "High Street"
    - Sustainability: *So what did you do today?*
    - Calls for industrial policy and deglobalisation to deal with world competition and dependencies
      - EU Foreign Subsidies proposal

This year has been a busy year for EU Competition law. The following are the most important developments overall[3]:

First, the EC proposed its Digital Markets Act and that has been working through the EU legislative process since. It will be recalled that this is designed to address

[3] References are included where the issue is described below.

the contestability of platform markets, perceived as prone to tipping to high degrees of dominance.

Second, the EU is also reviewing its *Vertical Restraints Block Exemption and Guidelines* to reflect changes in distribution practices, above all the growth of online sales. We have seen advanced drafts on which the EC has taken comments.

Third, there are many other EU legislative measures in the pipeline, notably *proposals for revision of the EC's Horizontal Guidelines*, with potentially a new section on sustainability. We have some insight on the EC's thinking in an EU *Competition policy brief* from September 2021. In the meantime, the EC has taken a decision fining *cooperation on car emissions technology* which was considered unlawful, while also explaining what coordination was allowed. Various NCAs have also continued their advocacy for progressive rules in the area; and the EU has been pursuing climate change issues in State aid and through its Green Deal proposals.

Fourth, there have been two important European Court cases on the *EC's accelerated competition law enforcement procedures.*

- *Pometon*, which deals with the issue of *hybrid settlements in cartel cases*; in particular to what extent the EC can refer to a non-settling alleged cartel infringer in an EC decision dealing with the settling parties, consistent with its duty of impartiality; and
- *Groupe Canal +*, which deals with the art.9 commitment procedure under Regulation 1/2003; and the issue whether the EC had considered the interests of a third-party pay-TV broadcaster in France, when assessing the proportionality of commitments offered by Paramount, a Hollywood film studio, to resolve EC concerns about territorial licensing restrictions in its agreement with Sky in the UK.

Fifth, there has been an important European Court judgment on *cartel damages liability*, *Sumal/Mercedes Benz Trucks Espaňa*. This deals with whether a company which claims for an alleged overcharge in the purchase of trucks could sue the subsidiary involved in Spain, or had to sue the group parent, Daimler, held responsible for the infringement in the EC's decision. In answering that question the Court gave a number of important clarifications as to the nature and extent of such liability in a group.

Sixth, there are other important European Court judgments, notably *Baltic Rail* and *Slovak Telekom* in which the criteria of the essential facilities doctrine in *Bronner* were *not* applied to cases considered to involve unfair or discriminatory conditions applied to existing infrastructure users, rather than forced new access to the infrastructure.

Finally, competition policy remains complex and developing. The COVID-19 pandemic continues with its impact on economies (and related EU and Member State action on State aid). Digitalisation and online sales continue to have a big impact on sales systems and traditional "High Street" shops, with concerns that both physical and online sales channels are needed for full coverage of consumer demand. The world is being challenged to take action to reduce greenhouse gas emissions today, not tomorrow, through all means possible. Finally, there is pressure from various quarters for the EU to review its approach to world competition,

which has led this year to proposed legislation on foreign subsidies, which are perceived to result in unfair competition in EU markets. Unsurprisingly therefore, Executive Vice-President Vestager continues to emphasise that competition law functions in context, not just by itself, and the regulatory setting is key to understanding the broader picture.

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

Legislative/EC Practice Developments (Actual and Proposed)

Box 2

- **Legislative/Practice Developments**
  - Proposed Digital Markets Act
  - Review of EC Vertical Restraints BE and EC Vertical Guidelines—drafts advanced
  - NCA initiatives on sustainability (revised draft Dutch guidelines, Greek "sandbox")
  - Other reviews coming
    - * Review of EC Market Definition Notice
    - * Consultations on EC Horizontal Restraints BEs (R&D and Specialisation) and EC Horizontal Guidelines
    - * Collective bargaining and competition law
    - * Notice on collusion tools (art.57 of the Procurement Directive)

We focus here mainly on the proposed Digital Markets Act and EC drafts for the Vertical Restraints BE and Guidelines, with shorter notes on the other measures.

Proposed Digital Markets Act

In December 2020, the EC adopted the Digital Services Act package, a landmark legislative proposal for the regulation of the digital sector.[4] The package includes two proposals: the Digital Services Act (DSA) and the Digital Markets Act (DMA).

The rules specified in the DSA primarily concern online intermediaries and platforms. For example, online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms.

The DMA regulates "gatekeepers", i.e. large online platforms intermediating between business and end users by providing core platform services. The aim of the act is twofold: (i) to address problems arising from the dependency of business users on these gatekeepers; and (ii) to ensure that other providers of core platform services will be able to contest the market. The DMA is therefore linked to competition issues and will be outlined here.

The DMA proposal includes new and extensive regulatory obligations for digital platforms offering services in the EU, irrespective of their place of establishment. These obligations will be harmonised throughout the EU and enforced by the EC.

[4] With thanks to Georgia Tzifa. See Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final, available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0842&from=en* [Accessed 17 January 2022].

The fines proposed under the DMA are similar to those provided for under the current competition law rules: up to 10% of a company's total turnover.

The key points of the DMA are the following[5]:

First, as regards the reason for the proposal of a new act, the EC states that the existing EU legal framework is insufficient to deal with competition law challenges in the digital sector. Under current rules, competition law authorities can intervene: (i) only after an infringement has taken place; and (ii) based on an individual and extensive investigation of often very complex facts. This is considered not enough to address structural problems in rapidly changing markets that may be prone to *tipping* (i.e. markets in which a first mover can develop and then no one else can contest its position; with a concern about data advantages leading to a data enhancing feedback "loop").

For these reasons, the DMA provides for regulatory obligations that will be imposed on gatekeepers *in advance* (*ex ante*), even where no competition law infringement has been committed. This act would not replace the existing competition law, and other regulatory rules (e.g. in the field of data protection, telecommunications, etc.) which will still apply in parallel.

Second, the DMA applies to widespread and commonly used digital services that intermediate most transactions between business and end users (*core platform services*). These services are listed in art.2 of the Act and include, among others, search engines, social networking, video-sharing, digital advertising, and cloud computing. The EC can also propose to amend the DMA and add more services to this list, after a market investigation.[6]

Gatekeeper designation

Box 3

- **DMA—Gatekeeper designation**
  - Large *online platforms intermediating between business and end users*, providing *core platform services* (CPS) in the EU
    - Search engines, social networking, video-sharing, digital advertising, cloud computing, app stores (art.2)
  - Platform providing CPS in the EU *presumed* to be a gatekeeper if it meets *three cumulative criteria*
    - Significant impact on the EU internal market—Turnover
    - Important gateway for business users to reach end users—Number of users
    - (Expected) "entrenched and durable position" in its operations
  - Ability to *rebut presumption*
  - Also *ability for EC to designate a gatekeeper below the thresholds* after a market investigation

[5] This summary takes account of the third compromise text of the Slovenian Presidency of the Council of the EU on the DMA proposal, issued on 12 October 2021.

[6] Article 17, DMA.

Third, the DMA does not regulate all companies that provide core platform services, but only so-called *gatekeepers*, as noted above. Gatekeepers are companies that fulfil three cumulative criteria.[7] They:

(1) *have a significant impact on the (EU) internal market*. This is presumed where the undertaking to which the company in question belongs achieves an annual EEA turnover equal to or above *€6.5 billion in the last three financial years*, or where the undertaking's *average market capitalisation*, or its equivalent fair market value, *amounted to at least €65 billion in the last financial year, and the company in question provides a core platform service in at least three EU Member States*;

(2) *operate a core platform service which serves as an important gateway for business users to reach end users*. This is presumed where the company in question provides a core platform service that has more than *45 million monthly active end users* established or located in the EU and *more than 10,000 yearly active business users* established in the EU in the last financial year; and

(3) *enjoy an "entrenched and durable position" in their operations or it is foreseeable that they will enjoy such a position in the near future*. This is presumed if the thresholds in point (b) above were met in each of the last three financial years.

Companies need to *self-assess* whether they meet the DMA's quantitative thresholds and, if so, notify the EC within two months. Within 45 days after notification, the EC shall designate the company in question as a gatekeeper, *in relation to each of its core platform services that satisfies these thresholds*.[8]

The above *presumption is rebuttable*. In other words, companies that meet these thresholds can also present, together with their notification to the EC, "sufficiently substantiated arguments" that they should not be designated as gatekeepers, as they do not in fact fulfil the three criteria of the DMA.[9] In that case, the EC shall open a market investigation to examine the issue and shall conclude this investigation within a non-binding deadline of five months.[10]

In the investigation, the EC will consider factors relating to the size and market position of the company and/or structural characteristics of the market in question (e.g. entry barriers, scale and scope effects, user lock-in, etc.), also taking into account their foreseeable development.[11] However, companies cannot seek to rebut the presumption based on efficiencies, i.e. on advantages that their market conduct brings to consumers.[12]

Conversely, it is *also possible for the EC to find that the three criteria are fulfilled despite the company not meeting the quantitative thresholds in question*. The EC can do so only after a market investigation into the factors just noted. The EC can open such an investigation on its own initiative or on the request of three

[7] Article 3(1)(2), DMA.
[8] Article 3(3)(4), DMA.
[9] Article 3(4), DMA.
[10] Articles 3(6), 15(3), DMA.
[11] Article 3(6), DMA.
[12] Recital 23, DMA.

or more EU Member States;[13] it shall endeavour to conclude it within 12 months.[14] These investigations are particularly important for companies which do not yet enjoy an entrenched and durable position in their operations, where it is foreseeable that they will have such a position in the near future (e.g., in markets that are prone to tipping).[15]

For each gatekeeper, the EC shall publish a decision identifying: (i) the relevant undertaking to which it belongs; and (ii) the core platform services for which it will be regulated under the DMA.[16] These decisions shall be reviewed at least every four years.[17] The EC shall also publish a list with the gatekeepers that it has designated and the core platform services for which they will be regulated under the DMA. This list will be updated on an ongoing basis.[18]

Gatekeepers' obligations

Box 4

- **DMA—Gatekeeper obligations**
  - Digital *gatekeepers obliged to comply with a series of obligations*
  - DMA obligations apply *only to specific CPS* designated under the DMA
  - *Two categories*
    - *Clearly defined obligations*—no possibility for further specification by the EC [8 on the current draft proposal]
    - *Obligations to be further specified by EC, after regulatory dialogue with gatekeeper* [12 on the current draft proposal]
  - Examples
    - user consent required for combination of personal data
    - no MFN clauses as regards other online intermediation services
    - disclosure of prices paid by advertising/publisher customers
    - no self-preferencing
    - *access for interoperability with digital gatekeepers' operating systems*
    - *access to data generated by search engines on FRAND terms*
  - *Notification of acquisitions* involving a digital services provider

Fourth, a company that has been designated as a gatekeeper for certain core platform services will need to comply with a list of some *twenty obligations* in relation to each service.[19]

These obligations are listed in *arts 5 and 6 of the DMA*. Companies will need to comply with them automatically within six months after they have been designated as gatekeepers. There is no need for any additional EC decision.[20]

[13] Articles 15(1), 33, DMA.
[14] Articles 3(6), 15(1), DMA.
[15] Articles 3(6), 15(1), DMA.
[16] Articles 3(7), 34, DMA.
[17] Article 4(2), DMA.
[18] Article 4(3), DMA.
[19] Articles 3(8), 5, 6, DMA.
[20] Article 3(8), DMA.

Clearly, some of these obligations are particularly far-reaching for the gatekeeper and are therefore still being debated.

Some obligations are considered already "clearly defined". The DMA recognises that others might be more complex in their implementation, as they require some intervention as regards the gatekeeper's infrastructure (e.g. granting access to data, amending ranking mechanisms, allowing for the installation/uninstallation of applications etc.). Therefore, when the EC finds that the measures that the gatekeeper has implemented or intends to implement do not ensure effective compliance with these more complex obligations, it may open proceedings and, within six months, issue a decision specifying the measures that the gatekeeper shall implement ("obligations susceptible of being further specified").[21]

The gatekeeper may also request itself the opening of such proceedings to determine, after a regulatory dialogue with the EC, whether the measures it has implemented or intends to implement are effective in ensuring compliance with the obligations in question.[22] However, the DMA does not provide for suspension of the application of these obligations when the proceedings opened by the EC or the regulatory dialogue are ongoing.

Some of the most important obligations are the following:

- Article 5(a): *Gatekeepers are prohibited from combining personal data sourced from their core platform services with personal data from other services offered by them or from third-party services*. Gatekeepers may only combine such data if the end user has consented to this, as provided for in the General Data Protection Regulation 2016/679 (GDPR).[23]
- Article 5(b): *Gatekeepers should allow business users to offer the same products or services to end users through third party online intermediation services at different prices or conditions from those offered through the gatekeeper's online intermediation services*.
- Article 6(i)(a): Gatekeepers are prohibited from using, in competition with business users, *not publicly available data provided by business users* of the gatekeeper's core platform services (or by end users of these business users).
- Article 6(i)(b): *Gatekeepers should allow end users to uninstall any preinstalled software applications on their core platform services*; it will be possible to restrict this if the applications in question are essential for the functioning of the operating system/device.
- Article 6(i)(c): *Gatekeepers should allow the installation and effective use of third-party software applications/stores* using or interoperating with the gatekeeper's operating systems. However, gatekeepers may take proportionate measures to ensure that these applications/stores do not endanger their hardware/operating system.

The obligations provided in arts 6(i)(b) and 6(i)(c) are "susceptible of being further specified" by the EC, according to the distinction noted above.

[21] Article 7(2), DMA.
[22] Article 7(7), DMA.
[23] See [2016] OJ L119/1.

Two provisions which are particularly debated (given their nature) relate to *interoperability* and *access to data*.

- Article 6(1)(f): Gatekeepers should allow business users and undertakings providing ancillary services *access to and interoperability with* the same operating system, hardware or software features that are available to or used by the gatekeeper, *on interoperability conditions that are fair, reasonable and non-discriminatory*. Although the gatekeeper is not to be prevented from taking strictly necessary and proportionate measures to ensure that third party ancillary services do not endanger the integrity of the operating system, hardware or software features, and provided that such proportionate measures are justified.
- Article 6(1)(j): Gatekeepers also shall provide any third-party providers of online search engines, on their request, with *access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data* in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation for the query, click and view data that constitutes personal data.

Furthermore, art.11(2) provides that gatekeepers need to comply with EU data protection and privacy rules when they collect or process personal data to fulfil their obligations under the DMA. For example, they may need to provide business users with anonymised data where appropriate.

Companies that have been designated as gatekeepers by the EC after a market investigation, on the basis that it is foreseeable that they will enjoy an entrenched and durable position in their operations in the near future, *need to comply only with a subset of these twenty obligations, listed in art.15(4)*. These limited obligations are designed to prevent the gatekeeper from achieving such a position by unfair means.

The EC may grant suspensions of and exemptions from specific obligations in limited circumstances.[24]

Fifth, the EC may adopt delegated acts to add more obligations to the list. According to *art.10(1)*, this can happen if, after a market investigation, the EC identifies the need for new obligations addressing practices that: (i) limit the contestability of core platform services; or (ii) are unfair in the same way as the practices addressed by the twenty obligations currently included in the list. This would be the case if: (i) the practice in question entails an imbalance of rights and obligations on business users, i.e. the gatekeeper obtains an advantage from business users that is disproportionate to the service that it provides to them; or (ii) the practice weakens market contestability, pursuant to art.10(2).

[24] Articles 8 and 9, DMA.

Acquisitions and audit of profiling techniques

Sixth, in addition to the above list, the DMA imposes two other obligations on gatekeepers, from which there can be no suspension or exemption. These are *the obligations to notify concentrations* and *to audit profiling techniques*.

In particular, gatekeepers shall inform the EC of any intended concentration within the meaning of art.3 of Regulation (EC) No 139/2004 ("the Merger Regulation") involving another provider of core platform services or of any other services provided in the digital sector. *This is irrespective of whether this transaction is notifiable to the EC under the Merger Regulation, or to NCAs under national merger rules*.[25] The concentration should be notified prior to its implementation. In case of infringement, the EC may impose on the gatekeeper a fine of up to 1% of its total turnover in the preceding financial year.[26]

Seventh, a gatekeeper, within six months after its designation, shall submit to the EC an *independently audited description of any consumer profiling techniques* that the gatekeeper applies to/across its core platform services that have been identified pursuant to the EC decision. The description shall be updated at least annually.[27] This provision aims, among others, to prevent making deep consumer profiling the industry standard.[28]

Enforcement

Eighth, the DMA shall be enforced by the EC with powers similar to those provided by the current competition law framework. Amongst others, the EC can send requests for information, carry out interviews and take statements, conduct on-site inspections, adopt interim measures, accept commitments and adopt monitoring measures.[29] The EC may also request access to the gatekeeper's IT system, algorithms and databases.[30]

In case of non-compliance with the DMA, the EC may impose on a gatekeeper a fine of up to 10% of its total turnover in the preceding financial year.[31] For procedural infringements, the DMA provides for fines up to 1% of the gatekeeper's total turnover, as well as periodic penalty payments.[32]

Where a market investigation shows that a gatekeeper has systematically infringed its obligations under the DMA and has further strengthened or extended its gatekeeper position, the EC may impose on it behavioural or structural remedies. Structural remedies may be imposed only where there is no equally effective behavioural remedy or where such a remedy would be more burdensome for the gatekeeper than a structural remedy.[33]

Ninth, it is also possible for NCAs to investigate possible non-compliance with the DMA on their territories. Before taking a first formal investigative measure, these authorities are required to inform the EC in writing. At the end of the

[25] Article 12(1), DMA.
[26] Articles 12(1), 26(2)(b), DMA.
[27] Article 13, DMA.
[28] Recital 61, DMA.
[29] Articles 19–24, DMA.
[30] Articles 19(1)(4), 21(3), DMA; see also arts 26(2)(e) and 27(1)(c), DMA.
[31] Article 26, DMA.
[32] Articles 26, 27, DMA.
[33] Article 16(1)(2), DMA.

investigation, the NCA shall report to the EC on the findings of its investigation, in order to support the EC in its role as sole enforcer of the DMA.[34]

Parties that have been harmed by an infringement of the DMA will be able to claim damages before national courts. The EC's decisions will be appealable to the CJEU.

EU jurisdiction

Finally, one of the EC's objectives in proposing new legislation for the digital sector was to avoid the application of divergent national rules on gatekeeper regulation across the EU single market. That is why the DMA is a proposal for a *Regulation*, i.e. for a directly applicable legislative instrument which establishes the same provisions in every EU Member State.

In line with this, *art.1(5)* provides that EU Member States shall not impose on gatekeepers further obligations for the purpose of ensuring contestable and fair markets. However, according to the same article,

> "nothing in this Regulation precludes Member States from imposing obligations, which are compatible with Union law, on undertakings, including undertakings providing core platform services, for matters falling outside the scope of this Regulation, where these obligations do not result from the relevant undertakings having a status of gatekeeper within the meaning of this Regulation".[35]

Status

Under the ordinary legislative procedure, the DMA needs to be approved by both the Council and the European Parliament before it is enacted into law. The rapporteur of the European Parliament's Committee on the Internal Market and Consumer Protection published a draft report on the DMA in June 2021, proposing many amendments to the Act.[36] The DMA has also been the subject of much discussion by EU Member States and the ECN, which have suggested various ways in which NCAs could have a role in the system proposed by the Act, amongst other things.[37] The EC's target is for the DMA to be adopted in 2022.

Vertical Restraints BE and Guidelines review

In October 2018, the EC launched a review of the EC's Vertical Block Exemption (VBE) and the Vertical Guidelines (VG).[38] Two years later, the EC published a

[34] Article 32(a)(6), DMA.

[35] Article 32(a)(6), DMA. See also Recitals 9, 9a and 10, DMA.

[36] Draft Report on the proposal for a regulation of the European Parliament and of the Council, Contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842—C9-0419/2020—2020/0374(COD)), Committee on the Internal Market and Consumer Protection, 1 June 2021, available at: *https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf* [Accessed 17 January 2022].

[37] See European Competition Network, "Joint paper of the heads of the national competition authorities of the European Union—How national competition agencies can strengthen the DMA", available at: *https://ec.europa.eu/competition/ecn/DMA_joint_EU_NCAs_paper_21.06.2021.pdf* [Accessed 17 January 2022].

[38] With thanks to Itsiq Benizri and Álvaro Mateo Alonso for their assistance.

Staff Working Document (SWD)[39] summarising its findings following the evaluation phase of the review. In last year's article, we highlighted the main points of this document, which focused on dual pricing, selective distribution, and parity clauses also called most-favoured nation (MFN) clauses.[40]

Box 5

- **New VBE and VG drafts—Key points (1)**
  - **Dual distribution** (where supplier sells / offers services in the market, as well as using distributors) accepted in BE
    - If distributor / service provider is not a competitor at supplier level and the parties' *aggregated market share in the retail market is <10%*
    - Or if market share at retail level is >10%, but still <30% BE market share thresholds *BUT information exchange assessed under HGs*
    - (Plus there are no by object or hardcore restrictions)
  - **Agreements with online intermediation service (OIS) provider NOT covered**
    - If OIS provider selling in the market in competition with undertakings to which it provides OIS
  - **Retail parity clauses as regards other competing platforms excluded** from the BE
    - But retail parity obligations relating to direct sales or marketing channels ("narrow parity") are in, if other BE conditions are met

In October 2020, the EC set out in an "Inception Impact Assessment" (IIA) a number of policy options concerning the possible revision of rules which the evaluation showed did not function well.[41] The EC then launched a public consultation in December 2020 to gather feedback from stakeholders on these policy options.

In February 2021, the EC published a Working Paper presenting DG COMP's views on how art.101 TFEU could be applied to agreements with distributors that also act as agents for certain products of the same supplier.[42] In June 2021, the EC published a summary of the feedback received on the consultation.[43]

The EC then published a *draft revised VBE* and *draft revised VG* in July 2021, inviting interested parties to submit their comments by mid-September 2021. The EC planned to finalise the Impact Assessment phase by the end of 2021. The revised VBE and VG would then enter into force on 31 May 2022.

The main points in the EC's drafts are as follows:

[39] EC Staff Working Document, "Evaluation of the Vertical Block Exemption Regulation", SWD (2020) 172 final, available at: *https://ec.europa.eu/competition/consultations/2018_vber/staff_working_document.pdf* [Accessed 3 February 2022]

[40] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2019–2020: Part 1", [2021] I.C.C.L.R. 105, 111.

[41] IIA, Ares(2020)5822391—23/10/2020, available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12636-EU-competition-rules-revision-of-the-Vertical-Block-Exemption-Regulation_en* [Accessed 17 January 2022].

[42] See, EC, "Working paper: Distributors that also act as agents for certain products for the same supplier", available at: *https://ec.europa.eu/competition/consultations/2018_vber/working_paper_on_dual_role_agents.pdf* [Accessed 17 January 2022].

[43] Summary of the contributions received in the context of the open public consultation on the impact assessment for the review of the Vertical Block Exemption Regulation (EU) No 330/2010 ("Summary"), Ares(2021)4119477—24/06/2021, available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12636-Revision-of-the-Vertical-Block-Exemption-Regulation/public-consultation_en* [Accessed 17 January 2022].

First, the *draft VBE* has a similar structure to the current VBE, with many modifications based on case-law, such as the *Coty* judgment[44] on online marketplace restrictions, and market developments, especially due to the growth in online sales and platforms offering online intermediation services.

The approach is still about exempting defined restrictions where the supplier and the purchaser each have no more than 30% of the markets on which they operate, subject to a set of hardcore (serious) restrictions whose inclusion in an agreement prevents the VBE applying, and with other restrictions excluded from the VBE and still subject to specific assessment.

The *Draft VG* are simpler than the current VG, while keeping their strong economic approach. They also deal with several new issues (e.g. price comparison tools and parity obligations).

Second, in the draft the *dual distribution* rules are narrowed (i.e. the situation where a supplier sells its products to consumers both directly and through independent resellers). Dual distribution is currently generally covered by the VBE. The EC was concerned that, with the growth of online sales, dual distribution has increased significantly and there is a risk of exempting vertical agreements, where horizontal concerns are no longer negligible and the conditions of art.101(3) TFEU are not satisfied.

In the draft revised VBE and VG, the EC proposes to retain the safe harbour where the supplier and the distributor are not competing at the manufacturing, wholesale or import level and *their aggregate market share in the relevant market at retail level* does not exceed 10%.[45]

The exemption would also apply if their aggregated market share at retail level exceeds 10% but is still below 30% although, in this case, the exemption would not apply to exchange of information, which has to be assessed under the rules applicable to horizontal agreements.[46] This is the subject of some debate both as to how to determine market shares and as to what that means in practice on information exchanges here.

Box 6

- **New VBE and VG drafts—Key points (2)**
  - **Shared exclusivity**: a supplier can appoint more than one exclusive distributor in a territory or customer group
    - Number to be determined so as to secure a certain volume of business that protects their investment efforts
  - Suppliers can oblige their buyers to *pass on* active sales restrictions to their customers
  - Some *rules on online sales revisited*:
    - **Dual pricing no longer a hardcore restriction**: Supplier can charge different prices for products sold online than those sold offline
    - In selective distribution, *criteria of suppliers for online sales no longer have to be overall equivalent* to the criteria for physical ("brick-and-mortar") shops

[44] *Coty Germany GmbH v Parfumerie Akzente GmbH* (C-230/16) Judgment of 6 December 2017 EU:C:2017:941; [2020] Bus. L.R. 777.

[45] Draft Revised VBE (C(2021) 5026 final, 9 July 2021), art.2(4); draft Revised Vertical Guidelines (C(2021) 5038 final, 9 July 2021), para.87.

[46] Draft Revised VBE, art.2(5); draft Revised Vertical Guidelines, para.90.

Agreements with providers of online intermediation services (OIS) are not covered by the BE if the OIS is "hybrid" (i.e. selling in the market in competition with undertakings to which they provide their services).[47]

Third, the rules on *active sales restrictions* (i.e. agreements aimed at restricting the territory into which or the customers to whom the buyer can sell), which are covered by the current VBE, are modified.

Notably, the draft revised VBE and VG would allow a supplier to appoint *more than one exclusive distributor in a particular territory or for a particular group* (so-called *shared exclusivity*).[48] The number of appointed distributors should be determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts.[49] In addition, suppliers can oblige their buyers to *pass on active sales restrictions to their customers* if they have entered into a distribution agreement with the supplier or a third party that was given distribution rights by the supplier.[50]

Fourth, *online sales* are currently generally considered a form of passive sales and restrictions preventing distributors from selling through the internet are considered hardcore restrictions not exempted by the VBE. The current rules apply the same approach to certain indirect measures that may make online sales more difficult, such as charging the same distributor a higher wholesale price for products intended to be sold online than for products sold offline ("*dual pricing*"). The same applies to imposing criteria for online sales that are not overall equivalent to the criteria imposed in physical ("brick-and-mortar") shops ("the *equivalence principle*") in the context of selective distribution.

Box 7

- **New VBE and VG drafts—Key points (3)**
  - *Internet use restrictions* (with the object to prevent buyers or customers effectively using the internet to sell) *are hardcore restrictions* (as restrictions of active or passive sales)
  - *Restrictions on use of price comparison websites, or paid referencing in search engines are also hardcore*
  - *Restrictions on use of online marketplaces are in the BE*
    - The *Coty* conditions apply
  - *Providers of OIS with direct purchasing are treated as suppliers under the VBE*
  - The VG also have a *long section on agents* which states that undertakings in the platform economy *in principle cannot qualify as genuine agents*

The EC is proposing to change its position on this. The draft revised VG indicate that dual pricing would no longer be a hardcore restriction. Dual pricing would be authorised to the extent that it is meant to incentivise or reward appropriate levels of investment and relates to the costs incurred for each channel.[51] In addition, the draft revised VG provide that the criteria imposed by suppliers in relation to online channels in a selective distribution system no longer have to be overall equivalent

[47] Draft Revised VBE, art.2(7); draft Revised Vertical Guidelines, para.91.
[48] Draft Revised VBE, arts 1(1)(g) and 4(b); Draft Revised Vertical Guidelines, para.205.
[49] Draft Revised VBE, art.1(1)(g); draft Revised Vertical Guidelines, para.102.
[50] Draft Revised VBE, art.4(b).
[51] Draft Revised Vertical Guidelines, para.195.

to those for "brick-and-mortar" shops given that the channels are inherently different in nature.[52] This is a very welcome development.

Restrictions that have as their object to prevent buyers or customers "effectively using the Internet to sell" are still hardcore restrictions.[53] Such restrictions include restrictions on use of price comparison websites or paid reference in search engines, since these are considered to be necessary tools to sell online.[54]

Further to the *Coty* judgment (cited above), restrictions on the use of online marketplaces are block exempted provided that: (i) resellers are chosen based on objective qualitative criteria that are laid down uniformly for all potential resellers and not applied in a discriminatory fashion; (ii) the characteristics of the contract goods or services necessitate a selective distribution network in order to preserve their quality and ensure their proper use (not just luxury); and (iii) the criteria laid down do not go beyond what is necessary.[55]

Fifth, the draft revised VBE and VG provide that undertakings providing OIS are categorised as suppliers under the VBE and therefore, in principle, cannot qualify as agents for the purpose of applying art.101(1) TFEU.[56]

Sixth, *parity obligations* (i.e. clauses that require a business to offer the same or better conditions to its contracting party as those offered on any other sales channel, or on the company's direct sales channels) are currently block exempted under the VBE.

The EC Evaluation showed an increase in the use of parity obligations across sectors, notably by online platforms. NCAs and the courts have identified anti-competitive effects of obligations that require parity with other indirect sales or marketing channels (e.g. other platforms or other online or offline intermediaries). The draft revised VBE and VG therefore remove the benefit of the block exemption for parity obligations relating to other indirect sales or marketing channels (so-called across platform retail parity clauses),[57] but still exempt retail parity clauses relating to direct sales or marketing channels (so-called narrow parity clauses) provided that the platform concerned has a market share of less than 30%.[58]

Finally, there is also a *long and detailed section on agents* which states, amongst other things that undertakings in the platform economy, in principle, *cannot* qualify as genuine agents (with any related restrictions outside art.101(1) TFEU).[59]

Comment

This is all very useful updating, although there are still some things to clarify. As noted above, some are concerned about the dual distribution market share and information exchange rules. The Draft VG also have developed sections on RPM (section 6.1.1 VG) and active passive sales bans (section 6.1.2.2 VG). There are multiple references to withdrawing the BE if certain effects apply (by the EC or

[52] Draft Revised Vertical Guidelines, para.221.
[53] Draft Revised VBE, art.1(1)(n).
[54] Draft Revised Vertical Guidelines, paras 323–332.
[55] Draft Revised Vertical Guidelines, paras 313 and ff.
[56] Draft Revised VBE, art.1(1)(d); draft Revised Vertical Guidelines, para.44.
[57] Draft Revised VBE, art.5(1)(d); draft Revised Vertical Guidelines, para.238.
[58] Draft Revised Vertical Guidelines, para.239.
[59] Draft Revised Vertical Guidelines, section 3.2.

NCAs). It is not clear how easy that is in practice. The Draft VG also illustrate that assessments can be hard if not in the BE (i.e. with many factors to consider which can vary over time).

EU Competition law and Sustainability

For those looking for a clearer idea as to the EC's approach to competition law and sustainability, it may be useful to read the EC's "Competition policy brief" ("the Brief") from September 2021.[60] This is not an official EC Communication. Nevertheless, a team in DG COMP outline what appears to be the EC's evolving policy.

The main points are as follows:

First, the Brief outlines the EC's consultation process on how competition policy and sustainability can work together. It also emphasises the EU's commitment to the "Green Deal" to combine sustainability objectives with economic growth.

Second, the Brief outlines EC thinking on this in State aid, anti-trust and merger control.

Third, focusing on concrete follow-up in relation to anti-trust issues, the Brief states the following points.[61]

- The EC will provide more guidance on cooperation for sustainability projects in its revision of the HG and VG. In particular, concrete examples on how sustainability objectives can be pursued in cooperation agreements.
- The EC considers that there are various ways for companies to pursue sustainability initiatives within the existing rules.
- The EC also considers that sustainability benefits can be assessed as *qualitative efficiencies* under art.101(3) TFEU.
- Sustainability benefits do not necessarily need to take the form of direct or immediately noticeable product quality improvement or cost savings.
- The EC considers that the assessment of the anti-competitive effects and the benefits of a practice have to be made *within the confines of each relevant market*. Benefits on (other) separate markets can be taken into account provided that the consumers affected by the restriction are substantially the same as those benefitting.
- The EC thinks it would be "helpful to address the question of when and how market failures would prevent the free market from generating benefits and thus necessitate an agreement between companies" (in the context of assessing indispensability under art.101(3) TFEU). The idea here is to look at the situation where cooperation may be justified to counter a first mover disadvantage and offer a more expensive sustainable product. Although the EC

[60] Directorate-General for Competition, "Competition Policy Brief 1/2021—Policy in Support of Europe's Green Ambition" (Europa, 21 September 2021), available at: *https://ec.europa.eu/competition-policy/index/news/competition-policy-brief-12021-policy-support-europes-green-ambition-2021-09-10_en* [Accessed 17 January 2022].

[61] Directorate-General for Competition, "Competition Policy Brief 1/2021—Policy in Support of Europe's Green Ambition" (Europa, 21 September 2021), pp.5–6.

notes that if consumers value such products, companies are also expected to offer them independently, rather than cooperating.

- The EC also will look at the extent that existing environmental regulation already incentivises companies to produce in a sustainable manner.

Fourth, the EC makes it clear that it still aims for companies to self-assess compliance. However, the EC also states that it is open to *requests for individual guidance letters on novel issues*. When appropriate the EC will also consider adopting decisions under art.10 of reg.1/2003.

Finally, the EC notes that it is looking at special rules as regards the application of the competition rules to sustainability initiatives in the agricultural sector.

The EC notes that the New Common Agricultural policy for 2023–2027 agreed on in June 2021 aims to tackle these issues through a newly adopted provision in the Common Market Organisation Regulation. This would exempt from art.101 TFEU sustainability agreements concluded between producers and/or other actors from the food value chain aimed at achieving higher standards than required by law in terms of environmental protection, climate change prevention, animal health and animal welfare. Guidelines on this derogation are foreseen for the beginning of 2024.

We will have to see what this means in practice in the draft HG and other cases. Some may be disappointed insofar as they would like to see a broader welfare basis for exemption under art.101(3) EC. Some were also hoping for a "Sustainability and Competition Law Notice" already by now.

The EC's point essentially appears to be that competition law is about maintaining independent economic incentives to compete even on sustainability, and that may be more important to fostering sustainable change than widespread cooperation (unless specifically justified).

In practice, as noted below, the EC has started this year with the *Car emissions* cartel case, indicating what it considered lawful cooperation and what not, with the theme that "*cleaning better*" *(the environmental objective) was a key competitive parameter*.

National competition authorities have also continued to push on the issue of competition law and sustainability, with initiatives from the Dutch, Greek, and UK competition authorities.

The Netherlands

In January 2021, the Dutch Competition Authority (ACM) published a revised version of its Draft Guidelines on Sustainability Agreements,[62] which are also accompanied by a clarifying Memo concerning the results of the public

[62] Authority for Consumers and Markets, *Guidelines—Sustainability agreements, Opportunities within competition law* (26 January 2021) (Draft Guidelines), available at: *https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law* [Accessed 18 January 2022].

consultation[63] and a Technical Report (in collaboration with the Hellenic Competition Commission).[64]

Greece

The Hellenic Competition Commission (HCC) published a Staff Discussion Paper, in which it analyses convergence areas and conflicts between sustainable development and competition law.[65] One aspect of particular interest is the development of a competition law sustainability "sandbox" for the industry to experiment with new business formats that aim to realise sustainability goals more quickly and efficiently. The details are on the HCC's website.

The United Kingdom

In January 2021, the UK Competition and Markets Authority (CMA) issued an information sheet to help businesses and trade associations better understand how competition law applies to sustainability agreements and where issues may arise.[66] The CMA recognises the various benefits of sustainability agreements and explains the methodology for assessment.

Other

Horizontal Restraints BEs and Guidelines review

The current Horizontal Block Exemptions (HBE), both the Research and Development Block Exemption (R&D BE) and the Specialisation Block Exemption (Specialisation BE), are set to expire next year, on 31 December 2022.[67]

It may be recalled that the EC started the evaluation of the current HBEs as well as the EC Horizontal Guidelines (HG) in July 2019 and launched a public consultation in November 2019. In March-April 2020, the EC published the responses to this public consultation, together with a summary report. In October 2020, the EC launched a second public consultation with a focus on how competition policy could support the EU Green Deal.

[63] Authority for Consumers and Markets, "Memo concerning the results of the public consultation of the second draft version of the Guidelines on Sustainability Agreements" (26 January 2021), available at: *https://www.acm.nl/en/publications/memo-concerning-results-public-consultation-second-draft-version-guidelines-sustainability-agreements* [Accessed 18 January 2022].

[64] Authority for Consumers and Markets, "Technical Report on Sustainability and Competition" (26 January 2021), available at: *https://www.acm.nl/en/publications/technical-report-sustainability-and-competition* [Accessed 18 January 2022].

[65] Hellenic Competition Commission, "Staff Discussion Paper on Sustainability Issues and Competition Law", available at *https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html* [Accessed 18 January 2022].

[66] Competition and Markets Authority, "Environmental sustainability agreements and competition law" (27 January 2021), available at: *https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law* [Accessed 18 January 2022].

[67] With thanks to Su Şimşek and Virginia Del Pozo.

In May 2021, the EC published the SWD[68] as well as an evaluation study.[69] This was followed by the publication of the Inception Impact Assessment (IIA) providing the potential policy options.[70] The EC asked interested stakeholders first to provide feedback on these documents by July 2021, then to provide their views on the policy options set out in the IIA in a public consultation by October 2021. The EC planned to publish by the end of 2021 a summary of the input received in these consultations.

The Staff Working Document

The SWD responds to the feedback received in various consultations. Two main areas of improvement were suggested. First, that the HBEs and HG need to be adapted to economic and societal developments (e.g. digitisation and sustainability goals). Second, that some of their provisions are viewed as rigid and complex, while others are considered to be unclear and difficult to interpret by businesses.

As a result, the EC concluded in its SWD that the following areas of the HBE and HG need to be revised.

First, the SWD found that some *general issues*[71] could be improved: Notably, where the cooperation between companies involves a combination of different types of horizontal agreements, the *centre of gravity* of horizontal cooperation agreements can be further clarified. The focus on *restrictions of competition "by object"* also could be moved away from since it leads to an overly cautious approach in the businesses' self-assessment. This could create the possibility of voluntary *ex-ante* consultations with the EC or a voluntary fast-track notification procedure. Guidance for additional types of horizontal cooperation agreements could be included.[72]

Second, with regard to *sustainability*,[73] the SWD found that the guidance on agreements pursuing sustainability goals could be improved, mainly to enable businesses to engage in large scale co-operation agreements. The type of benefits (such as out-of-market efficiencies, including CO2 reductions and animal welfare) that might be considered to outweigh the possible restrictive effects on competition need to be clarified. The Dutch Competition Authority's 2020 draft guidelines on sustainability agreements were mentioned as an example of guidelines in this respect.

[68] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD (2021) 103 final, available at: *https://ec.europa.eu/competition-policy/system/files/2021-05/HBERs_evaluation_SWD_en.pdf* [Accessed 18 January 2022].

[69] EC, "Evaluation support study on applicable to horizontal the EU competition rules cooperation agreements in the HBERs and the Guidelines", available at: *https://ec.europa.eu/competition-policy/system/files/2021-05/kd0221603enn_HBERs_evaluation_study.pdf* [Accessed 18 January 2022].

[70] EC, "Inception Impact Assessment", available at: *https://ec.europa.eu/competition-policy/system/files/2021-06/HBERs_inception_impact_assessment.pdf* [Accessed 18 January 2022].

[71] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.113–115.

[72] For example, agreements with sustainability goals; new forms of cooperation in the telecom/digital sector; infrastructure sharing; data pooling/sharing/data access between small and medium-size enterprises and collective bargaining; industry alliances, industry-wide cooperation agreements, and insolvency restructuring agreements.

[73] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.57–58.

Third, with regard to *information exchange*,[74] the SWD found that legal certainty was insufficient, in particular, for new business models that have developed as a consequence of digitisation (e.g. where parties are at the same time in a horizontal and vertical relationship). The SWD noted that in these cases some types of information exchange could be considered pro-competitive.[75]

The main cause mentioned for insufficient legal certainty was the absence of a market share threshold or other safe harbour. In addition, the SWD stated that there is also a need to reflect recent developments of the European Courts and national case-law into the revised HBE and HG. Stakeholders also raised in the public consultation that individual sector-specific guidance would be welcome and beneficial in sectors such as the banking, automotive, insurance and agricultural sectors and carbon emissions trading.

Fourth, with regard to *R&D agreements*,[76] the SWD found that certain provisions lack clarity, and their application could be difficult. For example, some of these provisions are no longer adapted to recent market developments and several definitions such as joint exploitation, R&D poles and competition in innovation should be further clarified. Stakeholders further requested the scope of exemption to be extended to cover early stages of R&D. Current conditions for exemption regarding access to the final results of the R&D, access to pre-existing know-how and joint exploitation prevent the correct identification of R&D agreements compliant with art.101 TFEU. The application of the market share thresholds also can be challenging (e.g. technology markets are hard to define) and the 25% market share threshold should be increased. Legal certainty could also be increased by including practical and more up-to-date examples and references to case-law.

Fifth, with regard to *specialisation agreements*,[77] the majority of stakeholders referred to several points relating to the market share threshold in the Specialisation BE, including an increase of the threshold from 20%, and issues concerning the calculation of the market shares. In particular, a few NCAs considered that further guidance would be useful on the calculation of market share thresholds in dynamic markets and/or markets in which services are offered at zero prices. Some respondents indicated that some definitions, including the notions of unilateral and reciprocal specialisation, joint production or joint distribution, could be simplified to increase legal certainty.

Sixth, with regard to *purchasing agreements*,[78] the SWD found that Chapter 5 of the HG could be improved to provide legal certainty, especially on the distinction between joint purchasing agreements and buying cartels, and between joint purchasing and joint bidding or joint negotiation respectively. Some respondents raised issues regarding retail alliances. While retailers consider that the horizontal and vertical aspects of retail alliances should be assessed together, suppliers raised

[74] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.43-45.

[75] For example, in M&A projects on the initial stages of horizontal cooperation, in restructuring scenarios, for the purposes of compilation of industry statistics, in the context of eco-systems and in areas where interoperability is needed.

[76] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.45–48.

[77] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.48–51.

[78] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.51–53.

issues relating to the practices of retailers through alliances.[79] Many stakeholders noted that the current safe harbour of 15% market share for joint purchasing agreements should be increased to be consistent with other EU competition law regulations.

Seventh, with regard to *commercialisation agreements*,[80] several respondents, including business associations, companies and law firms, suggested that Chapter 6 of the HG could be simplified to increase legal certainty. Some respondents noted that the HG do not provide examples on digital markets or new business practices relating to digitisation and are unclear on the concept of price-fixing within the framework of a horizontal commercialisation agreement. NCAs agreed that the examples do not take into account recent market developments, but disagreed on the legal certainty point. A few NCAs also noted that the guidance on joint bidding and consortia is insufficient.

Eighth, with regard to *standardisation agreements*,[81] some respondents noted the absence of a block exemption regulation. Respondents focused on the HG not dealing with the practical issues concerning interpretation of fair, reasonable and non-discriminatory (FRAND) terms and how to address licensing disputes in practice. Some respondents requested more flexibility in the standard-setting process, particularly as regards the requirement for unrestricted participation.

Ninth, with regard to *other types of horizontal cooperation agreements*,[82] some stakeholders consider that the HG either do not cover or do not sufficiently address benchmarking, data pooling, data sharing and network sharing agreements. Respondents noted that sustainability agreements, as well as types of collaboration regarding artificial intelligence, ecosystems, network sharing and platforms, should be specifically addressed to increase legal certainty. Regarding investment-intensive industries, such as the telecommunications market, stakeholders noted that network sharing agreements should be assessed based on not only market shares, but also pro-competitive aspects related to this type of cooperation (e.g. better quality of service, faster deployment of new technologies or consumer benefits connected to innovation).

The Inception Impact Assessment

The IIA sets out several policy options which would be refined on the basis of the input received during the public consultation and in the course of the impact assessment work.

Some policy options are directed at ensuring that SMEs, research institutions and/or academic bodies are not discouraged from participating in R&D and specialisation agreements. For example, the EC may introduce specific categories of block exemption for R&D or specialisation agreements to cover the agreements concluded by SMEs. The EC may further clarify the definition of "competing

[79] For example, cooperation where retailers do not purchase any products, but aggregate their buyer power to extract fees for services, collective delisting, and exchange of information.

[80] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.53–55.

[81] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.56–58.

[82] EC Staff Working Document, "Evaluation of the Horizontal Block Exemption Regulations", SWD(2021) 103 final, pp.56–58.

undertakings" in case research institutes or academic bodies are involved in R&D agreements.

To encourage the conclusion of pro-competitive R&D agreements, the EC is considering whether to ease the requirements of full access to the results and/or access to pre-existing know-how when such agreements are concluded with (i) SMEs, academic bodies and/or research institutes or (ii) more broadly with all types of market participants.

As for the Specialisation BE, the EC may widen its scope by (i) expanding the definition of unilateral specialisation to include more parties; and by (ii) covering horizontal sub-contracting agreements which would expand production in general. The EC will also review the conditions for exemption for joint distribution for unilateral or reciprocal cooperation.

As regards the HG, the EC aims to provide specific guidance in view of new market developments, such as digitisation and the pursuit of sustainability goals, and clarify definitions and terms which are considered difficult to interpret.

Motor Vehicle BE review

In the course of the year the EC also has been reviewing the Motor Vehicle Block Exemption Regulation (MVBE) which is due to expire on 31 May 2023. In May 2021, the EC published an Evaluation Report on the operation of the MVBE, together with a Staff Working Document.[83] The EC is now considering whether to renew the current rules, revise them or let the MVBE lapse by 31 May 2023.

The EC notes that the competitive environment on motor vehicle markets has not changed greatly since 2010 (when the last version of these rules was adopted). However, the sector is under intense pressure to adapt, due to three factors in particular:

- There is *technological evolution*, in particular as regards communications technologies and the growing importance of in-vehicle data.
- There is a *constant pressure to reduce emissions*, particularly in light of the EU Sustainable and Smart Mobility Strategy and the Green Deal, and to shift to more environmentally friendly fuels and power trains.
- The sector needs *to face the post-COVID-19 world* and the likelihood that to some extent mobility patterns may have changed permanently.

The EC has reviewed the competitive landscape in three markets:

(i) **Motor vehicle distribution markets:**

The EC found that competition in passenger cars remains vigorous, but is less intense for light commercial vehicles, trucks and buses. Overall, the evaluation concluded that the decision taken in 2010 to apply the EC's general vertical framework to these markets was appropriate.

[83] IP/21/2673 of 28 May 2021. Both documents are available on the EC website.

(ii) **Motor vehicle repair markets:**

The Evaluation showed that many authorised repairers enjoy considerable local market power and that intra-brand competition within the authorised networks appears to be limited by strict and detailed quality criteria. However, the Evaluation showed that independent repairers will only be able to continue to exert competitive pressure if they have access to key inputs such as spare parts, tools, training, technical information and vehicle-generated data. The Evaluation showed that the current regime is suitable for these markets but may require updating to take account of the increasing importance of data.

(iii) **Motor vehicle spare parts markets:**

The Evaluation showed that these markets are less flexible due to contractual arrangements between original equipment suppliers and vehicle manufacturers, which ultimately reduce the choice available to end-consumers. At this stage, the Evaluation finds that the decision in 2010 to give special treatment to these markets was appropriate.

The EC noted that the Evaluation report concludes that the current rules have shown themselves to be suitable and adapted to diverse situations. Nevertheless, some provisions and policy objectives may need updating.

The EC's Review of the Market Definition Notice

In April 2020 the EC published a roadmap for an evaluation of its Market Definition Notice[84] ("the MD Notice") from 1997.[85] In December 2020, the EC published the results of the public consultation that took place between June and October 2020, and a summary of the contributions from the NCAs.

In June 2021, the EC published an external support study accompanying the evaluation of the MD Notice.[86] The support study, prepared by a team of experts, examined the practices of NCAs and judgments of national courts in the EEA and worldwide, and reviewed the legal and economic literature in relation to four specific aspects of market definition: (i) digitisation; (ii) innovation; (iii) geographic market definition; and (iv) quantitative techniques.

The support study was followed by an SWD published in July 2021 summarising the findings of the evaluation of the MD Notice.[87]

The SWD is based on the contributions gathered in the public consultation, exchanges with NCAs, experts and stakeholder groups as well as the support study,

[84] With thanks to Su Şimşek. OJ C372/5, 9 December 1997.

[85] EC, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law", available at: *https://ec.europa.eu/competition-policy/public-consultations/2020-market-definition-notice_en* [Accessed 18 January 2022].

[86] EC, "Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law", available at: *https://ec.europa.eu/competition-policy/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf* [Accessed 18 January 2022].

[87] IP/21/3585, 12 July 2021; EC Staff Working Document, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997", SWD(2021)199 final, available at: *https://ec.europa.eu/competition-policy/system/files/2021-07/evaluation_market-definition-notice_en.pdf* [Accessed 18 January 2022].

among other sources of evidence.[88] It identifies five areas in which competition assessments have evolved since 1997: (i) digitisation, (ii) the high level of concentration of economic power in digital markets, (iii) technological convergence and integrated products, (iv) innovation, and (v) worldwide economic integration.[89] It concludes that the MD Notice is still very useful and that it remains relevant, although there are some areas where it does not reflect developments in EU Competition law and in academic research.

Some observations of particular interest in the SWD are as follows:

First, regarding the MD Notice's relevance, stakeholders consider that the MD Notice is even more important today than when adopted in 1997, particularly due to the antitrust self-assessment system established in 2004 and the use of market share thresholds in antitrust and merger systems.[90]

Second, as regards geographic markets, the SWD notes that the MD Notice does not clearly explain that the EC takes into account competition from imports in its competitive assessment and the calculation of market shares, regardless of the conclusion on the scope of the areas included in the geographic market.[91]

Third, as regards the calculation of market shares, respondents generally considered that the MD Notice provides correct, comprehensive and clear guidance. However, one area where the MD Notice does not provide clarity is the type of metrics that should be used in the case of services provided in multi-sided platforms, at a zero monetary price, in digital ecosystems and data markets.[92] The EC uses metrics not explicitly mentioned in the MD Notice, such as number of active users, number of web visits, number of downloads and number of transactions.

On the basis of the findings arising from the evaluation, the EC will assess whether and how to revise the MD Notice, with the broader goal of making EU Competition policy "fit for the modern economy".[93]

Consultation on collective bargaining between self-employed

In January 2021, the EC published an Inception Impact Assessment (IIA) inviting feedback on the applicability of EU Competition law to collective bargaining by self-employed.[94] The EC then launched a public consultation in March 2021. Responses were invited by 31 May 2021.[95] The EC aims to adopt an "initiative" by the end of 2021.

[88] EC Staff Working Document, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997", SWD(2021)199 final, pp.18–22.

[89] EC Staff Working Document, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997", SWD(2021)199 final, pp.13–15.

[90] EC Staff Working Document, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997", SWD(2021)199 final, p.25.

[91] EC Staff Working Document, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997", SWD(2021)199 final, pp.42–43.

[92] EC Staff Working Document, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997", SWD(2021)199 final, pp.49–50.

[93] EC Staff Working Document, "Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997", SWD(2021)199 final, p.2.

[94] With thanks to Lukas Šimas and Su Şimşek. EC, "Have Your Say, Collective bargaining agreements for self-employed—scope of application EU competition rules", available at: *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules_en* [Accessed 18 January 2022].

[95] IP/21/988, 5 March 2021.

This issue arises in the context of concern to improve the working conditions of platform workers. The initiative is focussed on ensuring that competition rules do not stand in the way of collective bargaining by the "solo self-employed" (i.e. self-employed without employees). Separately and in parallel to the competition aspects of the question, in February 2021, the EC launched a consultation of European social partners about how to improve the working conditions for self-employed people working through digital labour platforms.[96]

The IIA looks into whether some self-employed in the digital economy and beyond might be facing unbalanced negotiating power from certain labour platforms and other companies, leading them to have little influence over their payment and working conditions.

The EC notes that under EU Competition law, self-employed are "undertakings" who risk infringing competition rules when they bargain collectively. Under EU case-law, however, collective bargaining between employees and employers is outside the scope of competition law.

The IIA observes that self-employed people may lack clarity about their employment status, and that they may be prevented from entering into collective bargaining out of the fear of the EU Competition rules. The initiative seeks to provide legal certainty about the applicability of EU Competition law to collective bargaining by self-employed.

The EC sets out four policy options to be implemented as a Council Regulation or an EC Communication to provide access to collective bargaining. The narrowest group to be considered would include all solo self-employed providing their own labour through digital labour platforms, whereas the widest group also would include provision of labour to professional customers of any size.

Notice on tools to fight collusion in public procurement

In March 2021, the EC published a 37-page notice for European contracting authorities on "tools to fight collusion in public procurement" (bid-rigging), and how to apply the related "exclusion ground" ("the Procurement Notice").[97]

The Procurement Notice explains that bid-rigging is repeatedly seen in key economic sectors such as construction, IT or health, and that the risk is exacerbated during emergencies, such as the COVID-19 pandemic, in which public authorities need to procure urgently and in large quantities.[98]

The Procurement Notice differentiates public procurement from competition enforcement. Despite the benefits of competition enforcement and penalties imposed by the EC and NCAs after the collusion has taken place, the Notice emphasises the need *to address collusion before the public contract is awarded*. With this in mind, the Procurement Notice highlights means provided for under the public procurement directives, including the possibility to exclude a tenderer from the procedure on the basis of sufficiently plausible anti-competitive behaviour.[99]

[96] IP/21/686, 24 February 2021.

[97] With thanks to Su Şimşek. Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, (the Procurement Notice) [2021] OJ C91/1.

[98] Procurement Notice, pp.4–5.

[99] Procurement Notice , pp.7–8.

The Procurement Notice has two purposes. One is to support Member States and contracting authorities in building administrative capacity to deter, detect and address collusion in public procurement. The other purpose is to foster cooperation between national central procurement and competition authorities, for example, by encouraging the creation of a national database of cases where economic operators are excluded on grounds of collusion.

The Procurement Notice also provides guidance to contracting authorities on how to apply the collusion-related, optional exclusion ground provided in the public procurement directives[100] by focusing on *art.57 of Directive 2014/24/EU* ("the Directive").[101]

The Directive provides that a contracting authority may exclude an economic operator from a tender procedure where it has "*sufficiently plausible indications*" to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.[102] An economic operator, on the other hand, can make use of "*self-cleaning*" measures that it has taken following a previous infringement of competition rules to demonstrate its reliability despite the existence of a relevant ground for exclusion.[103]

The EC notes that the optional nature of the exclusion ground provides a wide margin of appreciation to contracting authorities in deciding whether to exclude a tenderer from the award procedure even if they have sufficiently plausible indication of collusion.[104] The Procurement Notice emphasises that exclusion of an economic operator effectively limits competition, and that it should be used with caution and only if the integrity and reliability of the future contractor cannot be ensured by other, less drastic measures.[105]

The Procurement Notice explains the notion of "sufficiently plausible indications" in detail considering what may be just "indicators" and how to handle leniency applications.

As regards self-cleaning arguments, the economic operator can submit measures set out in the Directive such as personnel and organisational measures.[106] The precise information to be submitted would depend on the nature of each case.[107]

As set out in the Directive an economic operator may be excluded from participating in award procedures for up to three years from the date on which it was excluded by a competent authority, so long as the period of exclusion has not been set by final judgment.[108] National legislation may allow a longer exclusion period if it is set in a final judgment. The Procurement Notice clarifies that the contracting authority automatically has to reject a tender made by an excluded economic operator.

[100] Article 38(7)(e) of Directive 2014/23/EU, art.57(4)(d) of Directive 2014/24/EU and art.80(1) of Directive 2014/25/EU.

[101] Section 5 of the Procurement Notice, pp.14 and following. The Notice focuses on Directive 2014/24/EU since the optional exclusion ground is mirrored in Directive 2014/23/EU and may apply to procurement covered by Directive 2014/25/EU.

[102] Article 57(4)(d) of the Directive.

[103] Article 57(6) of the Directive.

[104] See Section 5.3 of the Procurement Notice.

[105] Procurement Notice, p.19.

[106] See art.57(6) para.2 of the Directive. The economic operator may prove that it has paid or undertaken to compensate the damage, clarified the facts and circumstances by actively collaborating with the authorities and taken concrete measures to prevent further criminal offences or misconduct.

[107] Procurement Notice, p.26.

[108] Procurement Notice, pp.29–30.

The Procurement Notice explains that an exclusion decision refers only to an "economic operator", and not other economic operators affiliated with it.[109] A contracting authority may exclude affiliated economic operators only if the exclusion criteria are satisfied for them as well under the public procurement directives.

The Procurement Notice includes an annex which provides practical guidance to contracting authorities on how to: (i) design award procedures in a way that would deter collusion between tenderers; (ii) detect potential collusion when evaluating tenders; and (iii) react to such suspected collusion.

European Court Cases

General

First, we have two cases on limitation and the principle of effectiveness.

Box 8

- **Court Cases—General (1)**
  - *Finnish bid rigging case*
    - * Time runs from definition of the essential characteristics of a works contract after a tender, for the purposes of limitation of NCA proceedings
  - *Consiliul Concurentei v Whiteland*
    - * National limitation rules which present a systematic risk that infringements will go unpunished should be adapted to the specific circumstances of competition law investigations, allowing for interruptions to the running of time

Finnish Competition and Consumer Authority/Eltel

In this case, the Finnish Competition and Consumer Authority (FCCA) applied to the Finnish Market Court to impose a fine on Eltel of €35 million, for collusion on the market for design and construction of electricity transmission lines in Finland.[110]

The Market Court found the matter time barred since the tender in question and related contract was in June 2007 and the application to the court was more than five years later, in October 2014. In Finnish law, the limitation period for such administrative fines was five years.

The FCCA appealed to the Finnish Supreme Administrative Court arguing that the economic effects of the collusion lasted much longer, to November 2009 (when the works had been completed), or early 2010 (when the last part of the price for the works was paid). The FCCA argued that such economic effects, not the date of the contract, should determine limitation.[111]

[109] Procurement Notice, p.30.

[110] With thanks to Marilena Nteve. *Kilpailu- ja kuluttajavirasto v Eltel Group Oy* (C-450/19) Judgment of 14 January 2021, EU:C:2021:10; [2021] Bus. L.R. 441.

[111] *Kilpailu- ja kuluttajavirasto v Eltel Group Oy* (C-450/19) EU:C:2021:10 at [15] and [30]. See *Quinn Barlo Ltd v European Commission* (C-70/12 P), Judgment of 30 May 2013, EU:C:2013:351; [2013] 5 C.M.L.R. 18.

The Supreme Administrative Court then asked the ECJ if the infringement ended with the concertation in the tender, or later while the contractual obligations were discharged and/or payments were made for the works.

The ECJ considered that, in such a case, the infringement ends when the essential characteristics of the contract, in particular the overall price have been definitively determined, where appropriate by conclusion of the contract.[112] So, in short, the award of the tender was the key date, not later.

The Court stated that the restrictive effects of a cartel on competition (the exclusion of competing tenderers and the potential artificial restriction of the customer's choice) should be distinguished from the assessment of the resulting wider economic effects of a cartel, which may last longer and be the subject of claims for damages.

The Court also distinguished the question of limitation in a damages action, from limitation in the context of an administrative penalty. In the latter case, the Court emphasised that actions by the EC and NCAs are governed by the rule of law,[113] so arguments based on the need for effective implementation of art.101(1) TFEU could not justify an artificial extension of the duration of the infringement.[114]

Consiliul Concurentei v Whiteland

In September 2009, the Romanian Competition Authority (RCA) commenced investigations on the Romanian retail food market against several economic operators and their suppliers, including Whiteland.[115]

In December 2014, the RCA sent an SO, alleging that the undertakings concerned had concluded anti-competitive agreements between 2006 and 2009, by fixing the selling and resale price of the suppliers' products. In Whiteland's case, the alleged infringement ended in July 2009.

Under Romanian law, the official opening of the investigation in September 2009 interrupted the five-year limitation period, which therefore ended in September 2014. Romanian law (at least as interpreted by some national courts) did not foresee the possibility of additional interruptions or suspension of the running of time for limitation.

The RCA took several investigative steps and adopted its decision in April 2015, fining Whiteland 2.3 million Romanian lei (approx. €513,000).

However, the Bucharest Court of Appeal agreed with Whiteland that this meant that the investigation had taken too long and that the infringement had become time barred. The RCA's decision was therefore annulled insofar as it concerned Whiteland.

The RCA brought an appeal before the Romanian High Court of Cassation and Justice, arguing that this would jeopardise the uniform and effective application of EU law, and noting that the rules under Regulation 1/2003 are different, since various procedural steps taken by the EC throughout the investigation interrupt the limitation period. This means that EC investigations into infringements of art.101 TFEU can take longer than five years, without becoming time barred.

[112] *Kilpailu- ja kuluttajavirasto v Eltel Group Oy* (C-450/19) EU:C:2021:10 at [33], [35] and [41].
[113] *Kilpailu- ja kuluttajavirasto v Eltel Group Oy* (C-450/19) EU:C:2021:10 at [37]–[38].
[114] *Kilpailu- ja kuluttajavirasto v Eltel Group Oy* (C-450/19) EU:C:2021:10 at [39]–[40].
[115] With thanks to Édouard Bruc.

The High Court of Cassation and Justice decided to refer the issue to the ECJ. The Court asked:

(i) whether the Romanian limitation rules should be interpreted in line with art.25(3) of reg.1/2003; and

(ii) noting that in the national case-law there were differing views on how to interpret this situation, whether an interpretation that only the formal act of initiating the investigation suspended the limitation period, was precluded by art.4(3) TEU, read with art.101 TFEU.[116]

The ECJ's answers were "no" and "yes".

First, the Court rejected the view that national limitation rules had to be aligned on art.25(3) of reg.1/2003, because the rules in that article only applied *to the EC* in the exercise of its powers.[117]

Second, the Court noted however, that the interpretation of national limitation rules should be read in light of the principle of effectiveness in art.4(3) TEU, read with art.101 TFEU.[118] National rules laying down limitation periods had to be devised in such a way as to strike a balance between, on the one hand, the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time as general principles of EU law and, on the other, the effective and efficient application of arts 101 and 102 TFEU.[119]

Third, the Court noted that national rules also had to take into account that EU Competition law cases require, in principle, a complex factual and economic analysis.[120] National limitation rules had to be adapted to the specific features of competition law. Such rules should not present a *systematic risk* that competition law infringements would go unpunished because their application is impossible in practice or excessively difficult.[121]

The ECJ considered that a strict interpretation of the national rules prohibiting limitation from being interrupted by action taken after the decision to initiate an investigation appeared likely to present such a systematic risk, although this was for the national court to assess in all circumstances. If so, the Court should interpret the national rules in line with the EU Competition rules as far as possible or, if necessary disapply the national rules.[122]

This result is unsurprising given that this is the position was set out in the ECN+ Directive.[123] Nevertheless, it is yet another example of "full effectiveness" arguments leading to important changes in national procedural law.

[116] *Consiliul Concurentei v Whiteland Import Export SRL* (C-308/19) EU:C:2021:47; [2021] 4 C.M.L.R. 14 at [23]–[29].
[117] *Consiliul Concurentei v Whiteland Import Export SRL* (C-308/19) EU:C:2021:47 at [36], [39] and [41].
[118] *Consiliul Concurentei v Whiteland Import Export SRL* (C-308/19) EU:C:2021:47 at [42].
[119] *Consiliul Concurentei v Whiteland Import Export SRL* (C-308/19) EU:C:2021:47 at [49].
[120] *Consiliul Concurentei v Whiteland Import Export SRL* (C-308/19) EU:C:2021:47 at [51]–[52].
[121] *Consiliul Concurentei v Whiteland Import Export SRL* (C-308/19) EU:C:2021:47 at [53]–[56].
[122] *Consiliul Concurentei v Whiteland Import Export SRL* (C-308/19) EU:C:2021:47 at [56]–[58] and [65].
[123] EU Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3. Recital 70 and art.29(1).

Slovak Telekom

In February 2021, the ECJ gave a ruling regarding the NCAs' loss of competence to apply EU Competition law once the EC initiates proceedings as set out in art.11(6) of reg.1/2003. This ruling also clarifies the applicability of the *ne bis in idem* principle under art.50 of the EU CFR.[124] The judgment followed a request for a preliminary ruling from the Slovak Supreme Court (SSC).

In December 2007, the Slovak Competition Authority (SCA) issued a decision finding that Slovak Telekom (ST) had abused its dominant position on the Slovak telecoms market. Later, on *8 April 2009*, the EC initiated proceedings against ST for abuse of dominant position on the Slovak market for wholesale broadband access services. The EC alleged that ST refused to supply unbundled access to the local loop and implemented margin squeezes as regards such access. Ultimately, the EC fined ST and Deutsche Telekom (ST's parent company, DT) €38.8 million.[125]

On *9 April 2009*, i.e. one day after the initiation of proceedings by the EC, the Board of the Slovak Anti-Monopoly Office amended the SCA's 2007 decision and fined ST 525.8 million Slovak koruna (approximately €17.4 million) for a margin squeeze on prices for retail telecoms services and wholesale interconnection services.

In the context of ST challenging the SCA decision, the SSC referred two questions to the ECJ.

In its *first question*, the SSC asked whether under art.11(6) of reg.1/2003 NCAs lose their powers to apply arts 101 and 102 TFEU when the EC initiates proceedings examining infringements which are identical to those for which proceedings have been brought by the NCAs?

In response, the Court's answer was "yes".

First, the Court noted that the EC's "act" initiating proceedings had to specify the infringements, precisely because "the facts" have to be the same as those in national proceedings to relieve an NCA of its competence.[126]

Second, the Court spelled out what this meant: NCAs cannot bring proceedings against the *same* undertakings for the *same*, allegedly anti-competitive practices occurring on the *same* product and geographical market, or markets during the *same* period or periods.[127]

Third, the Court noted that such an interpretation followed from the context of art.11(6) which provides for cooperation between NCAs and the EC. Notably, the EC must consult an NCA if it is already acting on a case before initiating proceedings.[128]

Fourth, applying these principles here, the Court noted that the EC initiated proceedings against ST for an abuse of dominance on the market for *wholesale broadband access services*.[129] Whereas the SCA's proceedings related to ST's alleged abuses of a dominant position on the *wholesale and retail markets for*

[124] With thanks to Geoffroy Barthet. *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) Judgment of 25 February 2021, EU:C:2021:139; [2021] 4 C.M.L.R. 19. ECJ Press Release 21/21, 25 February 2021.
[125] *Slovak Telekom* (AT.39523) EC Decision of 15 October 2014.
[126] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [29].
[127] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [30].
[128] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [31].
[129] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [33] and [35].

telephone services and low-speed (dial-up) internet access services.[130] Therefore, the EC's proceedings and the SCA's proceedings related to alleged abuses on separate product markets.[131] As a result, the SCA was not relieved of its competence to apply art.102 TFEU in the case referred to by the SSC.

The Court's *second question* concerned the applicability of the principle *ne bis in idem* if there are separate and independent sanctions for infringements found by the EC and an NCA.

The ECJ considered that the principle did not apply. The Court noted that the application of that principle is subject to a twofold condition: (i) the "*bis*" condition, that is, the existence of a prior definitive decision; and (ii) the "*idem*" condition requiring that the prior decision and the subsequent proceedings or decisions concern the same anti-competitive conduct (same facts, same legal interest protected, same offender).[132] In the present case, the principle did not apply because, as noted above, the proceedings relate to anti-competitive practices on separate product markets.[133] The *idem* condition was therefore not met, because the facts were different.[134]

Further, in principle, a *ne bis in idem* issue should not arise since the initiation of proceedings under art.11(6) should preclude it.[135]

Box 9

- **Court Cases—General (2)**
  - *Lundbeck—Pay for delay*
    - Follows (now standard) assessment approach in the *Generics UK-Paroxetine* judgment
    - Specific duty to preserve documents after an EC sector inquiry
  - *International Skating Union—Sport and arbitration*
    - GC *upheld* EC's decision as regards the ISU's Eligibility rules
    - GC *disagreed* with the EC's position on CAS arbitration in Switzerland and said that a complainant "can still go to the courts or the EC/NCAs"
  - *Sumal—MBTE*
    - Important Opinion by AG Pitruzella
    - The concept of "single economic unit" in an "undertaking" applied to damages liability

Lundbeck—Pay for delay—Citalopram

In March 2021, the ECJ generally dismissed the appeals by Lundbeck (and several generic producers) against the GC's judgment which had upheld the EC's decision in the *citalopram* pay-for-delay case concerning Lundbeck.[136]

[130] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [36].
[131] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [37] and [46].
[132] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [42]–[43].
[133] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [44]–[45].
[134] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [46].
[135] *Slovak Telekom as v Protimonopolny urad Slovenskej republiky* (C-857/19) EU:C:2021:139 at [47].
[136] With thanks to Lukas Šimas and Georgia Tzifa. *H. Lundbeck A/S and Lundbeck Ltd v European Commission* (C-591/16 P), Judgment of 25 March 2021, EU:C:2021:243; [2021] 5 C.M.L.R. 2. ECJ Press Release 49/21, 25 March 2021. References here are to the *Lundbeck* judgment unless otherwise indicated.

It may be recalled that Lundbeck is an "originator", i.e. Lundbeck developed and brought to the market a medicine called citalopram. This is an active pharmaceutical ingredient (API) used in anti-depressants. Lundbeck's patent expired in 2002, but Lundbeck still held *process patents* relating to various production processes for citalopram.

At around the same time, Lundbeck concluded six agreements with four groups of generic medicines producers, according to which these producers agreed to delay the market entry of generic versions of citalopram against payment, approximately corresponding to the profits these producers expected to make if they had entered the market, or to the damages which could have been paid to them if they had ultimately succeeded in litigation (challenging the process patents) against Lundbeck.[137]

In June 2013, the EC fined Lundbeck €93.7 million and the four generic producers a total of €52.2 million for delaying the market entry of generic versions of citalopram. The EC found that the agreements in question infringed art.101 TFEU, in that they had the "object" of restricting competition. Lundbeck brought an action for annulment against the EC's decision, which was dismissed by the GC in 2016.[138] Lundbeck then appealed the GC's decision to the ECJ.

The ECJ's approach and findings were as follows:

First, the Court upheld the finding of the GC (and the EC) that Lundbeck and the generic producers were *at least potential competitors*. The ECJ interpreted the concept of "potential competition" by reference to its judgment in *Generics (UK) Paroxetine*,[139] which is cited throughout the decision. In order to assess whether an undertaking that is not present in a market is a potential competitor of one or more other undertakings that are already present in that market, it must be determined whether there are *real and concrete possibilities* of the former joining that market and competing with one or more of the latter.[140]

In that context, it is necessary to assess:

- whether, at the time when those agreements were concluded, the generic producer had taken *sufficient preparatory steps* to enable it to enter the market concerned within such a period of time as would impose competitive pressure on the manufacturer of originator medicines; and
- whether the market entry of such a generic producer would meet *barriers to entry that are insurmountable*.[141]

The existence of a process patent on the manufacturing of an API in the public domain cannot in itself be regarded as such a barrier, since a would-be market entrant might be willing to challenge it or enter the market at risk of infringement proceedings.[142]

[137] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [6].

[138] See *H Lundbeck A/S v European Commission* (T-472/13) Judgment of 8 September 2016, EU:T:2016:449; [2016] 5 C.M.L.R. 18.

[139] *Generics (UK) Ltd v Competition and Markets Authority* (C-307/18) Judgment of 30 January 2020, EU:C:2020:52; [2020] Bus. L.R. 1323. See also John Ratliff, "Major Events and Policy Issues in EU Competition Law 2019–2020: Part 1" [2021] I.C.C.L.R. 105, 122.

[140] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [54].

[141] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [57].

[142] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [59].

The Court also noted that a finding of potential competition between a generic medicine producer and an originator could be confirmed by additional factors, such as the conclusion of an agreement between them at a time when the former was not present on the market concerned.[143]

The ECJ considered that the GC had found correctly that the EC had carefully examined the relevant evidence concerning the real and concrete possibilities that the generic producers had to enter the market, relying on objective factors such as the investments already made, the steps taken in order to obtain a market authorisation (MA) and the supply contracts concluded with, amongst others, their API suppliers. In addition, the GC correctly found that the strongest evidence was the very fact that Lundbeck concluded agreements with manufacturers of generic medicines in order to delay their entry to the market, as the ECJ had previously held in the *Generics (UK) Paroxetine* case.[144]

In addition, the Court noted that each generic producer had taken preparatory steps showing their *firm intention and inherent ability* to enter the market. The medicine contained an active ingredient that was in the public domain. Such steps had put the generic producers in a position to obtain the MAs or equivalent authorisations necessary for the marketing of their generic medicines. These elements were sufficient to exert competitive pressure on Lundbeck.[145]

Second, the ECJ analysed the concept of a restriction of competition "by object" on the basis of its judgement in *Generics (UK) Paroxetine*.[146]

The Court recalled that a "restriction by object" exists *when it is plain* from the examination of the settlement agreement concerned *that the transfers of value provided cannot have any explanation other than the commercial interest of both the holder of the patent at issue and the party allegedly infringing the patent not to engage in competition on the merits*. Agreements whereby competitors deliberately substitute practical cooperation between them for the risks of competition clearly can be characterised as "restrictions by object".[147]

The Court noted that for the purpose of that examination, it is necessary to assess on a case-by-case basis whether the net gain of the transfers of value from the manufacturer of originator medicines to the generic producer was sufficiently significant actually to act as an incentive to the manufacturer of generic medicines to refrain from entering the market concerned and, consequently, not to compete on the merits with the manufacturer of originator medicines. However, there is no requirement that the net gain should necessarily be greater than the profits which that generic producer would have made if it had been successful in the patent proceedings.[148]

Finally, the ECJ noted from the *Generics (UK) Paroxetine* judgment that the pro-competitive effects of such agreements also had to be taken into account when deciding whether to characterise them as "restrictions by object". However, Lundbeck had not mentioned any pro-competitive effect associated with those agreements in its appeal, so it had not satisfied the standard of proof required to

[143] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [57].
[144] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [78]
[145] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [86].
[146] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [112].
[147] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [114].
[148] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [115].

establish any such effects. A mere unsubstantiated assertion concerning the pro-competitive effects of the agreements at issue was insufficient to rebut their characterisation as "restrictions by object".[149]

One other point is of particular interest. In one of the generic producers' appeals, the GC had found that *Xelli /Alpharma* should have kept records relevant to their defence *since 2003* (when the Danish Competition Authority issued a press release re. its investigation into the case and informed the EC of the relevant agreements).

The generic producer argued that this went too far and delay in initiating the EC proceedings had denied it the ability to defend itself properly, because various documents had not been preserved.[150]

The ECJ disagreed with the GC about such an obligation starting in 2003. However, the Court held that there *was* a "*specific duty*" to preserve relevant documents *during the EC's administrative procedure*, which in this case, the ECJ considered to apply from the EC's pharmaceutical sector inquiry in 2008, which expressly mentioned pay-for-delay cases.

The Court substituted that reasoning. The Court considered that there was no material impact on the GC's judgment otherwise insofar as the Court upheld the GC's findings and held that the alleged late initiation of the EC's procedure did not infringe Xellia/Alpharma's defence rights.

International Skating Union—Sport and arbitration

In December 2020, the GC *partially dismissed* International Skating Union's (ISU's) appeal against the EC's 2017 decision, in which the EC found that the ISU's rules (the "Eligibility rules"), preventing skaters that participated in its events from participating in events organised by third parties, were in breach of art.101 TFEU.

The Court also *partially annulled* the EC decision insofar as the EC found that ISU's Appeal Arbitration rules granting exclusive jurisdiction to the Court of Arbitration for Sports ("CAS") reinforced the competition restrictions in the ISU's Eligibility rules, and the decision required the ISU to end such mandatory arbitration.[151]

Background

We summarised the EC's 2017 decision in 2018 and in 2019, based on the provisional and the final non-confidential versions of the EC's decision.[152]

To recap, the background was as follows: The ISU is the sole international sport federation recognised by the International Olympic Committee to administer speed skating and figure skating on ice through national ice-skating associations. These national associations are typically composed of skating clubs, while athletes are

[149] *H Lundbeck A/S v European Commission* (C-591/16 P) EU:C:2021:243 at [136]–[137].

[150] *Xellia Pharmaceuticals ApS v European Commission* (C-611/16 P) Judgment of 25 March 2021, EU:C:2021:245; [2021] 5 C.M.L.R. 6 at [141]–[156].

[151] With thanks to Álvaro Mateo Alonso. *International Skating Union v European Commission* (T-93/18) Judgment of 16 December 2020, EU:T:2020:610; [2021] 4 C.M.L.R. 9. GC Press Release 159/20, 16 December 2020.

[152] *International Skating Union's Eligibility rules* (AT.40208). IP/17/5184, 8 December 2017. The non-confidential version of the decision is on the EC's website. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 2", I.C.C.L.R. [2019] 195, 205; John Ratliff, "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 2", I.C.C.L.R. [2020] 201, 229.

individual members of those clubs.[153] The ISU organises the most prominent speed skating on ice competitions, such as those at the Winter Olympics and the European and World Championships.[154]

In 2014, the ISU adopted Eligibility rules ("the 2014 Eligibility rules") clarifying the Eligibility rules that were already in place since 1998. According to these rules, if a speed skater were to participate in any speed skating event not authorised by the ISU or one of the national associations, he or she would become ineligible to participate in ISU's competitions for a period up to a lifetime.[155]

In 2016, the ISU adopted new Eligibility rules ("the 2016 Eligibility rules"), whereby participation in non-authorised events was subject to sanctions ranging from a warning to periods of ineligibility from an unspecified minimum to a maximum of a lifetime ban.[156]

Prior to 2015, there were no pre-established criteria to authorise third party events. In 2015, the ISU introduced such criteria, but the EC found that they were not objective, transparent and non-discriminatory, and that they went beyond what was necessary to protect legitimate aims.[157]

In addition, the ISU's Appeal Arbitration rules granted exclusive jurisdiction to the CAS as regards the ISU's decisions on ineligibility of skaters and officials, and provided that CAS decisions "*shall be final and binding*".[158]

In June 2014, two professional Dutch speed skaters lodged a complaint with the EC against the ISU's 2014 Eligibility rules establishing a *lifetime ban* for participating in competitions not sanctioned by the ISU. In particular, they argued that such rules prevented them from participating in competitions organised by Icederby offering significant prize money and the opportunity of other sources of revenue such as sponsoring.[159] Icederby was a Korean private company which was not a member of the ISU and which had plans to organise a competition in Dubai in 2014.

In 2017, the EC found that the ISU's Eligibility rules were in breach of art.101 TFEU insofar as they prevented skaters that participated in its events from participating in events organised by third parties, depriving those third parties of the services of athletes needed to organise those events. The EC did not impose a fine but set a 5% of turnover periodic penalty payment if the ISU did not amend its rules to remove the infringement within 90 days.

The EC also considered that the ISU's Appeal Arbitration rules reinforced the restriction of competition that it had found in the Eligibility rules, insofar as the CAS had exclusive jurisdiction over appeals of the ISU's decisions to sanction a skater for participating in unauthorised events.[160]

On appeal there were two main issues: (i) whether the Eligibility rules constituted a restriction of competition by object within the scope of art.101 TFEU; and (ii) whether CAS' exclusive jurisdiction reinforced the competition restriction of the Eligibility rules and was therefore contrary to art.101 TFEU.

[153] *International Skating Union's Eligibility rules* (AT.40208) at [7].
[154] *International Skating Union's Eligibility rules* (AT.40208) at [4].
[155] *International Skating Union's Eligibility rules* (AT.40208) at [3].
[156] *International Skating Union's Eligibility rules* (AT.40208) at [3].
[157] *International Skating Union's Eligibility rules* (AT.40208) at [3].
[158] *International Skating Union's Eligibility rules* (AT.40208) at [5].
[159] *International Skating Union's Eligibility rules* (AT.40208) at [22].
[160] *International Skating Union's Eligibility rules* (AT.40208) at [5], [269]–[277].

The ISU Eligibility rules

The main points in the GC's ruling on this were as follows.

First, the GC agreed with the EC that the Eligibility rules constituted an infringement by object contrary to art.101 TFEU. Based on *MOTOE* and *Ordem dos Técnicos Oficiais de Contas*,[161] the GC found that the ISU was in a situation capable of giving rise to *a conflict of interest* by carrying out simultaneously *a regulatory function* (when not a public body), adopting rules and authorising third-party sport competitions, *and a commercial activity*, organising the most important events in which professional skaters needed to participate to earn their living.

The GC noted that the obligations and restrictions on an entity carrying out a regulatory function to ensure that it "*may not distort competition by favouring events which it organises*" under arts 102 and 106 TFEU also apply under art.101 TFEU. Thus, as a sports federation exercising regulatory functions, the ISU had to ensure, when examining applications for authorisation of events from third parties, that "*those third parties are not unduly deprived of market access to the point that competition on that market is distorted*".[162]

The GC then assessed the content of the ISU's Eligibility rules, the severity of the penalties, and the objectives. The GC upheld the EC's finding that the content of the ISU's Eligibility rules did not have a direct link with legitimate objectives, since the ISU retained broad discretion not to authorise third party events, including for reasons not explicitly provided for in the Eligibility rules, "*which could lead to the adoption of refusal decisions on grounds which are not legitimate*."[163]

The Court also considered that the penalties for participating in competitions not authorised by the ISU, providing for a lifetime ban until 2014, and up to 10 years thereafter after amendment, were disproportionate. Notably insofar as the average length of a skater's career is eight years. Such severe penalties were particularly relevant to making obstacles to competition in sports, because they were likely to prevent market access to third party event organisers, who were deprived of the skaters' participation.[164]

The GC recognised that protecting the integrity of sports with: (i) rules to avoid the risks of the manipulation of events through sports betting; (ii) common standards to ensure that competitions take place fairly; and (iii) to ensure that the physical and ethical integrity of sportspeople is protected, are legitimate objectives under art.165 TFEU.[165] The GC also confirmed that the ISU pursuing its own economic interests is not in itself anti-competitive.[166]

However, any restriction had to be inherent to achieve legitimate objectives. The Court found that the ISU's rules on pre-authorisation went beyond what was necessary to achieve such objectives and were disproportionate (in requiring too

[161] *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Greece* (C-49/07) Judgment of 1 July 2008, EU:C:2008:376; [2008] 5 C.M.L.R. 11 at [51]–[52]; and *Ordem dos Tecnicos Oficiais de Contas v Autoridade da Concorrencia* (C-1/12) Judgment of 28 February 2013, EU:C:2013:127; [2013] 4 C.M.L.R. 20 at [88] and [92].

[162] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [70]–[76].

[163] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [89].

[164] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [92]–[95].

[165] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [102] and [108]. Article 165 TFEU provides, amongst other things, that the EU shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport.

[166] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [109].

much information; in setting a larger and more restrictive time limit for requests for authorisation, and not respecting the principle that all events should comply with common standards.[167] Further, the ISU could not make the authorisation of events organised by third parties subject to payment of a solidarity contribution which is used to finance only its own events and those of its members.[168]

The Court also considered that the sanctions for violating the ISU's Eligibility rules (e.g. lifetime ban) were too severe to avoid the risks of betting.[169]

The measures adopted to ensure common standards in third party events were also disproportionate: disclosing business plans, long and restrictive time limits to file and to authorise third party events, and non-exhaustive authorisation criteria.[170]

In sum, the GC found that the EC was right to conclude that the ISU's Eligibility rules constituted a restriction by object under art.101 TFEU.[171]

CAS arbitration

As regards mandatory arbitration through CAS, the GC partially annulled the EC's decision insofar as: (i) the EC had found that the exclusive and binding jurisdiction of CAS, based in Switzerland, over appeals to the ISU's ineligibility decisions to sanction a skater reinforced the competition restrictions created by the Eligibility rules; and (ii) it required the ISU to abandon CAS' exclusive jurisdiction.

The EC essentially had found that this system shielded the ISU from the reach of the EU/EEA Competition rules, depriving athletes of effective judicial protection, and clarified during the appeal that this constituted an aggravating circumstance under point 28 of the 2006 EC Fining Guidelines.[172] Partly, because CAS is in Switzerland where EU Competition law may not be taken into account.

The GC assessed whether the mandatory and binding arbitration system constituted an "*aggravating circumstance*" under point 28 of the 2006 EC Fining Guidelines, which covers only unlawful conduct or circumstances that render the infringement more harmful.[173]

The GC concluded that there were no such circumstances.[174] Arbitration is a "*generally accepted method of binding dispute resolution*" that does not infringe the athletes' right to a fair hearing. The European Court of Human Rights also held in *Mutu and Pechstein* that it was in the interest of international professional sport disputes to be submitted to a specialised court capable of adjudicating quickly and economically.[175]

The GC also considered that even if skaters could not bring actions for annulment of ineligibility decisions contrary to art.101 TFEU pursuant to the Arbitration rules, skaters and third-party organisers could bring damage claims in national

[167] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [110]–[111].
[168] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [114].
[169] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [103].
[170] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [110].
[171] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [120].
[172] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [143].
[173] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [153].
[174] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [163].
[175] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [154]–[156]. *Mutu and Pechstein v Switzerland* (40575/10), ECtHR Judgment of 2 October 2018, at [98].

courts, as well as file complaints with NCAs or the EC. The EU Courts could therefore gain jurisdiction indirectly.[176]

Comment This ruling is a key precedent for sports federations, dealing with a number of important issues. The question of exclusion from events, called here "ineligibility", as a result of participation in other "non-official" events is an old one, but still live in many sports, as with the recent Spanish request for a preliminary ruling on the *European Super League*.[177] As is the question of funding sports organisation through the grant of broadcasting rights to authorised sports events and the proportionality of measures which protect the related exclusivity. Similarly, many sport federations require mandatory binding arbitration.

The ISU has appealed.[178]

Sumal In October 2021, the ECJ gave an important ruling on which entity a plaintiff can sue for cartel damages.

A Spanish company, Sumal had purchased two trucks from Mercedes Benz Trucks España (MBTE) through leasing contracts via a dealer. Sumal sued for the additional cost of doing so, a claim of some €22,200, insofar as the purchase was during the infringement period of the *Trucks* cartel.[179] Sumal sued MBTE, which had not been named in the EC's decision, not Daimler, MBTE's parent, which had.

In January 2019, the Commercial Court of Barcelona rejected the action on the ground that MBTE could not be sued because Daimler had to be regarded as solely responsible for the infringement concerned.

In December 2019, on appeal, the Barcelona Provincial Court made a reference for a preliminary ruling to the ECJ asking if such an action was possible on the basis that Daimler and MBTE formed a single economic unit and, if so, on what conditions.[180] The Court also asked if a rule in Spanish law providing only for the liability of a parent which controls a subsidiary was incompatible with the ECJ's case-law on full effectiveness of competition law.[181]

The Advocate-General's Opinion

In April 2021, AG Pitruzzella gave his Opinion.[182] The AG focused on the issue whether liability was based on "decisive influence" or not. This was key because, if so, Daimler could be held liable for the infringing acts of a subsidiary which it controlled, but MBTE would *not* be liable for the acts of its infringing parent, since it did not control Daimler.[183]

[176] *International Skating Union v European Commission* (T-93/18) EU:T:2020:610 at [159]–[160].

[177] *European Superleague Company v UEFA and FIFA* (C-333/21) Request for preliminary ruling in [2021] OJ C382/10.

[178] ISU appeal of 20 February 2021, *International Skating Union v Commission* (C-124/21 P) published in [2021] OJ C163/19.

[179] With thanks to Édouard Bruc. *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) Judgment of 6 October 2021, EU:C:2021:800; [2021] Bus. L.R. 1755; ECJ Press Release 174/21, 6 October 2021. *Trucks* (AT.39824), EC Decision of 19 July 2016.

[180] Request for preliminary ruling published in [2020] OJ C87/7.

[181] [2020] OJ C87/7.

[182] Opinion of AG Pitruzzella of 15 April 2021, *Sumal v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:293. ECJ Press Release 63/21, 15 April 2021.

[183] Opinion, *Sumal v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:293 at [32]–[53].

AG Pitruzzella considered that this was not the correct way to assess the situation. Rather, he considered that liability attached to the *"undertaking" involved in the relevant infringement*, the "single economic unit" formed by the links between the parent company and related subsidiaries.[184] However, he added that, only those legal entities in the undertaking involved in the infringement could be sued (i.e. whose actions were "objectively necessary" to put the anti-competitive conduct into effect).[185]

In taking this line AG Pitruzzella appears partly to have been influenced by English case-law on the question whether a subsidiary could be sued in the UK and therefore become the "anchor defendant" to pull in claims for damages against various cartel members. He refers to the case-law and, the parties were invited to comment on it by the Court.[186] (Put broadly, the UK courts look for nexus of the UK subsidiary to the infringement, in the sense that it is named in the EC decision or received instructions implementing the cartel.)

The AG also considered it important that such an approach would support damages claims. Notably, on *TiborTrans*,[187] Daimler could also have been sued in Spain. However, on the approach that the AG advocated, practical difficulties as regards service abroad of the papers starting the proceedings and enforcement of any judgment could be avoided.[188]

The Grand Chamber's ruling The ECJ, sitting as Grand Chamber (an enlarged court form used for important cases) essentially agreed with the AG, and answered "yes" to both the Spanish Court's questions.

The main points are as follows:

First, the Court recalled that the determination of the entity which could be sued in a damages claim based on art.101 TFEU is directly governed by EU law.[189]

Second, that the concept of "undertaking" used in EU law does not have a different scope in public enforcement, than in actions for damages, applying *Skanska Industrial Solutions*.[190]

Third, the Court noted that the concept of "undertaking" in EU law goes beyond concepts such as "company" or "legal person", focusing on the economic unit involved in certain conduct, not the formal separation of companies.[191] That concept is used both in reg.1/2003 (for EC enforcement) and in the EC Damages Directive (in defining "who is the infringer").[192]

Fourth, such an *economic unit* can be found liable, where at least one entity belonging to it has infringed art.101(1) TFEU and that has been established either by an EC decision or independently before a national court.[193] As a result the concept of undertaking and, through it, economic unit "automatically entail the

[184] Opinion, *Sumal v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:293 at [40], [45]–[46] and [52]–[53].
[185] Opinion, *Sumal v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:293 at [56]–[57].
[186] See Opinion, *Sumal v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:293 at [57] and fn.70.
[187] *Tibor-Trans Fuvarozo es Kereskedelmi Kft v DAF Trucks NV* (C-451/18), Judgment of 29 July 2019, EU:C:2019:635; [2019] 5 C.M.L.R. 15.
[188] Opinion, *Sumal v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:293 at [68].
[189] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [34].
[190] See *Vantaan kaupunki v Skanska Industrial Solutions Oy* (C-724/17), Judgment of 14 March 2019, EU:C:2019:204; [2019] 4 C.M.L.R. 26.
[191] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [39]–[44].
[192] EU Directive 2014/104, [2014] OJ 2014 L349/1.
[193] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [42]–[43].

application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed".[194]

Fifth, however, noting that some groups are conglomerates, which are active in several economic fields having no connection between them, the Court added that the liability of a subsidiary could not automatically apply to every subsidiary of a parent company found to have infringed in an EC decision.[195]

Sixth, so overall a subsidiary not referred to in an EC decision as infringing (here MBTE) could still be liable for conduct committed by another legal entity (its parent, here Daimler), where the two entities form part of the same economic unit and therefore constitute an "undertaking" which infringed art.101(1) TFEU.[196] In practice, it must be shown that:

(1) there are economic, organisational and legal links that unite the two legal entities, demonstrating that they are part of the same economic unit; and

(2) there must be a "*a specific link*" between the economic activity of that subsidiary and the subject-matter of the infringement for which the parent company was held to be responsible.[197]

Seventh, the Court noted that the latter condition was fulfilled here as the anti-competitive agreement concluded by Daimler concerned the same products as those marketed by MBTE.[198]

Eighth, the Court considered that the fact that the subsidiary was not involved in the EC proceedings did not mean that it had had no opportunity to exercise its defence rights, because another part of "the undertaking", here the parent Daimler, had done so.[199] However, a subsidiary was still entitled to dispute that it belonged to the same undertaking as its parent.[200]

Ninth, the subsidiary was not entitled to challenge before the national court, the existence of the infringement found by the EC.[201]

Finally, it could not be inferred from the fact that the EC had held Daimler, as the parent company, responsible for the infringement, that other entities in the undertaking were *not* responsible.[202]

Turning to the Spanish Court's *second question* concerning national rules only allowing for the liability of a parent company which controls a subsidiary, the Court held that if that were the case, the national court would be required to disregard such provision and directly apply art.101(1) TFEU.[203] However, the Spanish Government, which intervened in the case, considered that this could be avoided by interpretation of the rules concerned.

Comment Clearly, this has caught practitioners' attention. Some see this as a useful clarification, allowing them to bring damages claims much easier. Others

[194] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [44].
[195] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [45]–[47].
[196] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [48].
[197] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [51]–[52].
[198] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [52].
[199] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [59].
[200] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [53]–[54].
[201] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [55] and [58].
[202] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [63].
[203] *Sumal SL v Mercedes Benz Trucks España SL* (C-882/19) EU:C:2021:800 at [68]–[75].

question what the implications are if there are several "single economic units" in a group? For example, does the case support the view that EC fines should be based on the unit concerned, not the total "conglomerate" turnover? In general, the full meaning and implications of the EU concept of "undertaking" are still being revealed.

Cartel Appeals

Box 10

- **Court Cases—Cartel Appeals**
  - *Heat Stabilizers—GEA*
    - Where the EC amends the fine on an undertaking jointly and severally liable with another, the obligation to pay, may continue for the other undertaking so that interest is payable for that undertaking from the original date set by the EC for payment
  - *Envelopes—Printeos*
    - Where the EC had to repay a fine paid on a decision which has been annulled, it had to pay compound default interest from the date sought by the applicant on appeal, until both the principal amount and the interest is fully paid
  - *Power Cables—Goldman Sachs*
    - A minority shareholder (with approximately a 32% stake) in an infringing company may be liable for the infringement, where it has decisive influence over the company through 100% of the voting rights

GEA/European Commission—Heat Stabilizers

In November 2020, the ECJ ruled on an appeal by the EC against the GC's judgment in 2018 concerning fines imposed jointly and severally on members of the GEA group in the EC's *heat stabilisers* cartel case.[204] The ECJ upheld the EC's appeal.

The background is as follows: The EC's *first decision* in this case was in 2009. In that decision the EC found that a number of undertakings had participated in a cartel in the ESBO/esters sector. GEA and members of its group, ACW and CPA were held jointly and severally liable for a fine of €1.9 million; and GEA and ACW were held jointly and severally liable for a fine of €1.4 million.

In 2010, the EC took a *second decision*, amending the 2009 one, to reduce the fine on ACW which had been in the GEA group, but was not at the time of the first decision. ACW was therefore entitled to have its fine capped by the 10% of turnover ceiling rule, assessed individually on its turnover. The EC's approach was that the amount of the fine on GEA and CPA remained unchanged, but the amount imposed on ACW should be reduced. On the first part of the fine imposed GEA, ACW and CPA were held jointly and severally liable for a fine of approx. €1 million, with GEA and CPA jointly and severally liable for €827.842; and on the second part of the fine GEA remained liable for €1.4 million.

GEA appealed, arguing breach of its defence rights. In 2015, the GC upheld its appeal, insofar as the EC had taken its 2010 decision without hearing GEA first.

[204] With thanks to Marilena Nteve. *European Commission v GEA Group AG* (C-823/18 P) Judgment of 25 November 2020, EU:C:2020:955; [2021] 4 C.M.L.R. 6.

Then in 2016 the EC took a *third decision*, in which it repeated its conclusions as set out in the 2010 decision, but set the fines as due *from 10 May 2010*.

GEA appealed again and, in 2018, the GC annulled the EC's 2016 decision.[205] The GC considered that the EC should have reapportioned "differently" the second part of the fine, for which GEA and ACW were jointly and severally liable, in order to limit the part of the fine for which GEA was solely liable (a breach of the principle of equal treatment).[206]

In essence, the GC considered that the EC should have identified the proportion of the first part of the second fine for which ACW was jointly and severally liable with GEA and CPA, relative to the part of the fine for which ACW was jointly and severally liable with GEA only. The EC should then have allocated the reduction in ACW's fine between the two instances of joint and several liability.[207]

The GC also considered that the date on which the fine was payable could only be from the date of notification of the 2016 decision.[208]

The EC appealed further to the ECJ on both points.

On the *issue of the fine on GEA*, the EC considered that the GC had treating the GEA group as two separate undertakings, whereas it was just one.[209] The EC argued that it was entitled to determine joint and several liability *within* an undertaking without regard for equal treatment, and not based on the duration of group member participation in the infringement.[210] Further, GEA's liability was not affected by the reduction granted to ACW since, when the 2009 decision was adopted, ACW and GEA no longer formed one and the same undertaking.[211]

The ECJ agreed with the EC. GEA, ACW and CPA were in a single undertaking during the infringement, not two undertakings. The EC was entitled to determine the maximum amounts of liability imposed on them jointly and severally that they would each have to pay. Such maximum amounts did not have to reflect the specific periods during which the entities in the single undertaking participated in the infringement. GEA's residual liability for €1.4 million in the second of the fines followed only from the fact that, at the time of the EC's decision, ACW was no longer in an undertaking with GEA.[212]

On the issue as *when GEA had to pay its fine*, the EC argued that it was entitled to amend the amount of the fine imposed and joint and several liability, without necessarily having to set a new date by which that fine is payable. Whereas GEA argued that EC should not be able to set a date on which default interest is payable which is prior to the date on which the fines are set.[213]

Again, the ECJ agreed with the EC. The Court stated that when the GC annulled the EC's second decision in 2010, the initial wording on the obligation to pay in the first decision in 2009 was "reactivated".[214] Further, that the amendment of the 2009 decision, first by the 2010 decision (which was annulled), and then in 2016

[205] *GEA Group AG v European Commission* (T-640/16), Judgment of 18 October 2018; EU:T:2018:700; [2019] 4 C.M.L.R. 19.
[206] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [39].
[207] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [44].
[208] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [126].
[209] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [48].
[210] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [49], [52], [72].
[211] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [53].
[212] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [71]–[77] and [80]–[82].
[213] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [95] and [98].
[214] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [94], [106] and [108].

"*concerned only the amount of the fine imposed on ACW and the reapportionment of joint and severability*". That "*did not affect the imposition of the fine as such or the total amount of that fine*". As a result, the legal basis of the obligation to pay the fine *was the 2009 decision*, not the 2016 decision.[215]

Since, in 2018, the GC had not ruled on other grounds of appeal given its judgment, the ECJ referred the case back for further review by the GC.[216]

This is proving a long saga. The Court's second finding here may well surprise. With *Printeos* in mind also, the practical and prudent theme is clear: if a company can do so, it should pay the fine first, as it appeals.

Printeos—Envelopes

It may be recalled that the EC fined Printeos €4.7 million for its participation in the *Envelopes* cartel in 2014. On appeal in 2016, the GC annulled the EC decision for insufficient reasoning as regards Printeos' fine.[217]

Printeos had paid its fine after the EC decision. The EC repaid the principal amount, but paid no interest. Printeos appealed, claiming interest and the GC agreed, awarding it €184,592, with interest thereon from the date of its judgment until the EC paid these amounts.[218]

The EC appealed and Printeos lodged a cross-appeal before the ECJ.[219]

The EC's claim

In its appeal, the EC claimed to set aside the GC's judgment and to dismiss Printeos' claim for €184.592 in interest. The main issues raised by the EC were: (i) an alleged infringement of the EC's rights of defence and the principle of *ne ultra petita*; (ii) an alleged misinterpretation of art.266 TFEU[220]; (iii) an alleged infringement of the principles of legality and legal certainty; and (iv) an alleged error of law as regards the constituent elements of the EU's non-contractual liability.

The ECJ rejected all of the EC's claims and upheld the GC's decision to award Printeos €184,592 in interest on the principal amount until the EC repaid it.

First, the ECJ found that the EC's rights of defence and the principle of *ne ultra petita* were not infringed. The Court recalled that even if the EU courts must rule only on the heads of claim put forward by the parties, they cannot confine themselves to the parties' arguments in support of their claims. If they were to do so, the EU courts might be forced, in some circumstances, to base their decisions on erroneous legal considerations.[221]

In this case, the GC had relied exclusively on the facts alleged in Printeos' application and awarded Printeos the exact amount claimed. In particular, the ECJ noted that the change in the characterisation of the interest from "compensatory

[215] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [110].
[216] *GEA Group AG v European Commission* (T-640/16), EU:T:2018:700 at [116].
[217] With thanks to Virginia Del Pozo. *Printeos SA v European Commission* (T-95/15), Judgment of 13 December 2016, EU:T:2016:722; [2017] 4 C.M.L.R. 9, see John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016-2017: Part 1", I.C.C.L.R. [2018] 143, 170.
[218] *Printeos SA v European Commission* (T-201/17), Judgment of 12 February 2019, EU:T:2019:81, see John Ratliff, "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 1", I.C.C.L.R. [2020] 109, 132.
[219] *European Commission v Printeos SA* (C-301/19 P), Judgment of 20 January 2021, EU:C:2021:39; [2021] 4 C.M.L.R. 13.
[220] This requires an EU institution whose act is annulled to implement the relevant court judgment.
[221] *European Commission v Printeos SA* (C-301/19 P), EU:C:2021:39 at [58].

interest" (claimed in Printeos' pleading) to "default interest" (claimed by Printeos in the oral hearing following the GC's question to clarify the issue) was a mere application of the legal characterisation which appeared appropriate to the alleged facts. It was not an alteration in the nature or substance of Printeos' written claims.[222]

Second, the ECJ rejected the EC's allegations that art.266 TFEU had been misinterpreted and that there was no absolute and unconditional obligation to pay default interest to Printeos. The Court recalled that the right of restitution arises where amounts are received in breach of EU law. In particular, if amounts were received pursuant to an EU measure declared invalid or annulled by the EU courts. Moreover, the first paragraph of art.266 TFEU is designed to provide compensation at a standard rate for the loss of enjoyment of the monies owed.[223]

The Court added that, in the event that the interest yielded (from investments made by the EC) while the EC held the principal amount of a fine was equal to or greater than the default interest payable on the principal amount, the EC would not be required to pay default interest. However, if the interest yielded was lower than the default interest payable (or if there were no interest because the return on the capital invested had been negative), the EC had an obligation to pay the difference between the amount of "interest yielded" and the amount of default interest owed, for the period between when Printeos had paid the fine and repayment of that principal amount.

As a result, in this case since there had been no interest yielded while the EC held the fine paid, the ECJ considered that the GC had correctly held that the EC was required to repay the fine together with the default interest. Consequently, the GC's characterisation of the interest due as default interest was correct.[224]

Third, the ECJ rejected the EC's claim that the principles of legality and legal certainty had been infringed, because (i) it was not required to pay Printeos interest on the amount of the fine to be repaid; and (ii) the interest was calculated on a different basis from that provided for in its 2014 cartel decision.

The Court noted that the EC is required to pay Printeos interest in accordance with the conditions laid down in art.90 of the EC's own Delegated Regulation 1268/2012,[225] and not as stated in its 2014 EC decision. Furthermore, according to art.266 TFEU, if a decision imposing a fine is annulled, the EC must repay the amount of the provisionally paid fine with default interest for the period from the payment date until the repayment date. The EC cannot adapt, in an individual decision imposing a fine provisionally paid, the conditions under which it will pay default interest in the event that this decision is annulled.[226]

Fourth, the ECJ dismissed the EC's allegations that its refusal to pay interest on the amount of the fine imposed on Printeos did not constitute a sufficiently serious breach of art.266 TFEU as it did not imply a specific or quantifiable loss for Printeos. The Court stated that, if an institution has only reduced (or even no) discretion, a mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach of EU law capable of giving rise to the EU's non-contractual liability. In this case, the EC was required to repay Printeos

[222] *European Commission v Printeos SA* (C-301/19 P), EU:C:2021:39 at [52]–[60].
[223] *European Commission v Printeos SA* (C-301/19 P) EU:C:2021:39 at [66]–[68].
[224] *European Commission v Printeos SA* (C-301/19 P)EU:C:2021:39 at [71]–[78].
[225] [2012] OJ L362/1.
[226] *European Commission v Printeos SA* (C-301/19 P)EU:C:2021:39 at [90]–[96].

both: (i) the amount of the fine paid; and (ii) the default interest. The EC's failure to pay such interest, resulted in Printeos suffering a loss equal to the amount of interest not received.[227]

The cross-appeal

In its cross-appeal, Printeos claimed that the EC also had to pay default interest *from the date that it had appealed seeking such interest* until the EC fully paid the default interest (i.e. not just from the date of the GC's judgment). In other words, interest for a longer period, including compound interest. The ECJ agreed and awarded default interest on the €184,592 from when Printeos had applied for it.

First, the Court noted that the GC had rejected Printeos' claim without any reasons, and wrongly relied on *Gascogne*,[228] which was of a different nature insofar as it granted *compensatory interest* from the date on which the action was brought, so that the award of default interest for the same period was not justified. The Court added that in *Gascogne* the ECJ found that no particular circumstances in that case justified paying compound interest, but that did not imply that compound interest was excluded in every case in which an EU institution must pay.[229]

Second, the ECJ noted that the EC's obligation to include default interest on the principal amount of the fine when repaid stemmed both from art.266 TFEU and the ECJ's case-law.

The Court found that the specific circumstances of the case justified the default interest on the principal amount being compounded. In particular, the ECJ noted that the EC unlawfully refused to pay such interest and confined itself to the repayment of the fine, even though Printeos had clearly reminded it of its obligation and requested both the repayment of the fine, and the payment of default interest. The ECJ also stated that, in the event that no compound interest were to be awarded, Printeos would not be compensated for the loss of enjoyment of the amount of interest to which it was entitled.[230]

Goldman Sachs—Power Cables

In January 2021, the ECJ dismissed Goldman Sachs' further appeal against the GC ruling upholding the EC's decision in the *Power Cables* case, in which the EC had held Goldman Sachs liable for the infringement, with others.[231]

It may be recalled that the EC took its *Power Cables* decision in 2014, imposing some €302 million in fines on 11 producers of high-voltage underground and submarine power cables.[232] The EC found that European, Japanese and Korean producers of such cables had entered into a worldwide market-sharing agreement, save for the United States. In addition, the European producers of such cables had a market-sharing agreement within Europe. The EC found that some 60% of

[227] *European Commission v Printeos SA* (C-301/19 P)EU:C:2021:39 at [101]–[106].
[228] *European Commission v Printeos SA* (C-301/19 P) EU:C:2021:39 at [117]–[120].
[229] *European Commission v Printeos SA* (C-301/19 P)EU:C:2021:39 at [120]–[121].
[230] *European Commission v Printeos SA* (C-301/19 P) EU:C:2021:39 at [122]–[126].
[231] With thanks to Álvaro Mateo Alonso. *Goldman Sachs Group v European Commission* (C-595/18 P), Judgment of 27 January 2021, EU:C:2021:73; [2021] 4 C.M.L.R. 16.
[232] *Power Cables* (AT.39610), EC Decision of 2 April 2014. The EC's summary is in [2014] OJ C319/10; the non-confidential version of the decision is available on the EC's website.

worldwide projects were allocated to European producers and 40% to Asian producers. The infringement had lasted some 10 years from 1999.

The EC sanctioned not only the companies directly involved and their industrial owners, but also an investment firm, Goldman Sachs.

Between July 2005 and January 2009, Goldman Sachs indirectly held, through GS Capital Partners V Funds and others, shares in Prysmian SpA and its wholly owned subsidiary, Prysmian Cavi e Sistemi Srl (together, "Prysmian"), one of the cartel members.

Goldman Sachs held equity in Prysmian between 100% and 84.4% until May 2007, when some of Prysmian's equity was offered to the public through an initial public offering ("IPO"), and Goldman Sachs' shareholding fell to 31.69%.

Although there was no evidence that Goldman Sachs (or its direct intermediaries) were involved in the cartel, Goldman Sachs was held jointly and severally liable for €37 million of the €104.6 million fine imposed on Prysmian, proportional to its four-year investment in Prysmian.

In July 2018, the GC had dismissed Goldman Sachs appeal (and all others appeals) against the EC decision.[233]

The main points of interest of the ECJ ruling are as follows:

First, Goldman Sachs reargued that it should not be liable for its investment in Prysmian when it owned only 84%–91% of Prysmian. In such a case, the presumption of decisive influence based on 100% share ownership should not apply.

The ECJ disagreed, upholding the GC ruling that the EC was correct to presume that Goldman Sachs exercised decisive influence over Prysmian because it held 100% of *the voting rights* over Prysmian. The ECJ broadened the presumption of "*decisive influence*" over a company beyond the settled case-law based on shareholding, ruling that "a parent company which holds all the voting rights" is "in a similar situation to that of a company holding all or virtually all the capital of the subsidiary, so that the parent company is able to determine the subsidiary's economic and commercial strategy".[234]

Second, the ECJ did not accept that the GC had erred in its review of public statements by Prysmian's Board of Directors' as to their independence. The Court noted that the GC had just found that they were not enough to reverse this presumption, in the absence of concrete evidence supporting them.[235]

Third, the ECJ endorsed the GC's assessment of the factors that the EC cited to show actual exercise of Goldman Sachs' decisive influence over Prysmian's commercial activities during its investment (both pre- and post-IPO, when Goldman Sachs' shares fell to 31.69%), noting that such influence could be inferred from a body of consistent evidence, even if individual pieces of evidence, by themselves, were insufficient to establish such influence.[236]

Amongst the factors reviewed, one is of particular interest because it shows how far-reaching the evaluation is. One factor cited was Goldman Sachs' links with at least 50% of the Directors, where for some of the Directors, the links were inferred from the fact that they had rendered "*previous advisory services*" to, or had

[233] *Goldman Sachs Group Inc v European Commission* (T-419/14), Judgment of 12 July 2018, EU:T:2018:445.
[234] *Goldman Sachs Group v European Commission* (C-595/18 P) EU:C:2021:73. at [35].
[235] *Goldman Sachs Group v European Commission* (C-595/18 P) EU:C:2021:73. at [52].
[236] *Goldman Sachs Group v European Commission* (C-595/18 P) EU:C:2021:73. at [90].

"*consultancy agreements*" with Goldman Sachs. Goldman Sachs argued that such "links" only existed if there was an "accumulation of posts" between the parent company and the company invested in. The Court disagreed.[237]

The ECJ ruling serves to underline that the test of "decisive influence" in control issues is not a formal one tied to shareholding alone, it is a substantive one, assessed in the light of all relevant circumstances. "Decisive influence" is also possible from a position of minority shareholding, if other relevant factors apply. One issue to check is the extent of voting rights.

Box 11

- **Court Cases—Cartel Appeals**
  - *Steel Abrasives—Pometon*
    - If the EC takes a settlement decision, it can only include references to a non-settling undertaking, if those references are *necessary to show the liability of those settling*
    - The EC *has to make it clear that there is no finding of infringement as regards the non-settling party*
    - So that, overall, there is no pre-judgment of the non-settling party's situation (applying *Karaman/Germany*)
  - *Retail Food Packaging—Italmobiliare*
    - Immunity is not a moving queue where if the "first in" fails to cooperate, the "second in" takes its place
    - If a company has immunity for providing information allowing the EC to do a targeted inspection that is enough
      - No need to see if its information was the first to allow the EC to prove the infringement
    - The position is similar as regards leniency fine reduction bands; the key is who is first to provide information of significant evidentiary value
  - *Battery recycling—Recylex*
    - Partial immunity is based on compelling evidence showing new facts about the gravity or duration of a cartel

Pometon—Steel Abrasives

In March 2021, the ECJ gave an important ruling on how the EC should deal with a hybrid settlement in cartel cases (i.e. when not all alleged infringers decide to settle with the EC, so there is potentially a first settlement decision; and then a second decision after the EC's ordinary procedure).[238]

Background

In 2013, the five alleged parties to a cartel as regards coordination of pricing of steel abrasives engaged in settlement discussions with the EC. However, in January 2014, one of them, Pometon, decided to withdraw from the settlement procedure. In April 2014, the EC took a settlement decision as regards the other four alleged

[237] *Goldman Sachs Group v European Commission* (C-595/18 P) EU:C:2021:73. at [93]–[95].

[238] With thanks to Édouard Bruc. *Pometon SpA v European Commission* (C-440/19 P) Judgment of 18 March 2021, EU:C:2021:214; [2021] 5 C.M.L.R. 1.

cartelists.[239] Then, in December 2014, the EC sent Pometon an SO and, in May 2016, the EC adopted an infringement decision as regards Pometon.[240]

The EC found that Pometon, as well as the other cartel participants: (i) had introduced a uniform method of calculation enabling them to achieve a coordinated increase in the price of steel abrasives based on scrap metal price indices; and (ii) agreed to coordinate their behaviour as regards selling prices of steel abrasives to individual customers, in particular by undertaking not to compete with each other by means of price reductions.

Pometon appealed. In 2019, the GC rejected most of the pleas, but partially annulled the decision, reducing the fine imposed on Pometon to €3.8 million, instead of €6.19 million.[241]

Pometon appealed further to the EC arguing essentially three things:

(i) infringement of the presumption of innocence and the principle of fair trial, and/or the right to equal treatment;
(ii) that the GC had reversed the burden of proof by suggesting that Pometon had to show distancing from the cartel in a period of no contacts; and
(iii) that the GC's fine setting had infringed the principle of equal treatment.

The ECJ's judgment The ECJ rejected the *first "lack of impartiality" claim*.

The Court recognised that under art.41 of the Charter of Fundamental Rights (CFR), every person has the right to have his or her affairs handled impartially by the institutions of the EU.[242] The presumption of innocence also constitutes a general principle of EU law, laid down in art.48(1) of the Charter.

The ECJ also noted that the principle of the presumption of innocence is infringed if a judicial decision or a statement by a public official concerning a person charged with a penal offence contains a clear declaration, in the absence of a final conviction, that the person concerned has committed the crime in question.[243] Attention must therefore be paid to the choice of words by the judicial authorities, the particular circumstances in which they were made and the nature and context of the proceedings at issue.[244]

However, the Court also noted that in complex criminal proceedings involving several persons who cannot be tried together, references to the participation of third persons who may later be tried separately, may be indispensable for the assessment of the guilt of those who are on trial separately.[245]

The Court referred, in particular to, the case-law of the European Court of Human Rights (*Karaman v Germany*) and its own case-law on the CFR (*AH*, C-377/18).[246] The Court noted that, on this case-law, if facts related to the involvement of third

[239] *Steel Abrasives* (AT.39792), EC Decision of 2 April 2014.
[240] *Steel Abrasives* (AT.39792), EC Decision of 25 May 2016.
[241] *Pometon v European Commission* (T-433/16) Judgment of 28 March 2019, EU:T:2019:201. See Ratliff, "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 1", I.C.C.L.R. [2020] 109, 146.
[242] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [58].
[243] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [62].
[244] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [62].
[245] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [63].
[246] *Karaman v Germany* , Case No. 17103/10, ECtHR Judgment of 27 February 2014; *Criminal Proceedings against AH* (C-377/18), Judgment of 5 September 2019, EU:C:2019:670; [2019] 4 W.L.R. 128.

parties have to be introduced, the court should avoid giving "more information than necessary for the assessment of the legal responsibility of those persons who are accused".

In addition, the reasoning of judicial decisions

> "must be worded in such a way as to avoid a potential pre-judgment about the guilt of the third parties concerned, capable of jeopardising the fair examination of the charges brought against them in the separate proceedings."[247]

This approach was applicable *mutatis mutandis*, where the EC adopts a hybrid settlement.[248]

Interestingly, AG Hogan considered that some references in the EC's settlement decision were not essential to the assessment of the guilt of the defendants, and overall raised doubts as to possible pre-judgment of Pometon's case on the part of EC.[249]

For example, in recital 39 of the settlement decision, the EC stated that

> "the participants of the meeting of 3 October [expressly referred to in recital 38 as Winoa, Ervin and Pometon] were subsequently in contact with the two German steel abrasives producers, MTS and Würth, with a view to including them within the new scrap surcharge calculation system."

The AG considered that use of the term "*include*" suggested that the three others were already participating in this system.[250]

However, the ECJ disagreed. The Court noted that, in its review the GC had said that references to certain conduct of Pometon in the settlement decision could "be objectively relevant to the description of the origin of the cartel as a whole",[251] rather than finding them "necessary" for the case against those settling. However, the Court was clear that the GC had applied the necessity test.[252] Moreover, the EC did not categorise Pometon's conduct as anti-competitive conduct.[253] The EC had also included express statements in its settlement decision that its decision did not concern Pometon (in line with *Karaman v Germany*).[254]

According to the ECJ, the GC was right when it considered that references to Pometon were intended solely to clarify the development over time of the cartel in which the four undertakings party to the settlement procedure participated. In essence, considering that the references were necessary to show the infringement *of the others which had settled*.[255]

Second, the ECJ also rejected Pometon's claim *on the burden of proof*. The issue here was that there was a period of no contacts between the cartel participants in the infringement which the EC had found. The EC considered that Pometon had

[247] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [63].
[248] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214at [64]–[66].
[249] Opinion of AG Hogan of 8 October 2020, *Pometon SpA v European Commission* (C-440/19 P) EU:C:2020:816 at [70]–[81].
[250] Opinion of AG Hogan of 8 October 2020, *Pometon SpA v European Commission* (C-440/19 P) EU:C:2020:816 at at [75].
[251] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [77]–[81].
[252] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [81].
[253] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [75].
[254] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [69] and [73].
[255] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [84].

still participated continuously in that period, and had not shown that it had not. Pometon argued that was an unlawful reversal of the burden of proof.

The ECJ disagreed, upholding the GC's approach finding that, given the specific characteristics of the cartel, the absence of collusive contacts between Pometon and the other parties during the period in question did not raise the inference that Pometon had interrupted its participation in that cartel. Those characteristics were: the automatic application of the scrap surcharge; and the lack of structured organisation of contacts between the participants to implement coordination in respect of individual customers, with ad hoc contacts taking place only in the event of disagreement.[256] The Court found, in other words, that the EC had made out its case of continuous infringement and it *was* up to Pometon to show why that was wrong.

Third, Pometon appealed the fine as set by the GC, alleging infringement of the principle of equal treatment. Here the ECJ agreed.

The Court noted that the GC was bound, when exercising its unlimited jurisdiction, by the requirement to state reasons and the principle of equal treatment. When the amount of a fine imposed is determined by the Court, the exercise of unlimited jurisdiction cannot result in discrimination between undertakings which have participated in an infringement of the competition rules.

When comparing Pometon's situation with that of the other cartel participants, the GC examined: (i) Pometon's individual liability for participating in the cartel; (ii) the actual impact of its unlawful conduct on price competition; and (iii) the size of the undertaking based on its total turnover. The GC granted Pometon an exceptional reduction of 75% on its fine.

However, Pometon argued that such a rate of its reduction was identical to that granted to Winoa in the settlement decision although, according to the GC: (i) Pometon had "a more limited role overall in the cartel" than Winoa; (ii) its influence in the infringement was substantially less than that of Winoa; and (iii) its turnover did not reach one third of that of Winoa.[257]

Pometon argued that the GC had given too much weight to Pometon's larger size.[258]

The ECJ agreed and reduced the fine imposed on Pometon on the basis that the GC had not explained how the fine reduction that it awarded to Pometon was consistent with the principle of equal treatment. The Court then reassessed Pometon's fine at €2.6 million instead of the €3.87 million in the GC's judgment.

The impartiality assessment is clearly important, insofar as it upholds the EC's approach, yet all this shows how difficult it is to deal with the issue in practice.

Italmobiliare—Retail Food Packaging

In April 2021, the ECJ dismissed the appeal of Italmobiliare (and others) ("Italmobiliare") of the GC judgment in the *food packaging* cartels case.[259] In doing so, the ECJ rejected Italmobiliare's claim that a leniency applicant automatically

[256] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [117].
[257] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [150].
[258] *Pometon SpA v European Commission* (C-440/19 P), EU:C:2021:214 at [125].
[259] With thanks to Geoffroy Barthet. *Italmobiliare SpA v European Commission* (C-694/19 P), Judgment of 15 April 2021, EU:C:2021:286.

could claim immunity or move up in the cooperation ranking by taking the higher position of another leniency applicant that would have ceased to be eligible for that benefit.

The background was as follows: In June 2015, the EC fined eight manufacturers and two distributors of retail food packaging trays a total of €115.87 million for having participated in at least one of five separate cartels. The EC found that the members of the cartels fixed prices and allocated customers of polystyrene foam or polypropylene rigid trays in five different regions/markets, namely France, Italy, South-West Europe (SWE), North-West Europe (NWE) and Central and Eastern Europe (CEE). Polystyrene foam and polypropylene rigid trays are used for packaging food sold in shops or supermarkets, for products such as meat, fish, cake and cheese.[260]

The cartel was revealed by Linpac's application for leniency. The information and evidence provided by Linpac was considered sufficient to enable the EC to carry out a series of onsite inspections in June 2008. A second undertaking, Vitembal, subsequently submitted an application for immunity or a fine reduction. Italmobiliare followed shortly after Vitembal.

In light of the information submitted by the leniency applicants, the EC decided to grant immunity of fines for all markets to Linpac. Vitembal was granted a "first place" 30-50% leniency fine reduction for Italy, SWE, NWE and France; and Italmobiliare was granted a "first place" 30–50% leniency fine reduction for CEE and "second place" 20–30% leniency fine reduction for Italy and France.

Italmobiliare appealed. In July 2019 the GC rejected its claims against the EC decision.[261]

Then, in September 2019, Italmobiliare appealed further to the ECJ. Italmobiliare argued that Linpac did not end its involvement in the cartel immediately following its application for leniency,[262] in breach of point 12(b) of the EC Leniency Notice. Therefore, Linpac should not have been granted immunity of fines and Italmobiliare should be moved up in the ranking for leniency, i.e. receiving full immunity for the CEE market and a "first place" fine reduction for Italy and France.[263]

The ECJ disagreed, since under point 8 of the EC Lenieny Notice, an undertaking can be granted immunity only if it "is the first to submit information and evidence".[264]

According to the ECJ, the GC was right to consider that Linpac was the first undertaking to submit the relevant information and evidence to the EC, allowing it to carry out a targeted inspection in connection with the cartel (i.e. under point 8(a) of the EC Leniency Notice).[265] The ECJ added that, even if Linpac had not benefitted from the immunity from fine because it did not end its participation in the infringement, it would not cease to be the first undertaking that submitted information and evidence within the meaning of point 8 of the EC Leniency Notice.[266] So Italmobiliare's position was not affected and it could not claim that it was the first undertaking to gain immunity from fines.

[260] *Retail Food Packaging* (AT.39563), EC Decision of 24 June 2015.
[261] *Italmobiliare v European Commission* (T-523/15), Judgment of 11 July 2019, EU:T:2019:499.
[262] *Italmobiliare SpA v European Commission* (C-694/19 P), EU:C:2021:286 at [75].
[263] *Italmobiliare SpA v European Commission* (C-694/19 P), EU:C:2021:286 at [76].
[264] *Italmobiliare SpA v European Commission* (C-694/19 P), EU:C:2021:286 at [77].
[265] *Italmobiliare SpA v European Commission* (C-694/19 P), EU:C:2021:286 at [78].
[266] *Italmobiliare SpA v European Commission* (C-694/19 P), EU:C:2021:286 at [79].

The ECJ also noted that Italmobiliare did not contest that the EC's inspection was enabled by the information submitted by Linpac. Italmobiliare only argued that the GC had held mistakenly that its application did not meet the conditions of point 8(b) of the EC Leniency Notice (i.e. as the first to allow the EC to show an infringement). Italmobiliare argued that the EC did not have sufficient information to find an infringement of art.101 TFEU before its application and that, consequently, Italmobiliare was the first to meet the terms of that provision.[267]

However, the Court disagreed, noting that even if correct, the argument was ineffective. Linpac was still the first undertaking to submit information and evidence which enabled the EC to carry out a targeted inspection. That was enough.[268]

Recylex—Battery recycling

In June 2021, the ECJ dismissed Recylex' appeal of the GC's judgment in the *car battery recycling* cartel case.[269]

The background was as follows: In July 2012, Johnson Controls Inc. applied for immunity of fines. Later Eco-Bat and Recylex applied for immunity and, failing that, for a reduction of fine, in September and October 2012 respectively.

In the proceedings, the EC informed Eco-Bat and Recylex of its provisional conclusion that the evidence which they had submitted represented significant added value. Eco-Bat and Recylex would be granted a 30–50% and 20–30% fine reduction respectively. In February 2017, the EC found that the recycling companies participating in the cartel sought to increase their profit margin by: (i) coordinating prices for the purchase of scrap lead-acid car batteries from scrap dealers or traders; and (ii) restricting competition for their purchase. The EC fined Recylex €26.7 million, with a 30% fine reduction.[270]

Recylex appealed. However, in May 2019, the GC rejected its arguments.[271] Recylex then appealed further to the ECJ, essentially arguing that:

(i) it was entitled to claim *partial immunity*, i.e. a 100% reduction of the fine linked to "additional facts" which were proved through its leniency application (under the third para. of point 26 of the EC Leniency Notice); and

(ii) *it should take up Eco-Bat's position in the leniency ranking* (under the first para. of point 26 of the EC Leniency Notice) as the first applicant for a reduction, leading to a fine reduction in the 30–50% bracket (instead of in the 20–30% bracket).

On the *first argument for partial immunity*, Recylex argued that the GC was wrong to consider that it could not claim partial immunity on the ground that the EC was already aware of the existence of a certain meeting and of the territorial scope of the cartel (matters on which Recylex gave evidence). Recylex argued that

[267] *Italmobiliare SpA v European Commission* (C-694/19 P), EU:C:2021:286 at [80].

[268] *Italmobiliare SpA v European Commission* (C-694/19 P), EU:C:2021:286 at [81].

[269] With thanks to Geoffroy Barthet. *Recylex SA v European Commission* (C-563/19 P), Judgment of 3 June 2021, EU:C:2021:428; [2021] 5 C.M.L.R. 8.

[270] *Car battery recycling* (AT.40018), EC Decision of 8 February 2017, corrected on 6 April 2017.

[271] *Recylex SA v European Commission* (T-222/17), Judgment of 23 May 2019,EU:T:2019:356; [2019] 5 C.M.L.R. 3, see Ratliff, "Major Events and Policy Issues in EU Competition Law 2018-2019: Part 1", I.C.C.L.R. [2020] 109, 151.

whether the EC knew about those additional facts was irrelevant. It was entitled to claim that immunity because the EC was not in position to *prove* them.

However, the ECJ disagreed. The Court stated that for partial immunity a cartelist must provide *compelling evidence, enabling it to establish new facts regarding the gravity or duration of the infringement*. This did not cover cases where the cartelist merely provided information which strengthened the evidence regarding the existence of the infringement.[272] Partial immunity is reserved to companies that adduce evidence concerning new facts previously unknown to the EC.[273] Also, contrary to Recylex's claim, there was no need to compare the evidential value of the information it provided with that of the other parties' information which was already provided.[274]

On the *second argument for a change in cooperation ranking*, the Court held that there is no such change where a leniency applicant fails to cooperate adequately with the EC. Recylex argued that Eco-Bat, the first company to provide evidence with significant added value, failed to fulfil its duty of cooperation. So, according to Recylex, it should take over Eco-Bat's first place in the ranking and benefit from the 30–50% reduction of the fine given to the first company to provide evidence, instead of the 20–30% reduction of fine that it was granted by the EC as the second company to provide evidence with significant added value.[275] Recylex argued that undertakings which fail to cooperate should be disregarded in the cooperation ranking.[276]

However, again the ECJ disagreed. The Court held that if an undertaking is excluded from a reduction of its fine, that cannot have the result that undertakings which have produced evidence later replace that undertaking in the chronological ranking in point 26 of the EC Leniency Notice.[277] There is no provision for a change in the cooperation ranking under the EC Leniency Notice.[278] Point 26 of the Leniency Notice lays down *only* a criterion of a chronological nature in the fine reduction bands. In other words, the fine reduction band depends *exclusively* on the order in which leniency applicants have provided the EC with evidence representing significant added value.[279]

The Court noted that the aim of the leniency programmes was to incentivise companies to cooperate as quickly and effectively as possible. Allowing a change in ranking (affecting the quickest and the less quick companies) would be detrimental to the objective of speeding up the dismantling of cartels.[280]

Capacitors

In September 2021, the GC ruled on appeals brought by five companies which the EC had fined in its 2018 *capacitors* cartel decision. The GC dismissed the appeals.[281]

[272] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [37].
[273] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [38].
[274] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [40].
[275] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [52].
[276] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [53].
[277] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [56].
[278] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [57].
[279] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [57].
[280] *Recylex SA v European Commission* (C-563/19 P), EU:C:2021:428 at [59].
[281] With thanks to Itsiq Benizri, Virginia Del Pozo and Su Şimşek. *Nec v European Commission* (T-341/18) [2021] 5 C.M.L.R. 18; *Nichicon Corp v European Commission* (T-342/18) [2021] 5 C.M.L.R. 19; *Tokin v European Commission* (T-343/18) [2021] 5 C.M.L.R. 20; *Rubycon v European Commission* (T-344/18) [2022] 4 C.M.L.R. 1;

It may be recalled that in March 2018, the EC imposed fines totalling some €254 million on nine Japanese undertakings, which were producers of electrolytic capacitors (Elna, Hitachi Chemical, Holy Stone, Matsuo, NEC, Nichicon, Nippon Chemi-Con and Rubycon) for exchanging information on prices, supply and demand, as well as for entering into and monitoring price agreements between 1998 and 2012. In October 2021, the EC published the provisional non-confidential version of its 2018 decision in this case on its website.[282]

We focus below on the main points of interest in the judgments.

Repeated infringement

In *NEC*'s case, the EC found that at the time when the *electrolytic capacitors* cartel was ongoing, NEC already had been held liable for its involvement in the *DRAMs* cartel. NEC participated in the electrolytic capacitors cartel through its subsidiary Tokin for almost two years after the fining decision in the *DRAMs* cartel was adopted.[283] As a result, the EC imposed on NEC a 50% increase in the amount of the fine for repeated infringement.

NEC appealed. However, the GC upheld the EC's approach.

The GC noted that factors that are specific to a parent company may justify its liability being assessed differently to the liability of its subsidiary, even in the event that the parent's liability is based exclusively on the unlawful conduct of the subsidiary.[284] In this case, the aggravating circumstance corresponded to a circumstance specific to NEC's situation, which did not apply to Tokin, its subsidiary. The GC therefore found that it was justified for the EC to assess NEC's and Tokin's liability differently.[285]

The GC also agreed with the EC's conclusion that NEC had purchased Tokin which had been in the cartel for some time and *continued the unlawful conduct for some two years* after NEC had received the first fine in the *DRAMs* cartel. This showed a tendency on NEC's part not to draw the appropriate conclusions from a finding that it had infringed the competition rules.

According to the GC, this was not contradicted by the fact that NEC, together with Tokin, submitted a leniency application; or that NEC was held liable only as parent company in this cartel.[286]

Single and continuous infringement, public distancing

In *Nichicon*'s case,[287] that company claimed that the EC had failed to establish its participation in the single and continuous infringement (i) before November 2003 in the light of the "significant" delays between some of those meetings,[288] and (ii) after November 2008, the date of the last "Cost Up" or "Condenser Up" meetings

Nippon Chemi-Con Corporation v European Commission (T-363/18) [2022] 4 C.M.L.R. 2; Judgments of 29 September 2021. ECLI references included with particular cases below. GC Press Release 164/21, 29 September 2021.

[282] *Capacitors* (AT.40136), EC Decision of 21 March 2018.

[283] *Nec Corp v European Commission* (T-341/18), Judgment of 29 September 2021, EU:T:2021:634; [2021] 5 C.M.L.R. 18.

[284] *Nec Corp v European Commission* (T-341/18), EU:T:2021:634 at [84].

[285] *Nec Corp v European Commission* (T-341/18), EU:T:2021:634 at [89].

[286] *Nec Corp v European Commission* (T-341/18), EU:T:2021:634 at [108]–[109].

[287] *Nichicon Corporation v European Commission* (T-342/18), Judgment of 29 September 2021, EU:T:2021:635; [2021] 5 C.M.L.R. 19.

[288] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [361].

("CUP meetings") held between 2006 and 2008, after which the participants viewed Nichicon as an external competitor.[289]

The GC disagreed. For the period before November 2003, the GC noted that Nichicon participated in more than 21 multilateral meetings from its participation in the cartel in June 1998 to November 2003, which were pursuing a single economic aim.[290] The GC concluded that a 10-month gap between the meetings in that period could not be considered as an interruption of the infringement in which Nichicon participated for almost 12 years.[291]

As for the period after November 2008, the GC noted that Nichicon had not shown its "firm and unambiguous" disapproval of the cartel by publicly distancing itself from it. It was not apparent that Nichicon adopted competitive conduct, or that it clearly and substantially refused to fulfil its obligations relating to the implementation of the cartel to the point of disrupting its operation. According to the GC, it was not sufficient that Nichicon may have been less willing to share competitively sensitive information or that it may have competed more aggressively.[292]

Nichicon claimed that it publicly distanced itself from the cartel by communicating its withdrawal from "Aluminium Tantalum Capacitors" group meetings to the other participants.[293] The GC disagreed, noting that Nichicon continued to participate in numerous other anti-competitive meetings and contacts.[294]

Further, the GC took into account that an individual who represented Nichicon during several other anti-competitive meetings was invited to join a meeting later on. The GC found that this invitation directly contradicted the claim that Nichicon publicly distanced itself from the cartel and that the other participants understood this.[295] Furthermore, according to the GC, the fact that Nichicon did not make a leniency application encouraged the continuation of the cartel and compromised its discovery.[296]

Ne bis in idem and non-EU Member State fines

The GC also rejected Nichicon's argument that the EC infringed the *ne bis in idem* principle and the principle of proportionality by imposing an additional amount to ensure a deterrent effect, in view of the substantial fines imposed in non-EU Member States.[297] The GC noted that this principle does not apply since the proceedings conducted by non-EU Member States and the EC do not pursue the same objectives. Notably, insofar as the EU proceedings are directed to protecting competition in the EEA, whereas other proceedings are concerned with markets in non-EU Member States.[298]

[289] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [375] and [381].
[290] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [368]–[369].
[291] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [371].
[292] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [384]–[385].
[293] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [395].
[294] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [401].
[295] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [404].
[296] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [405].
[297] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [509].
[298] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [514]–[515].

However, the EC could take into account the fines imposed by the authorities of a non-EU Member State *at its discretion* in setting fines for infringements of EU competition law.[299]

Determination of the reference year for fining

In *Tokin*'s case,[300] that company claimed that the EC made an error in using the last full business year of participation in the cartel as the reference period to calculate the basic amount of the fine imposed on it.[301] According to Tokin, that year was not representative of its size and economic power or of the scale of the infringement as its sales were exceptionally high in that year.[302]

The GC noted that it was common ground that the EC applied the rule laid down in point 13 of the EC Fining Guidelines, and rejected Tokin's argument, finding that there were no special circumstances which would require the EC to derogate from the rule.[303]

Tokin also argued that the EC created a likelihood of discrimination by using a different methodology to calculate the basic amount of the fines imposed on some of the participants.[304]

The GC rejected this, noting that the EC used the criterion set out in the EC Fining Guidelines (i.e. the last business year of participation in the infringement) for all the cartel participants with the exception of Elna and Nippon Chemi-Con.[305] That may have led to the use of different reference years in view of the different infringement periods of the cartelists. However, the EC had been consistent in its application of the principle and, in fact, the turnovers of the undertakings were comparable. The method did not lead to an infringement of the principles of non-discrimination and equal treatment.[306]

For Elna and Nippon Chemi-Con the EC considered the value of sales during the last full business year in which those undertakings sold the capacitors concerned to avoid underestimating the economic significance of the infringement.[307] The GC considered that difference objectively justified.[308]

Determination of the gravity percentage

Tokin also claimed that the EC should have taken its non-participation in the CUP meetings in calculating the gravity percentage of its infringement, rather than as a mitigating circumstance.[309]

The GC considered that the EC has a discretion to take into account the individual conduct of an undertaking when assessing the gravity of the infringement or when

[299] *Nichicon Corporation v European Commission* (T-342/18), EU:T:2021:635 at [519].
[300] *Tokin Corp. v European Commission* (T-343/18), Judgment of 29 September 2021, EU:T:2021:636 ; [2021] 5 C.M.L.R. 20.
[301] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [49].
[302] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [52].
[303] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [64]–[67].
[304] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [95].
[305] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [110].
[306] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [111]–[114].
[307] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [109].
[308] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [116]–[118] and [120].
[309] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [128].

adjusting the basic amount of the fine.[310] In any event, the GC rejected Tokin's argument that its participation in the cartel was less significant considering its non-participation in the CUP meetings. Since Tokin participated in the vast majority of the multilateral meetings, the GC concluded that its absence from the CUP meetings did not alter key factors going to gravity, e.g. the nature or geographic scope of its infringement.[311]

In *Rubycon*'s case,[312] that company claimed that the EC should have granted it partial immunity from fines because it submitted evidence concerning cartel meetings that enabled the EC to increase the gravity of the infringement. Rubycon's point was that it had given evidence as regards certain meetings. Although the EC had therefore reduced the duration multiplier for the fine of duration on Rubycon, as partial immunity,[313] Rubycon argued that it should have had a benefit in terms of the *gravity percentage* in the EC's fining assessment, insofar as the EC should not have held Rubycon liable for all aspects of the infringement.[314]

Further, Rubycon argued that it had enabled the EC to increase the gravity finding in the infringement[315] by showing that there were price agreements, and it had offered evidence of a reporting mechanism and a monitoring mechanism.[316]

The GC disagreed. The Court noted that partial immunity from fines concerns only the amount of the fine. Where the conditions for benefiting from partial immunity are satisfied, the only consequence is that the EC cannot rely on the evidence in question to determine the gravity or the duration of the leniency applicant's infringement. In that situation, the EC does not take those facts into account when setting the amount of the fine. However, this had no impact on the extent of Rubycon's liability for the infringement.[317]

The GC also found that Rubycon's evidence had not offered elements which had an impact on the gravity of the infringement, since the characterisation of each unlawful form of conduct as an agreement or concerted practice did add materially to the EC's findings.[318]

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

- European Court judgments on:
  - taking into account third party interests in art.9 commitment decisions (*Groupe Canal+*)
  - whether the essential facilities doctrine applies to decisions affecting access in regulated sectors (*Baltic Rail*, *Slovak Telekom*)
- Various EC decisions on cartels
- An EC decision fining unlawful collusion on *car emissions cleaning* for diesel passenger cars

[310] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [139]–[140].
[311] *Tokin Corp. v European Commission* (T-343/18), EU:T:2021:636 at [149].
[312] *Rubycon Corp. v European Commission* (T-344/18), Judgment of 29 September 2021, EU:T:2021:637; [2022] 4 C.M.L.R. 1.
[313] *Rubycon Corp. v European Commission* (T-344/18), EU:T:2021:637 at [26]–[27] and [83].
[314] *Rubycon Corp. v European Commission* (T-344/18), EU:T:2021:637 at [78].
[315] *Rubycon Corp. v European Commission* (T-344/18), EU:T:2021:637 at [85].
[316] *Rubycon Corp. v European Commission* (T-344/18), EU:T:2021:637 at [92].
[317] *Rubycon Corp. v European Commission* (T-344/18), EU:T:2021:637 at [87]–[89].
[318] *Rubycon Corp. v European Commission* (T-344/18), EU:T:2021:637 at [114].

- * where the EC also explained what technical cooperation *is* allowed
- A new decision on pay-for-delay (*Cephalon Teva—Modafinil*)
- An EC guidance letter on information exchange in *matchmaking events for vaccine cooperation*
- Various art.102 TFEU decisions
  - * e.g. *Aspen* on excessive pricing, *Google AdSense* re. online search advertising, *Broadcom* on exclusionary practices
- Selected policy issues, including the EU's Foreign Subsidies legislative proposal