European University Institute

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

EUI WORKING PAPERS

RSCAS 2020/62
Robert Schuman Centre for Advanced Studies
European Networking and Training for National Competition Enforcers (ENTraNCE)

European Networking and Training for National Competition Enforcers ENTraNCE for Judges 2019 Selected Case Notes

Edited by Pier Luigi Parcu and Giorgio Monti

European University Institute

Robert Schuman Centre for Advanced Studies

European Networking and Training for National Competition Enforcers (ENTraNCE)

European Networking and Training for National Competition Enforcers ENTraNCE for Judges 2019

Selected Case Notes

Edited by Pier Luigi Parcu and Giorgio Monti

EUI Working Paper **RSCAS** 2020/62

ISSN 1028-3625

Published in September 2020 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies, created in 1992 and currently directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21st century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

For more information: http://eui.eu/rscas

European Networking and Training for National Competition Enforcers (ENTraNCE for Judges)

This series of working papers is published in the context of ENTraNCE for Judges, a training programme for national judges involved in EU competition law. The training is organised by the RSCAS, with the financial support of the DG Competition of the European Commission. In the context of the training programme, selected judges from different EU Member States attend both online and residential training activities in Florence. Each year the training focusses on a different aspect of competition law enforcement that is relevant to the national judiciaries.

Information concerning the ENTraNCE for Judges training programme can be found at: **http://www.eui.eu/Projects/ENTRANCE/Home.aspx**

Each working paper includes the case notes written by the national judges participating in one edition of ENTraNCE for Judges. In the context of the training activities, each judge is requested to summarise and to comment on a national judgment that is related to the field of competition law. The working paper thus aims to increase the understanding of the challenges faced by the national judiciaries in enforcing national and EU competition in the context of the decentralised regime of competition law enforcement, which was introduced by Reg. 1/2003.

EUROPEAN NETWORKING AND TRAINING ENTraNCE FOR NATIONAL COMPETITION ENFORCERS

European Commission

Abstract

This working paper includes a collection of case notes written by those national judges who attended the European Networking and Training for National Competition Enforcers (ENTraNCE Judges 2019). The training programme was organised by RSCAS between November 2018 and October 2019, with the financial contribution of the DG Competition of the European Commission. The case notes included in the working paper summarise judgments from different EU Member States that relate to diverse aspects of competition law enforcement. The working paper thus aims to increase understanding of the challenges that are faced by the national judiciaries in enforcing national and EU competition in the context of the decentralised regime of competition law enforcement that was introduced by Reg. 1/2003.

Keywords

Competition law; Article 101 TFEU; Article 102 TFEU; Reg. 1/2003; judicial training, national judges.

Table of contents

Introduction

The cases annotated by the judges raise a wide range of legal and economic issues. The major theme that arises from these annotations is the increased use of the case law of the ECJ by national judges. If we compare these annotations with those of the first ENTRANCE course in 2011, we see that judges appear more familiar with EU case law and integrate it into their decisions. In addition some of the cases discussed below reveal that a number of disputes raise issues about the relationship between competition law and rules of national law and that at times the courts struggle with delineating the precise relationship between EU and national law. Below, we summarise each of the case notes so as to provide the reader with a quick guide to the main issues that are discussed by the judges.

Scope of Application of Competition Law

Judge Goda Ambrasaite discusses litigation in Lihuania concerning the fixing of notaries' fees by the Lithuanian Chamber of Notaires. The National Competition Authority considered that there had been an infringement of competition law insofar as the decision of the association of undertakings restricted price competition. On appeal, however, the Vlinius Regional Administrative Court quashed the decision of the competition authority. The appeal hinged on whether the Chamber of Notaries was acting as an undertaking or whether it was merely implementing state regulation. On the facts the court held that the ultimate power to set fees was with the Ministry of Justice. Thus, all that the Chamber did was provide recommendations. The court's finding is in line with the ECJ's case-law (*Arduino* and *Cipolla*).[1] However, just because the conduct is not an infringement of Article 101 TFEU, it remains arguable that the fees are an unjustified restriction on the freedom to provide services and thus a further challenge might be brought on the basis of Article 56 TFEU. The only difficulty is that this challenge can only be brought by private action in the national courts or by the Commission starting infringement proceedings. Compared to public enforcer by a competition authority, the former route is costly and the Commission does not initiate a large amount of proceedings. It would be desirable, in these contexts if more national competition authorities had advocacy powers to challenge state regulation that restricts competition.

Judge Ewa Stefanska discusses a case where the Polish Competition Authority dismissed a complain about exploitative abuse. The allegation was that a collecting society was licensing non-dramatic works at high fees and the agreement with the copyright holders gave them relatively small royalties. Combined these two acts gave the collecting society a larger revenue than if markets were competitive. However, the competition authority dismissed the complaint because the remuneration rates were set by the Copyright Commission and not by the collecting society. As with the case discussed above, the question was the extent to which the Copyright Commission was in fact setting the fees or whether it just rubber-stamped the recommendation of the collecting society. The court's view was that the collecting society was in fact the party who was setting the fees. It also noted that there had been an appeal to the Administrative Court which had quashed the decision of the Copyright Commission. On these facts, it was held that the Polish competition authority was not justified in dropping the case. This is an interesting judgment in two respects. First, as Judge Stefanska notes, it displays the complex interaction between intellectual property and competition law, secondly it is worth reflecting on the impact of the ECJ's judgment in *MEO* on cases like this.[2] In *MEO* the Portuguese collecting society set licensing fees and one factor that the court took into account was that if there was disagreement between it and a licensee then the fee would be set by arbitration. Here instead the decision on the fees could be

[1] *Cipolla and others*, Joined cases C-94/04 and C-202/04, EU:C:2006:758, *Arduino*, C-35/99, EU:C:2002:97

[2] *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência*, C-525/16, EU:C:2018:270

challenged ex ante once the Copyright Commission approved the fees. This reduces the economic power of the collecting society and so leads one to wonder if it holds a dominant position at all.

Judge Eric Mille discusses a decision about the rules set by the International Equestrian Federation (IEF), which organizes equestrian events and regulates the sport on behalf of national associations. The Belgian competition authority condemned a rule whereby an athlete who participated in a competition organized by another federation would face a temporary ban from participating in events organized by the IEF. It was felt this foreclosed market access to organisers of competing events, contrary to Article 101 TFEU. On appeal the issue arose whether the IEF was an association of undertakings whose rules might be justified by public interest considerations (along the lines of *Meca Medina*).[3] The national court recognized a number of public policy justifications that the IEF could invoke (i.e. the health of the horses and riders, the enforcement of anti-doping rules and it seems also timetabling considerations). However, it held that the IEF had not applied its rules in a proportionate manner and had favoured its events at the expense of those of other organisers. Based on the *MOTOE* judgment the court recalled that a sports regulator who is also in the market for the organization of the sports has a special responsibility not to foreclose market access to others who wish to organize competing sporting events.[4] It found that the complainants in this case had agreed to abide by the animal welfare and anti-doping rules of the IEF so excluding athletes from the events organized by competitors was disproportionate.

Horizontal Agreements

Judge Judit Szabó Zsoltné Banu discusses horizontal agreements to exchange information. The Hungarian competition authority condemned an agreement among contact lens sellers to conduct market research: they appointed a firm to conduct research on their behalf and each seller would provide it with information about sales. The agreement came to light when one of the participants made a leniency application and the competition authority condemned the agreement. On appeal, however, the decision was quashed because the competition authority had not examined the effects of the information exchange on the market. This judgment tracks closely the ECJ case-law as well as the Guidelines on Horizontal Agreements. One aspect that does not seem to have been considered is the nature of the information that the undertakings received from the marketing agency – this indeed is crucial to understand if the information exchange facilitates collusion or not.

Judge Gerald Ehgatner discusses a joint venture agreement whereby the two parents had tried to divide up the geographical market for their product (gloves for medical procedures). The question on appeal was whether the market division could be considered an ancillary restraint – subsidiary to the main agreement but necessary for its operation. The court, rightly, would have none of this. It is obvious that the clause that has been condemned here is harmful to competition. That one of the parties would not have entered into the joint venture without the agreement to segment markets is irrelevant for the puporses of Article 101(1). Perhaps, but this point does not seem to have been litigated, the parties could have tried to argue for an exemption under Article 101(3), but even here one would have struggled to explain why such a strong competition preventing restriction was necessary for the joint venture.

Judge Maja Valusnig discusses collusion in the market for bus transport that took place in 2011, before Croatia's accession to the EU. This looked like a simple collusion case. However, there has been a long judicial history with the Constitutional Court upholding appeals by the applicant. In the latest round reported here, the Administrative Court quashed the decision of the competition authority because the application of competition law appeared to clash with the legislation on road transport which appears to tolerate some cooperation among transport undertakings. This raises interesting issues about what it

[3] *Meca-Medina and Majcen v Commission*, Case C-519/04 P, EU:C:2006:492

[4] *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, C-49/07, EU:C:2008:376

is that the national law allows and how such rules can be compatible both with competition law but also with rules about the internal market. Arguably, unless national law requires cooperation among bus companies then there is nothing that national law can do to immunize an agreement by bus companies to share markets or fix fees.[5] It looks as if after this third trial in front of the Administrative Court, that the competition authority has not yet taken the case up again – given the lapse of time it may no longer be in the public interest to pursue such matters, but the Croatian parliament may want to review the national laws for compliance with EU Law, now that it has become a member state.

Vertical Agreements

Judge Sigita Rudėnaitė discusses a vertical agreement between Bionuovs, a producer of biofuel, and Vilniaus Energija, a major supplier of heating in the Vilnius region. This was an exclusive purchase agreement for a 5-year term and concerns were raised because of the high purchase price which was passed down to consumers. The buyer defended itself by saying that the supply contract was agreed following a public procurement procedure and only Bionuovos had participated. The tender had been reviewed by the Public Procurement Office and found it complaint with procurement law. As the learned judge explains in her case note this judgment is important because the courts agree that compliance with public procurement law is not a guarantee that the agreement is compatible with EU competition law – here the duration of the exclusivity agreement is problematic. As she explains in the future, the design of a tender should take into account the risk that the contract may restrict competition. The second important feature is how much of the litigation was spent on market definition, to try and examine if the agreement fell within the scope of the Block Exemption Regulation for Vertical Agreements. However, it might have first been useful to explore what the theory of harm was and whether the agreement was restrictive by object or effect.

Judge Renate Schohaj discusses what looks like a hub and spoke cartel orchestrated by Spar (a leading supermarket with 30% market share) which agreed prices with its suppliers of dairy products. The deal was designed to allow Spar to raise retail prices and in order to ensure that it could do so without losing sales, it asked suppliers to set recommended prices and to communicate these also to its rivals. A system was put in place to monitor retail prices. Unsurprisingly the Austrian competition authority condemned Spar for creating an anticompetitive arrangement. This is one of those cases where an appeal was unwise. While the cartel court as set the fine at EUR 3 million the supreme cartel court raised it to EUR 30 million! The judgment of the court is interesting for three reasons: first the court is sensitive to the superior bargaining power that Spar has – even if it is not dominant in the market, suppliers of dairy products are always in a weaker position with respect to supermarkets and are likely to agree to any demand so as to guarantee sales. This explains why the fine is imposed only on Spar. Second, the case is interesting because the court condemns both the vertical aspect of the agreement (as RPM) and the possible horizontal manifestations of this (i.e. collusion among retailers). Some might question the wisdom of this because usually the RPM is designed as a means to monitor a horizontal agreement but under EU Law there is a concern about RPM independently of the horizontal impact. Finally the learned judge notes that the system for fixing fines in Austria is based on a different set of principles than that used by the Commission, which appears to facilitate the imposition of higher fines: the system seems to score high on deterrence but low on predictability.

Judge Doina Visan also looks at an RPM agreement in the market for certain car supplies (e.g. wheel rims and antitheft devices). The agreement restricts intra-brand competition (auto dealers cannot compete with each other on price) and was duly condemned by the Romanian competition authority. The case is interesting for it reveals the detailed account that the national court gives to EU case-law to support its finding that the agreement may be condemned as a restriction by object. This is yet another

[5] Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265, paras 33-35.

case where the national court finds it useful to have regard also to the guidelines on vertical restraint (the judgment annotated by Sigita Rudėnaitė discussed above being another one where the guidelines are cited).

Procedural Aspects

Judges Nina Korjus and Markus Mettila both discuss the same case concerning collusion in the market for power transmission line supply. As a result of a leniency application only one party was pursued for a cartel alleged to have taken place between 2004 and 2011. The issue at stake here is about the limitation period. The court found that there was no evidence of a cartel after 2009, and this was fatal because then the case was brought out of time by the national competition authority. The limitation period begins to run when the infringement ceases, but when is that time? On the fact at hand, collusion was by way of bid-rigging, as a result of which the two parties agreed in advance on who would win certain tenders issued by the purchasing authorities. These contracts take a number of years to complete and payment is normally made at the end. The legal question then became this: when you have a bid-rigging agreement, does the agreement end when the bids are sent to the purchasing authority or when the winner completes the work in question? If the latter then the action brought by the competition authority would be on time. The national court reviewed the case-law of the ECJ extensively and found that no judgment gave a clear answer to this question. As a result it made a reference for a preliminary ruling to the ECJ, which is still pending.[6] As judge Mattola notes it may be that the answer also depends on the nature of the contract – one might distinguish a tender with other kinds of agreements.

Abuse of Dominance

Judge Fátima Reis Silva discusses the MEO judgment.[7] Of particular interest here is the judge's discussion of the procedural issues at play here – in particular the role of judicial review in cases where the competition authority decides not to pursue a case and the importance of balancing the rights of the parties with the analysis of the NCA about the probability of conviction. On the facts, and greatly aided by the ECJ's judgment the national court found it easy to dismiss the appeal as it was unlikely that the dominant undertaking abused its dominant position. As the judge notes the ECN plus Directive may make cases such as these more rare because national competition authorities have greater freedom to set priorities.[8]

Judge Adrian Engman discusses a case about refusals to deal in high frequency trading markets. High frequency trading works best if the trader's computers are located near the stock exchange, so the time lag is shortest. The dominant trader, Nasdaq, had refused to give access to premises located near to its exchange to a would-be rival who complained that this served to exclude competition. The case however was unsuccessful. At first instance the Market Court held that Nasdaq was free not to give access. Instead the Patent and Market Court of Appeal found that the party who had brought the complaint was not as efficient as Nasdaq and so even if they had been given premises next to it this would not have made a difference. Other judges went further and said that here was no essential facility to begin with. The majority seems to misunderstand the as efficient competitor test, which is a hypothetical standard. In cases of rebates of predatory pricing the test asks if the prices set by the dominant firm would exclude from the market a non-dominant firm who is as efficient as the dominant undertaking. But this is an exercise that is based on constructing a hypothetical rival with the same efficiency as the dominant firm.

---

6 Case C-450/19, *Kilpailu- ja kuluttajavirasto v Eltel Group Oy ja Eltel Networks Oy* (pending).

7 Above n.2.

8 Directive (EU) 2019/1 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.

The test reveals that there is an abuse because the market is distorted. It is not easy to see how this test can be applied to a refusal to deal which is based on whether access is indispensable. Moreover, the purpose of Article 102 is to allow rivals to compete on the merits or to try to do so – the precise abilities of the party bringing the complaint is irrelevant.

Judge Maruis Cristian Ispas brings us an important case at the borderline between public procurement and competition law (which should be read alongside the case annotated by Judge Sigita Rudėnaitė). Here the dominant company (Hoffman La Roche) made the best bid but one of the competitors argued that there was a margin squeeze: it was buying drugs from Hoffman La Roche for resale and it said that the price Hoffman La Roche charged it was higher than the price that Hoffman La Roche quoted in the tender. As a result the complainant was unable to compete to supply the purchasing authority. The court gave a very thorough judgment – it determined that there was no dominance, and even if dominance was established there was no abuse as the interest of the purchaser is to get the best price. Moreover, the notion of margin squeeze is not applicable in a case like this. It was also important that the court noted that the law requires a court to review competition law issues even if the tender complies with public procurement law. As the learned judge notes in his comments there is an interest in the state being able to select the cheapest provider. At the same time there appeared no competition risks: i.e. in the long term there was no foreclosure. Moreover, as he rightly notes in other margin squeeze cases the sale is of a component where the dominant firm knows that the buyer is competing downstream, while here Hoffman La Roche is selling the same drugs to the rival as it is to the purchasing authority.

Damages Actions

Judge Magda Teppey discusses the difficulties in calculating damages for lost profits. The dominant firm had excluded the competitor from the market for the provision of internet services. How does one calculate lost profits? The learned judge reveals how as the case got appealed, different judges approached damages calculation differently. The aspect that troubled the judges was how to construct the right counterfactual to determine what profits the plaintiff would have made. The difficulty was that there were other competitors as well as the plaintiff so the issue was to determine what proportion of sales would have been made by the plaintiff. The Practical Guide for Quantifying Harm In Actions For Damages Based on Breaches of Article 101 or 102, produced by the Commission in 2013, is an instrument that can help courts in identifying widely accepted and consolidated methods to define countefactuals and effectively estimate antitrust damages.

Judge Jussi Karttunen discusses the asphalt cartel. The legal question in this case arose because after the cartel had been found there had been several corporate reorganisations of the undertakings concerned: shares in the infringers were bought by another company and the original firms were put in liquidation. Thus, by the time the municipalities brought several follow-on actions for damages, the defendants stated that they were not the corporations that had infringed the law and the plaintiffs should lodge their claims against the firms being liquidated. This would have meant that the plaintiffs would receive no damages. The question for the courts was then whether the liability in damages could be traced to the new companies, by applying the economic continuity test that is available in cases of public enforcement also to actions for damages. As the learned judge explains, under Finnish civil law the liability rules may allow the plaintiff to sue the acquiring firm only in limited circumstances. In contrast, under EU Law, guided by the principle of effectiveness the ECJ ruled that the liability should be fairly extensive: when all the shares of the undertaking that participated in the cartel are acquired by other companies which continue with their commercial activities and dissolve the former companies, then the acquiring companies are liable.[9] The question that this case gives rise to is whether the judgment may have any follow-on effects on Finnish civil law: the legal system now has a special rule for competition

[9] Vantaan kaupunki v Skanska Industrial Solutions Oy and Others, Case C-724/17, ECLI:EU:C:2019:204, paragraph 51.

law offences only and it may be that as a matter of fairness all tort claimants should be free to seek damages in similar cases.

IP and Competition Law

Judges Emanuela Germano, Gabriella Ratti and Dr Andrea Piletta Massaro discuss a judgment of the Turin Court of Appeal. The defendant is the holder of patents which the claimant considered were either invalid, or if valid, essential for it to enter the market for digital TV and so the defendant had a duty to license them. The defendants counterclaimed that the plaintiffs were using the patented technology in breach of their rights. At first instance, the court sided with the defendants – it found that the patents were valid and that there were other technologies that could have been used to enter the market. The remedy was a recovery of profits that the plaintiff made at the defendant's expense. The Court of Appeal held that some of the patents were invalid, but affirmed the other findings. As the learned judges note, an important feature of this case is the use of experts to aid in calculating damages, something which may perhaps assist in cases like that annotated by judge Teppey noted above. Moreover, the judgment confirms the narrow scope of the rules on essential facilities.

Judge Birgit Herregodts discusses litigation surrounding a licensing agreement. The licensor sought to rescind the agreement on the grounds that the licensee did not comply with some contractual obligations. Several legal proceedings were issued to terminate the contract. However, during the litigation on interim proceedings, the judge raised the point ex officio that the licensee's breach was their decision to make sales outside the territory that had been allocated. Accordingly the court had to consider that the agreement in question possibly infringed EU competition law, Article 101 forbidding agreements to allocate markets. This was not a point that the parties had considered at all, but it is of major significance because it would likely render the contract void. Final judgment is pending, but the case reveals clearly the importance of parties to ensure that agreements are designed in a manner consistent with EU competition law: should the court find that the licensing agreement is automatically void as a result of the offending clause this will lead to more litigation. The licensor will not be able to insist that there was a breach by the licensee since the contract is invalid. Complex restitution issues may arise if litigation continues. It is submitted that the parties had better settle this out of court, revise their agreement so that the licensee is free to make passive sales out of their territory rather than continue with legal proceedings.

Conclusion

As the reader will have seen from this overview, national courts are much more confident with EU Law: this may indicate that training courses are a useful means to familiarize judges with the tools needed to solve disputes. The cases also reveal the complexities that arise in damages actions and how more efforts are needed beyond the damages directive to clarify the rules applicable for private enforcement. Issues like quantification are likely to continue to cause difficulties that continuous guidance from the Commission and help from external experts, particularly applied economists, may well help address effectively.

Scope of Application of Competition Law

Goda Ambrasaite – Balyniene, Court of Appeal of Lithuania

Judgment of the Vilnius Regional Administrative Court of 19th February, 2019, Case No. eI-286-1063/2019

By its decision of 26 April, 2018, the Competition Council of the Republic of Lithuania found that the Lithuanian Chamber of Notaries and the members of its Praesidium had concluded an anti-competitive agreement by setting the amount of notary's fees and agreeing upon their calculation procedure. The Council imposed a €88,400 fine on the Lithuanian Chamber of Notaries, and fines ranging from €100 to €20,800 on eight members of the Praesidium for the infringements of the Law on Competition and the Treaty on the Functioning of the European Union (TFEU).

In Lithuania, notary's fees are approved by the order of the Minister of Justice after consulting the Lithuanian Chamber of Notaries. The amounts of these fees are fixed in various forms: fixed price, price range, or a percentage, depending on the value of the transaction. As the Council has established, from 88 different notary's fees for the performance of 24 notarial acts, a fixed amount was established by the Minister of Justice, while, in other cases, the amount of the fee was determined by the interval method, indicating the minimum and maximum amount of the notary's fee.

Having conducted an investigation, the Council concluded that the Lithuanian Chamber of Notaries and eight members of the Praesidium had adopted decisions, thereby setting the notaries' fees' calculation procedure, which was stricter if compared to that envisaged by order of the Minister. These decisions restricted the ability of notaries to apply lower notaries' fees and to offer more favourable ones to consumers[10].

The Council concluded that: "h*aving adopted the decisions which set notaries' fees, the Lithuanian Chamber of Notaries and the members of the Praesidium prevented all notaries from choosing a fee that was within the limits of set ranges and its calculation independently. The freedom of notaries' economic activity, as well as that of price competition, were therefore restricted, and this resulted in increased fees for consumers".*

The Lithuanian Chamber of Notaries and the members of its Praesidium have submitted a claim to the Vilnius Regional Administrative Court. The claim was based, *inter alia*, on the following arguments:

1. *Article 101 of the* TFEU could not be applied to the activities of the Lithuanian Chamber of Notaris, and its Praesidium, as the markets for notarial services in EU member states do not constitute a common market, due to the peculiarities of notarial acts and national regulation in every state. Notarial activities are not harmonised within the EU, and member states are free to choose the model of legal regulation;
2. The functions performed by notaries are in the public interest, and the notary essentially carries out public functions. In order for public functions performed by notaries to be properly realized, notaries are allowed to compete only on the quality of their services, but not on prices;
3. The Explanations of the Praesidium, which were investigated by the Council, relate to the implementation of the statutory function of the unification of notarial practice, which is necessary in order to ensure the proper performance of the public functions that are assigned to notaries and to guarantee a uniform standard of performance of notarial duties. Unification of the practice of notaries is carried out in such a way that interpretations do not go beyond the limits of the law.

[10] For instance, the order envisages that notaries could charge from 0.2 to 0.3 per cent of the value of assets, but no less than €14.48, and no more than €144.81 for the approval of mortgage on assets. However, in 2017, the Praesidium issued a clarification stating that notaries have to multiply the fee by the number of items that are being mortgaged, although the order itself does not contain such a requirement.

In addition, the decisions taken by the Praesidium cannot change or replace the legal regulation that was established by the Ministry of Justice;

4. Sanctions against the alleged anti-competitive agreement (cartel) were applied to both the Lithuanian Chamber of Notaries and the members of its Praesidium. The same decision of the Presidium was thus unjustifiably qualified as being made up of two violations - the decision of the association itself, and the agreement of the members of the association. The status of the persons accused is also unclear from the contested decision: i.e., whether members of the Praesidium should be held to be liable as independent notaries, or as members of the Praesidium, as a self-governing body.
5. The contested decision is based on the false presumption that the acts of the Chamber of Notaries was aimed at harmonizing notarial practice must be regarded as being a *restriction* of *competition* “by object”.

The Council disagreed with the claim by stating that the applicants' position on the inability to compete on prices is based solely on the doctrinal interpretation of the concept of the Latin notary, which is not in fact reflected in the legal regulations of the Republic of Lithuania. No legal act states that notaries are not economic entities and that they cannot compete with each other on prices. The Council pointed out that, according to the case law of the ECJ, the concept of an “undertaking” in EU competition law is based on the *functional* approach, i. e., the person's compliance with the characteristics of the “undertaking” is determined not by its legal form, but by the nature of the activity it carries out. Following this practice, the liberal professions, on whose activities the State has imposed certain constraints. must also be regarded as “undertakings”.

Vilnius Regional Administrative Court, on 19th February, 2019, upheld a claim from the Lithuanian Chamber of Notaries and the members of its Praesidium in full, annulling an earlier decision by the Competition Council.

The Court has agreed with the Council that, according to the case law of the ECJ (and also to the case law of the Supreme Administrative Court of Lithuania), the fact that an entity is established under public law, as well as the fact that it offers intellectual services, the provision of which requires a license or other authorization, does not in itself prevent the application of EU competition law rules. In the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. However, the rules on competition do not apply to any activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity, or which is connected with the exercise of the powers of a public authority.

In the opinion of the Court, the treatment of the members of the Praesidium of the Lithuanian Chamber of Notaries as “undertakings” under competition law would be justified only in a case where there was an agreement between notaries, as independent economic entities, on price fixing in a particular market / territory. In this case, the applicants (notaries), against whom the contested decision was adopted, acted not as economic entities - notaries acting independently in the market, but as members of the Praesidium of the governing body of the Chamber of Notaries. In providing guidance to notaries, the Chamber of Notaries had performed its public duty of unifying the notarial practice, as set out directly in the Law on the Notarial Profession. The Chamber of Notaries was therefore not to be equated with an “economic undertaking”, as defined in the Law on Competition, and the decision by the Council should be acknowledged as being legally void due to this factor alone.

The Court has also pointed out that the maximum values indicated in the Explanations of the Praesidium were set within the ranges specified, without exceeding them, while the Council did not substantiate with significant evidence why the maximum amounts could not be set out. In the opinion of the Court, the maximum amounts of notaries’ fees, which are set out in the Explanations, are aimed at the equal application of rates. In this way, the Explanations are justifiably aimed at notaries, who are competing on the quality of services, the highest standards of which are thus also guaranteed, but they are not competing on prices.

The Court further noted that the Ministry of Justice had sole discretion in establishing notaries' fees, so it was essentially able to reject the tariffs that were suggested by the Chamber of Notaries, or to recommend tariffs that it deemed to be more appropriate. The case contained evidence that the Minister of Justice had actually approved some tariffs that were different to those suggested by the Chamber of Notaries. In other words, the Minister of Justice had not taken into account the comments and suggestions that had been made by the Chamber of Notaries.

The Court noted that only those agreements of the Chamber of Notaries (the Praesidium), whose actual objective would be to restrict competition, could be recognized as infringing competition law (Article 5 (1) of the Competition Act, Article 101 TFEU). In the opinion of the Court, the assessment of the content of the Explanations of the Praesidium, from an anti-competitive point of view, does not justify the conclusion that their adoption might have had adverse effects on competition which, in this case, was contrary to what the Council itself states. The Council was required to assess, since the alleged infringement of competition law could not be seen from the outset as being so obvious that it would have an automatically negative impact on the market. From the evidence gathered in the case, it was established that the adoption of the Explanations fully justifies the legitimate purpose of their preparation, i.e., to adjust (unify) the abstract notarial fees.

The Court also ruled that by imposing fines on both the Lithuanian Chamber of Notaries and the members of its Praesidium, the principle of *non bis in idem* was violated.

The judgment of the Vilnius Regional Administrative Court is now being appealed before the Supreme Administrative Court of Lithuania.

Comment

This is the most recent case involving competition law issues. It raises some interesting questions:

Do the characterizations of the office of the notary, and the legal status of the Chamber of Notaries qualify as exception to the competition law established by the ECJ?

Were the explanations given by the ECJ in the Wouters case[11], and the state's action defense properly applied by the Court? And, in this case:

Was the Council obliged to additionally assess whether the Explanations of the Praesidium might have had adverse effects on competition[12]?

---

[11] Case C-309/99

[12] The Council insists that, in this respect, the Court has deviated from the established practice of the ECJ that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered to be so likely to have negative effects, in particular, on the price, quantity or quality of goods and/or services, that it may be considered redundant to prove that they have actual effects on the market.

Ewa Stefanska, Supreme Court of Poland

Names of the parties:

Plaintiffs: Elżbieta C.-G. "Radio - Puls" w P., Radio Bielsko sp. z o.o. w B.-B., Radio WA - MA S.A. w O.

Other participants: Radio Vanessa sp. z o.o. w R., Wojciech J. - Radio Alfa w K., Stowarzyszenie Autorów ZAiKS

Defendant: The President of the Competition and Consumer Protection Office

Name of the Court: The Supreme Court of Poland

Date of the judgment: 2nd April 2009

Type of proceedings: Review of the decision of the National Competition Authority

Reference: III SK 19/08

Note on the case

In the decision issued on 17th September, 2002, the President of the Competition and Consumer Protection Office discontinued the proceedings initiated by the submission by the plaintiffs of the application in the case concerning the Association of Authors (ZAIKS) on competition-restricting practices that were based on an abuse of a dominant position by:

(A) the imposition of onerous terms for license agreements, which brought unjustified benefits to ZAIKS by setting the amount of an author's royalties for the broadcasting of non-dramatic pieces of music in the amount of 5% of the revenues received by the broadcaster in connection with the broadcasting activity, in particular, from advertising revenues;

(B) charging excessively high rates of copyright remuneration for the exploitation of non-dramatic pieces of music for which the copyrights are administrated by ZAIKS (the first point of decision).

The authority has not found a violation of Article 8 of the Act of 15th December 2000, on competition and consumer protection (the Act of 2007 is currently in force) by ZAIKS' refusal to conclude a license agreement with the plaintiffs (the second point of decision).

In justification of the decision, the President of the Competition and Consumer Protection Office clarified that the competence to approve the rates of copyright remuneration is with the Copyright Commission, but not with ZAIKS. It is not therefore possible to accuse ZAIKS of imposing unfair prices or onerous conditions in the case of prices charged that result from tables that are approved by the Copyright Commission. The Copyright Commission doesn't have the character of an entrepreneur, so the authority has no competence to challenge the amounts of the rates of copyright remuneration for the exploitation of non-dramatic pieces of music. Furthermore, by the refusal to conclude a licensing agreement with the plaintiffs, ZAIKS did not violate the public interest, and it wasn thus not a competition-restricting practice.

The plaintiffs appealed the decision to the Competition and Consumer Protection Court and the First Instance Court annulled the decision. The Court pointed out that in approving the rates of copyright remuneration, the Copyright Commission issues a decision that is addressed to the organization for the collective management of copyright that had submitted the remuneration tables for approval. However, the decision contains those norms that are, in fact, general and abstract. The Copyright Commission isn't bound by any factors that are able to provide guidance when approving, or refusing to approve, a specific table. Moreover, the Commission isn't competent to question the rates that are submitted in the remuneration tables. In particular, the Commission isn't entitled to apply Article 8 of the Act of 15th December 2000, on competition and consumer protection, but ZAIKS is competent to issue such a decision. So, there was no justification for the discontinuation of the proceeding by the President of the Competition and Consumer Protection Office.

The authority and ZAIKS appealed the judgment to the Second Instance Court. Both appeals were dismissed by the judgment of the Court of Appeals in Warsaw, which was issued on 17th October 2007. The Court pointed out that the fundamental meaning in this case has the legal nature of the remuneration tables that are approved by the Commission, and the fact of binding by them the organization for the collective management of copyright, as well as the licensees. It clarified that the organization for the collective management of copyright couldn't act in the case that there was a lack of the approved remuneration tables, because it wouldn't be able to carry out a statutory duty and apply the principles of equal treatment. The tables approved by the decision of the Copyright Commission are binding on ZAIKS. If they aren't approved, the tables are treated as a non-binding offer. In the analyzed case, the decision of the Copyright Commission wasn't final, because it had been annulled by the Administrative Court. This means that, at that moment, the remuneration tables had not been approved and did not bind the organization for the collective management of copyright and the licensees. So, the President of the Competition and Consumer Protection Office could recognize the substantive objections to the abuse of a dominant position by the organization for the collective management of copyright. The Court also clarified that ZAIKS is a non-profit organization, but it performs a paid activity. This means that the provision of Article 8 of the Act of 15th December 2000, on Competition and Consumer Protection applies to the organizations for tje collective management of copyright.

The President of the Competition and Consumer Protection Office appealed the judgment to the Supreme Court, which in a decision of 2nd April 2009, dismissed the cassation complaint.

Conclusion

The Supreme Court pointed out that the provisions of the Act on Competition and Consumer Protection doesn't violate the content of copyright, in particular, the authors' exclusive right to use the work, dispose of it in all fields of exploitation, and to remuneration for the use of the work. The statute also does not violate the competence of the organizations for the collective management of copyright in the field of management and the protection of these rights. The Act on Competition and Consumer Protection applies to the commercialization of copyrights by concluding licensing agreements.

The Act does not apply to such provisions of contracts in which the subject is the determination by the author, or by another authorized entity, of the rules for the use of the work by a third party, conditions for the disposal of the right to the work, and the granting to the author of the right to remuneration. For example, applying the provisions of the Act to assess compliance with competition law. the provisions of the license agreement granting the licensee the exclusive right to use the work, are not allowed, since granting an exclusive license is the essence of the exclusive right to use the work. It is also not allowed to apply the provisions of the Act to a refusal by the author to grant a license to use the copyright. However, the application of the statute to the provisions of the license agreements regarding the amount of remuneration due to the author, or to another authorized entity, is allowed, because the amount of compensation for creative effort, or the financial risk that is related to the development of the work, are not the essence of the work's copyright. The copyright law is limited only to granting the right to the entitleent to remuneration, without the reservation of exclusivity to him/her in determining the amount of this remuneration. Using his/her right, and the freedom to shape it, an author, or another authorized entity, must move within the limits that are set by the provisions of competition law. They are thus not allowed to enter into prohibited price agreements, and thus the use of an excessively high price or a grossly low price.

The provisions of the Act are not applied to those restrictions of competition that are permitted under separate Acts. In accordance with the provisions of the law, the organization for the collective management of copyright is obliged to conclude a licensing agreement. It cannot, without valid reasons, refuse the permission to use the works within the limits of the management board. This obligation of the judiciary is understood to be the requirement for acceptance, if there are no objections to this, the offer to conclude a licensing agreement authorizing the use of the organization's repertoire at conditions that it defines, which are identical for all contractors, in particular, those resulting from the remuneration table that is approved by the Copyright Commission.

Eric Mille, Brussels Commercial Court

Appeal of a decision of the Belgian Competition Authority (hereafter, the BCA), dated 28th April, 2016, in a case opposing the International Equestrian Federation (hereafter, the IEF, the defendant in the First Instance) to the Global Champions' League (hereafter, GCL) and Tops Trading Belgium (hereafter, TTB) companies (the claimants in the First Instance).

Summary of the facts of the dispute

The IEF is an association whose members are the national equestrian federations, and these bring together both athletes and horse owners. The IEF is therefore expanding its activities worldwide.

It sells broadcasting rights for equestrian competitions and enters into licensing and sponsorship agreements with third parties, such as competition organisers.

It also exercises regulatory powers, because oits agreement with the International Olympic Committee to be the sole international regulator for equestrian sport. As such, the IEF is the author of a general regulation for equestrian competitions.

In November 2012, the IEF General Assembly introduced a clause in its regulations stating that any participation by an athlete, horse or organiser in an event that is not approved by the IEF would prevent any participation within 6 months in any event that was approved by the IEF. This provision entered into force on 1 January 2013.

According to the IEF, the objective of this clause is the protection of the horses' welfare and of the integrity of competitions (anti-doping), by limiting the number of competitions per year, through a calendar of those competitions that meet these objectives. However, GCL and TTB pointed out that the adoption of this clause coincided with the growth of the IEF's commercial activities and the doubling of its commercial and marketing expenses and revenues.

Since 2006, the TTB has promoted international jumping competitions under the so-called Global Champions' Tour (GCT). This GCT was approved each year by the IEF.

GCL is a company that was created by TTB in June 2015, to organize and promote the so-called GCL event.

This event is a new competition that is comprised of 15 international jumping competitions bringing together 15 teams, each of which is composed of 4 riders. It is expected that the GCL will be organized in parallel with the GCT, during the GCT's competitions' programmes, as an competition that is additional to the GCT competition, but in which the same riders, horses and organisers would appear.

A regulation of the GCL event was adopted in February 2015, requiring the participation of each of the 15 teams in each of the 15 events that were organized during the season.

Summary of the judicial proceedings

In 2013 and 2014, TTB and GCL sought IEF accreditation for the GCL event. but without success, so they could not organise this event for the seasons 2014 and 2015.

They therefore brought a complaint against the litigious clause of the IEF's regulation that was before the BCA in June 2015, in view of obtaining the nullification of this clause for breaching of Article 101,1 of the EU Treaty. In parallel, they requested that the BCA order interim measures to suspend the litigious clause and to prohibit the IEF from sanctioning athletes, horses and organizers who participate in the GCL event, even though it is not authorized by the IEF, and provided that they comply with the IEF's provisions regarding the horses' welfare and the integrity of the competition (anti-doping), in order to enable the organisation of the GCL event for the 2016 season, and until the BCA rules on the merits of the complaint.

The BCA ordered the requested suspension in July 2015.

In August 2015, the IEF brought an action for the annulment of this decision before the Brussels Court of Appeal.

The Decision of the Court

To justify interim measures, the litigious facts must *prima facie* be eligible for an infringement of competition law.

By its judgment of 18 July 2006, in the Meca Medina case (C-519/04), the CJEU confirmed that sports regulations cannot be excluded from the scope of competition law if it complies with the conditions for the application of Articles 101 and 102 TFEU.

According to the CJEU, in the light of the Community's objectives, sport is a matter of EU law, provided that it implies an economic activity within the meaning of Article 2 TFEU, i.e., any activity consisting of offering goods or services on a given market (C-49/07, Motoe, 1st July, 2008).

In the case at hand, the IEF performs economic activities as an organiser of equestrian competitions, this being the relevant criterion for regarding this entity to be an "undertaking" within the meaning of the TEUE. In addition, the national federations which are members of the IEF, also organise such events, so that the IEF is, in addition, an association of undertakings within the same meaning.

The Possible Violation of Article 101(1) TFEU.

Article 101,1 TFEU prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and which may affect trade between member states. In the case at hand, the litigious clause is a decision adopted by an association of undertakings.

According to a CJEU decision of 11 September 2014, the concept of the restriction of competition by object can only be applied to certain types of agreements between undertakings which create such a level of anti-competition that the examination of the effects of these agreements is not even necessary.

In the present case, the Court noticed that the BCA's contested decision does not establish the existence of a restriction by object of the litigious clause.

If the analysis of the content of the agreement considered does not reveal a sufficient degree of harm to competition by its object, and its effects should be examined in order to determine whether they prevent, restrict, or significantly distort competition (cf. Allianz Hungária Biztositó and Others - C-32/11, CB / College, C-67/13 P, Dole Food and Dole Fresh Fruit Europe / College, C-286/13 P).

The effect of the litigious clause is that riders and horse owners are excluded from all competitions that are accredited by the IEF for 6 months, in principle, but this exclusion lasts for 12 to 18 months when the exclusion takes place at the end of a calendar year. In addition, as far as the GCL event organizers are concerned, this implies that the athletes and horse owners will not participate in this event.

Prima facie, the clause is therefore restrictive by its effects on athletes, horse owners and the claimants, and this restriction affects economic operators the European market. Moreover, since the IEF and the national equestrian federations promote horse races and act as undertakings, the litigious clause is *prima facie* likely to distort competition to their advantage.

The compatibility of the litigious clause with the TFEU depends on

(i) the legitimacy of its objectives,

(ii) whether its restrictive effects on competition are inherent in such legitimate objectives, and

(ii)

(iii) whether these restrictive effects are proportionate to the said legitimate objectives (Mecca Medina case -C-519/04).

According to Advocate General Kokott, in the Motoe case (C-49/07), providing the unified game rules of a sport, as well as integrating competitions in this sport into a specific timetable are legitimate objectives of sport regulations that may justify restrictive effects on competition. However, a regulatory authority which also organises competitions cannot give priority to the latter and to those of other independent organisers.

The BCA holds the view that the litigious clause does not have clearly defined objectives, since the IEF had initially put forward in, 2012, that these objectives were for the protection of horses' welfare and the integrity of the sport, whereas it subsequently argued that these objectives are further comprised of the preservation of the equestrian events' calendar, in order to prevent the proliferation of non-accredited events and of the competitions' formats.

The Court, however, holds the view that calendar objectives are admissible as being legitimate, according to the CJEU, and that, in addition, a restrictive provision that meets both legitimate and other objectives is not prohibited. In the case at hand, it has therefore not been demonstrated, according to the Court, that the IEF does not pursue legitimate objectives, as it had originally claimed.

The CJEU acknowledged that legitimate objectives, such as participants' welfare, sport integrity and a coherent organisational framework for competitions, may justify a regulation based on which a sport's regulatory body refuses its agreement for the organisation of a competition, and that the restrictive effect of this refusal on the athletes' freedom of action must be considered to be inherent in such legitimate objectives (Meca Medina case C-519/04 – the considered legitimate objective being, in this case, sport integrity that has led to anti-doping rules).

However, the Court notes that, according to the European Commission's 2001 decision in the FIA case, a regulatory body which also performs commercial activities must be particularly attentive to conflicts of interest, and must ensure that the regulation it provides influences competition only to the extent that it is strictly justified by the pursuit of legitimate interests.

In the case at hand, the Court underlined that the claimants had agreed to comply with the IEF'sprovisions regarding animal welfare and the integrity of sport, and introduced provisions in the GCL regulation, according to which the IEF regulation on horse welfare and anti-doping is enforceable for participants at the GCL event. Consequently, the Court considers that, in the presence of such commitments, it is not inherent to the legitimate objectives that are pursued by the IEF to exclude participation in approved events by horses and athletes who participate in the non- approved GCL event, even temporarily.

According to the Court, the BCA's decision rightfully considers that the litigious clause is disproportionate to the legitimate objectives that are pursued by the IEF, since more proportionate measures could have been taken to achieve, notably, the preservation of the horses' welfare, such as an exclusion from the events of thos that refuse to comply with the provision of the IEF regarding this welfare.

The Court further noticed that other national competition authorities, after having initiated proceedings regarding similar restrictive clauses, terminated them only provided that the concerned sports federations mitigated their restrictive effects, or abandoned the problematic clause.

The Court underlines that the IEF did not invoke the benefit of this Article, nor had it demonstrated that an exemption was justified. In particular, it did not demonstrate that the litigious clause would be indispensable for improvement of the production or distribution of products, or in promoting technical or economic progress, and that it would not give the IEF the opportunity to ban competition.

For the foregoing reasons, the Court considers that the BCA made no error of assessment in considering that the litigious clause is likely to constitute a breach of Article 101, 1 TFEU.

Personal comment

The Court of Appeal, in its decision, basically applied CJEU case-law.

In particular, it considers that a sport organisation may act as an undertaking and be subjected to competition law, provided that it performs economic activities and underlines that, in such situations, it must be especially careful in elaborating regulations in order that, even though such regulations pursue legitimate objectives, they do not unnecessarily distort competition between this sport organisation and its competitors on the market. Such a regulation, which hasrestrictive effects on this market, must therefore be as neutral as possible on competition, and must these restrictive effects to the minimum that is required by its legitimate objectives.

Horizontal Agreements

Judit, Banu Zsoltné Szabó (Hungary, Budapest-Capital Regional Court)

Case No.: Judgment of the Curia of Hungary No. Kfv.II.37.110/2017/13.

Substance of the case: Restrictive agreements on the market for contact lenses, in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU)

Facts

Between 2003 and 2010, the market for contact lenses was concentrated and there were 5 leading participants in the market. Four participant undertakings, CooperVision Kft. (CooperVision), FOTEX-OFOTÉRT Kft. (FOTEX-OFOTÉRT), Johnson & Johnson Kft. (a division of Vision Care) (Johnson & Johnson) and Novartis Hungária Kft. (Novartis) covered more than 80% of the market. Under the market for contact lenses, not only contact lenses but also the related care products, are understood. From 2000, the market for contact lenses showed a strong increase, and it was stabilized in 2006, however, the number of products sp;d increased until 2008.

The market research company, Kleffmann & Partners Kft. (Kleffmann), wanted to broaden the scope of its activities so, in 2003, it made an offer for market research to Novartis, Johnson & Johnson and FOTEX-OFOTÉRT, separately. Kleffmann undertook negotiations with the undertakings separately, and after bilateral negotiations, on 20th October 2003. agreements were concluded on market research services between Kleffmann and Novartis, Kleffmann and FOTEX-OFOTÉRT, and Kleffmann and Johnson & Johnson. Based on the suggestion of Novartis, FOTEX-OFOTÉRT and Johnson & Johnson, Kleffmann also involved the predecessor of CooperVision in the research, which took part in it from 23rd October 2003.

According to the parties to the agreements, at the time of the conclusion of the market research agreements there were not sufficient data on the Hungarian market for contact lenses and related care products, so they accepted Kleffmann's offer. Kleffmann originally offered tracking research, but the parties ordered black-box research instead. During the black-box research, the market participants provided their own data on product distribution so that an independent market researcher could present the main trends in the market by aggregating and structuring the data that was collected from them.

The bilateral market research agreements were concluded year-to-year between Kleffmann and the contact lens producers and distributors with the same content. Based on the agreements, the contact lens producers and distributors provided data on their own distribution in quarterly breakdowns relating to the priorly determined market segments. The distribution data are data on the distribution of 16 product groups within Hungary, as well as on the sales volumes and the resulting revenue therefrom. Based on these data, Kleffmann calculated the average price or, more precisely, the revenue per product.

Regarding the second quarter of 2010. Johnson & Johnson did not provide its data to Kleffmann, because its legal department raised concerns about participation in the provision of data. Johnson & Johnson submitted a complaint on the agreement to the Hungarian Competition Authority (Competition Authority) on 2nd August 2010. [according to Art. 78/A. § (2) a) of the Act on the Prohibition of Unfair Trading Practices and Unfair Competition (the Competition Act), revealing the activities that are detailed in Point 4. of 78/A. § (2) a)], as well as a request for exemption from a fine. The Competition Authority initiated a competition supervision proceeding on 7th December 2010, against CooperVison, FOTEX-OFOTÉRT, Johnson & Johnson, Novartis and Kleffmann. The Competition Authority, in its Decision No Vj/96-310/2010 dated 13th June, 2014, found that the undertakings - using the market research - had committed an infringement by exchanging business information between companies, including data on their recent income and the quantities of their products, and these could not be obtained from public sources. This could have a preventing, restricting or distorting effect on competition, that violates Art. 101, TFEU. For this infringement, the Competition Authority fined CooperVision HUF15,400,000, FOTEX-OFOTÉRT HUF 48,900,000, Novartis HUF34,500,000. The Competition Authority waived the fine for Johnson & Johnson and terminated its proceedings against Kleffmann.

Court Procedures

Novartis, CooperVision and GrandVision Hungary Kft. (the successor to FOTEX-OFOTÉRT) (GrandVision) initiated the Court Revision of the decision of the Competition Authority at the Budapest-Capital Administrative and Labour Court. The claim raised procedural and substantive legal errors.

In its Decision No. 3.K.33.033/2014/45, the Budapest-Capital Administrative and Labour Court rejected the claimants' claim. In connection with the procedural legal errors the Court stated that they did not affect the substance of the administrative decision, which is a condition of the successful reference to procedural legal errors. Regarding the substantive legal errors, the Court decided that for the potential effect to be established was only that the potential should be proven, and it did not need to be proven that the parties to the agreement that actually used the information that was obtained unlawfully. Not the facts, but the capability to affect the competition should have been underlined on the necessary level, because proof beyond doubt is impossible in such cases. Based on the provisions of the TFEU and the Competition Act, it seems that the legislation even wanted to sanction the possibility to restrict competition. In this regard, the Court referred to the case of the CJEU No. C-7/95. P. John Deer Ltd. v. The Commission. The CJEU ruled that the self-evidence of the market and economic prognoses make it possible to draw the necessary conclusions. The concerted practice can also be determined without an expressed agreement, with an aim that is based on the fact that the parties had co-operated in developing the conditions for the concerted practice. The exchange of information relating to the Kleffmann agreements ight affect some aspects of the market's policies.

The Court turned to the European Commission based on Art. 15. (1) of Council Regulation (EC) No. 1/2003., which confirmed the applicability of its Horizontal Guidelines, published earlier.

Novartis, CooperVision and GrandVision appealed against the First Instance Decision. In its Decision No. 2.Kf.650.032/2016/12. the Budapest-Capital Regional Court affirmed the First Instance Decision. The Appeal Court accepted the reasoning of the Competition Authority, which expressed the view that the claimants' statement - stating that the average prices of market segments does not have any relevance during the determination of market price - is contrary to economic rationality. The Competition Authority, in points 311-326 of its decision, analysed the strategic nature of the data collected. During the Court proceeding, the European Commission also confirmed the legal interpretation of the Competition Authority. The Appeal Court emphasised that not only can the actual effect of competition restriction be unlawful, but also such activities/practises that can generate a competition-restricting effect.

The Decision of the Hungarian Curia

CooperVision sought the judicial revision of the Second Instance Decision from the Curia. According to its opinion, an infringement could not have been established simply based on the potential effects. Explaining that the regulations of the Competition Act and the TFEU were misinterpreted by the Court of Second Instance, because, for the establishment of the potential competition-restricting effect, additional conditions must also be underlined. The Competition Authority did not prove any actual effect. The burden of proof was on the Competition Authority. The agreements on information exchange could only be infringing based on their effects, if the exchanged information is connected to future prices and quantities. In the John Deere case the ways in which the exchanged information was capable of restricting competition was explored. The Competition Authority did not carry out such an analysis in the present case.

In its decision No. Kfv.II.37.110/2017/13, the Curia abrogated the rulings of the Second and First Instance Courts' decisions, as well as the administrative decision in connection with CooperVision, and it terminated the competition supervision proceedings against CooperVision. The Curia expressed the view that Art. 11. (1) of the Competition Act classifies competition law infringements into three categories: an agreement with an anti-competition purpose, or with a potential or actual anti-competitive effect. In the present case, there were no anti-competition purposes, so the Competition Authority examined the anti-competitive effect. It made an economic analysis, however, the market trends might also take place in the case of competition-conforming practice, or as a result of competition restriction, so the infringement was not proven.

The Curia determined the legal context as being Art. 101. (1) TFEU and Art. 11. (1) of the Competition Act. Pursuant to the decision of the CJEU, in case No. C-32/11, there is no substantive difference between the two legal provisions. Art. 101, TFEU defines two unlawful acts: anti-competitive purpose and anti-competitive effect. Art. 101, TFEU does not differentiate between actual and potential anti-competitive effect, the Competition Act defines them as separate infringements. According to the decisions of the CJEU, based on Art 101, TFEU (C-238/05. and C-345/14.) both the actual and potential effects shall be understood as falling under 'effect'. There is no contradiction between Art. 101, TFEU, and Art. 11. (1) of the Competition Act. Both the actual, as well as the potential, competition-restricting effects, are also unlawful. The question is whether the potential effect can be examined in the case of an information exchange that has lasted for 7 years and that had been concluded in the past.

The CJEU case law is well established in relation to the competition-restricting purpose; these agreements are harmful to the competition on such a level that the anti-competitive effect does not have to be proven through empirical analysis. Where the analysis of a type of co-ordination between undertakings does not reveal a sufficient level of harm to the competition, the effects of the co-ordination should, on the other hand, be considered, and for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has, in fact, been prevented, restricted or distorted to an appreciable extent (Case No. C-67/13. Point [52.]). All significant facts underlining competition law liability must be proven by the Competition Authority, the analysis must be carried out according to Points 26-29., 75-76. of the Horizontal Guidelines. The Competition Authority did not identify any competition-restricting effect relating to the concluded information-exchange; so started an analysis according to the Horizontal Guidelines, but did not prove that there had been any infringement. In the administrative decision, it was not even expressed whether the exchange of information had an identifiably disadvantageous effect on any indicator of the competition (such as price, production, quality, range of products). The opinion of the Commission is binding, but the abstract analysis is not enough, even according to the opinion of the Commission, so the strategic benefit of the exchanged information shall also be evaluated. The John Deere case is similar to the present case, but it does not provide an appropriate basis for the decision on it. According to Point 54. of the CJEU Decision, No. C-238/05. the compatibility with the Community's competition rules cannot be assessed in the abstract. The Curia established that, as a main rule, actions concluded in the past can only be regarded as infringing, if they had an actual anti-competitive effect on the market. Particular analysis should have been carried out to show the probable capability of competition restriction, but such analysis was not carried out.

Personal opinion

The Hungarian regulation, in accordance with Article 101, TFEU, considers the potential competition-restricting effect to also be unlawful. The potential competition-restricting effect is harder to prove. If the restriction of competition is not expressed as the purpose of the agreement, but the agreement can have the potential effect of competition-restriction, the Competition Authority shall make an economic analysis that also covers the potential effects. Competition-restriction can be determined, if there are reasonable grounds to suspect that, as a result of the agreements, the parties might profitably increase prices, or decrease production, the product quality, the range of products, or innovation. In the administrative decision, it is not enough to quote the set of criteria that are determined by the Horizontal Guidelines, the effects must be explored and shown in connection with the particular agreement.

Gerald Ehgartner, Federal Finance Court, Austria

Semperit OGH 6.9.2017, 16 Ok 10/16f

Facts

This case concerns the Austrian corporation Semperit Technische Produkte GmbH, which is one of the group companies of the publicly listed Semperit AG Holding company, an internationally oriented group that develops, produces, and sells rubber products for the medical and industrial sectors.

On 22 January 1989, the Thai Corporation, Sri Trang Ltd., its subsidiary Rubberland Ltd., and four individuals with Thai citizenship ("the STA-group") closed a Joint Venture Agreement (JVA) with the Austrian Semperit GmbH in order to form a Joint Venture that was to be called "SSC".

The main purpose of this Joint Venture was the production of gloves for medical examinations. These gloves were to be made of natural latex rubber. Since 1991, Semperit GmbH has held 50% of the shares, the other 50% being held by the STA-Group. According to the agreement for the Joint Venture, the distribution activities in Europe and the Middle East would exclusively be carried out by Semperit, meaning that Semperit had the exclusive right to sell the gloves that were produced in Europe and the Middle East.

In January 2015, Sri Tang started to sell its part of the production not only – as agreed – in Thailand, but also in Europe. Semperit, which had been granted the European sales area by the Joint Venture Agreement, tried to impede the distribution activities of Sri Thai by intervening through the use of judicial and extrajudicial methods. The STA-Group applied for leniency at the Austrian Federal Competition Authority, which initiated the proceedings. As a result, the Anti-trust Court prohibited Semperit from having the exclusive sales distribution in Europe. Semperit was not entitled to claim the benefit of the Joint Venture agreement. The appeal against this decision by Semperit before the Upper Cartel Court remained unsuccessful.

Legislative framework

There are two central rules in the European anti-trust law, which are set out in the Treaty on the Functioning of the European Union (TFEU):

- Article 101, TFEU, prohibits market operators in the European Union from concluding agreements which restrict competition. These restrictive agreements can happen horizontally, between two or more undertakings that are operating at the same level on the supply chain, as well as vertically, between two or more businesses that are on different levels (vertical agreements, mostly distribution contracts).
- Article 102, TFEU, deals with the prohibition of unilateral anti-competitive conduct and the abuse of a dominant market position. An abuse is only possible if a company retains a dominant market position, meaning its market share mist exceed 30%, so it can harm competition without co-operation with others. In principle, having a dominant market position is not forbidden, however, the abuse of such a position is.

EU Law distinguishes between three types of core restrictions: price-fixing agreements, the limiting of production, and the allocation of sales territories. Due to these restrictions, the producers are able to set prices according to their preference, as long as there is no competition.

Summary of the judicial proceedings

After the measures taken by the Austrian Federal Competition Authority, and the decision of the Cartel Court, Semperit filed an appeal against the judgment at the Upper Austrian Cartel Court.

The Cartel Court had to define the relevant market in order to assess dominance, as a dominant position can only exist in a relevant market. The relevant market consists of the product market and the geographical market. The first judgment limited the proceedings to the hearing, and it denied Semperit the exclusive distribution in the European market. The fact that this distribution area was exclusively reserved for Semperit constitutes, according to the judgment, an appreciable restriction of competition within the meaning of Article 101, Para. 1 of the TFEU.

Semperit appealed for amendment to the application of the Austrian Federal Competition Authority according to Article 26 KartG (Austrian Anti-trust Law Act), against this ruling, and eventually an application for annulment was made. Semperit declared that the distribution agreement was part of the Joint Venture Agreement, and therefore a permitted side agreement which had to be assessed *ex ante*.

The Austrian Upper Cartel Court, however, declared the appeal to be ill-founded.

The Ruling of the Austrian Upper Cartel Court

Article 101, Para. 1, TFEU, is not applicable to additional agreements if the agreement is substantial and necessary for the accomplishment of the main object. It must be decided objectively, without taking into account the intention of the parties, whether a restriction is deemed necessary in order to realise the key actions.

If the main agreement can be fulfilled without any additional agreement, then it is not directly linked to this additional agreement, and therefore the additional agreement can be considered to be unnecessary. If the key actions can only be fulfilled by concluding an additional agreement, the additional agreement is objectively necessary. Even when the distribution agreements and the passages in the Joint Venture Agreement must be seen as agreements that are additional to the main agreement on the founding of the Joint Venture, the restriction one the distribution of the production of the Joint Venture would not have been objectively indispensable. According to the Commission Notice on restrictions that are directly related and necessary to concentrations (2005/C 56/03) Section 11, the “criteria for direct relation and necessity are objective in nature. Restrictions are not directly related and necessary to the implementation of a concentration simply because the parties regard them as such.”

The Upper Cartel Court shares the opinion of the Cartel Court that this agreement cannot be considered to be a side agreement, nor is it permissible according to the Commission’s Notice.

The agreement has to be seen as a distribution agreement, which is qualified as a horizontal agreement between two market operators. Both market operators have made a market allocation, and therefore a core restriction, which is not permissible under Article 101, Para. 1, Litera c, of the TFEU. The Joint Venture agreement should be considered to be a horizontal agreement, even if it is the case that the founders are not competitors. Through the founding process of the Joint Venture, the founding parties become active through the Joint Venture at the same market level. The Upper Cartel Court views the STA-Group and Semperit as competitors on the European geographical.

The Upper Cartel Court does not investigate whether Semperit had invested in the Joint Venture and given their Know-How should the sole distribution right not have been granted to Semperit. Furthermore, the Upper Court is not interested in the submission of Semperit, which states that no other investor would have wanted to co-operate without a distribution agreement. These questions concern the subjective element of Semperit, which are not taken into account when assessing additional agreements.

Maja Valusnig, Zagreb Administrative Court

The Administrative Court of the Republic of Croatia. Judgment number: UsII-171/18-2 -27 September 2018.

A Brief summary of the facts of the dispute

The Plaintiff: Presečki grupa d.o.o. (a bus carrier) brought an action against the decision of the defendant, the Croatian Competition Authority: KLASA: UP/I-030-02/11-01/024, URBROJ: 580-04/74-2012-070 od 27. December, 2012, before the Administrative Court of the Republic of Croatia, seeking its annulment.

The Croatian Competition Authority, in its decision, concluded that the plaintiff, along with several other bus carriers, have, through two explicit agreements in 2011, determined:

a) that they should co-operatively set the prices for the services of the regular bus transport lines in Međimurje County; ways of dividing the market for bus transportation in that County;

b) to co-operate on registering new bus lines in that County; joint participation in all future public tenders for the bus trasportation of students of primary schools in that County and, by doing so, that they have concluded a prohibited agreement which limited competition on the relevant bus carrier market in Međimurje County, in the period from 1 February, 2011, until 1 October, 2011, which represents a breach of national competition law. In its decision, the Croatian Competition Authority declared their agreement void, and fined all of them with different amounts of fined (from 67,000,00 kn as the lowest fine, to 1,009,000,00 kn as the highest, which was imposed on the plaintiff.

The plaintiff claimed that it was he who had begun the initiative to determine that Međimurje County, and its Municipalities, and certain joint bus carriers were limiting and breaching competition on the relevant bus carrier market in Međimurje County, but his initiative was dismissed by the Croatian Competition Authority, on the grounds that they did not act together, that they had separate licences for certain regular bus transportation lines, that they did not conclude the prohibited agreement, and that they did not act upon those agreements, and that they did not put them in practice. The plaintiff claimed that, even though two of the bus carriers were providing a bus transportation service on regular lines for which the plaintiff had a licence, they did not act upon the Agreements. The plaintiff also complained about the amount of fine that had been imposed upon him, claiming it was set too high, considering that even if the breach of competition in the relevant market had occurred, it was insignificant and had no negative repercussions in the relevant market.

The Croatian Competition Authority claimed that just the conclusion of such agreements, which were aimed at limiting competition, is considered to be a breach of competition law, and that the non-implementation of all the contractual provisions that might have negative effects in the relevant market, was taken into consideration during the procedure as being a mitigating circumstance, but that the plaintiff cannot be exonerated from paying the fine in this procedure, because he was the intiator of the Agreements, and the conclusion of any cartel agreement is considered to be the most serious violation of competition law.

Summary of the judicial proceedings

The judicial proceedings were a bit complicated, because The Administrative Court of the Republic of Croatia had previously dismissed the plaintiff' s action, and the Constitutional Court of the Republic of Croatia overturned the ruling of the Court, then the Court dismissed the plaintiff's action once again, and the Constitutional Court also overturned that ruling of the Court, so this is the third decision of the Court in relation to this procedure.

Ruling of the Court

This time, the Court anulled the decision of the Croatian Competition Authority, and returned it to it, in order to repeat the procedure and, in its decision, it referred to the decision of The Constitutional Court, which had annulled the previous decision of the Court, instructing that the provisions of the Road Transport Law regarding joint and co-operative transportation should be applied in this case.

My personal comment

It was interesting for me that the decision of the Court upholding the decision of The Croatian Competition Authorithy was overturned twice by The Constutional Court and, finally, the Court, in the repeated procedure, for the third time decided to annul the decision and return it for a repeated procedure to The Croatian Competition Authorithy. I was also interested to learn whether certain provisions of the Road Transport Law regarding joint and co-operative trasnportation, conflict with the norms of Competition law. So, I think that it would be interesting to ask the judges in my group, during the workshop, if they have this sort of jurisdiction in the Competition Law of the Constitutional Court in their own country. I also checked whether the Croatian Competition Authorithy had come to a decision in this case, but, by the time I was writing this case note, it had not. If it decides by the time the Workshop takes place, I will update the group about the decision during the seminar.

Vertical Agreements

Sigita Rudėnaitė, Supreme Court of Lithuania

Judgment of the Supreme Administrative Court of 13 June 2018, Case No. eA-507-552/2018 and the Ruling of the Supreme Administrative Court of 20 December 2018, Case No. eP-62-492/2018

Lithuania is a country with a long central-heating season, which makes heat supply prices a very sensitive topic for many households.

By its decision of 2 December 2015, the Lithuanian Competition Council fined two undertakings for concluding a prohibited vertical agreement in the energy and heating sector. Vilniaus Energija, a major supplier of heating in the Vilnius region, and Bionovus, later renamed First Opportunity OÜ, which is registered in the Republic of Estonia, and is a producer of biofuel, had entered into an exclusive purchase agreement for a 5-year term. The Council found that the vertical supply agreement between the two companies obligated Vilniaus Energija to purchase all of its biofuel requirements exclusively from Bionovus at agreed prices that were 15 percent higher than the prices paid for biofuel by other heating producers. The biofuel cost was also included in the heat supply bills for consumers, thus inflating the heating bills. Since the market shares held by Vilnius Energija and Bionovus exceeded 30 percent in their respective markets, and the undertakings did not succeed in invoking an efficiency defence, the agreement was deemed to be restrictive of competition. For an almost 2.5 year-long violation of competition rules, the Competition Council imposed an €19 million fine on Vilniaus Energija, and an €3,53 million fine on First Opportunity OÜ (the successor to Bionovus).

Notably, Bionovus was selected as a supplier for Vilniaus Energija through a public tender. Disagreeing with the decision of the Competition Council, Vilniaus Energija therefore stated that the fact that biofuel had been purchased only from Bionovus was determined not by an exclusive purchasing agreement, but by a set of objective factual circumstances that were not related to the contractual relations between Vilniaus Energija and Bionovus. Bionovus was the only supplier to submit a bid at the public tender. In addition, only one of the participants in the relevant geographical market, as defined in the contested decision of the Council, Biovoice, had expressed a general desire to familiarize itself with the conditions of the tender, but did not then submit a bid, nor did it make any claims regarding the conditions of the public tender. Participants in the geographical market, as defined in the decision of the Council, confirmed that they did not consider supplying Vilniaus Energija. Under Paragraph 6.1 of the exclusive purchase agreement, therefore, the market was supposed to be “closed” solely to those suppliers who had not even considered supplying biofuels to Vilniaus Energija during the relevant period, or to those who would not be able to do so. In the opinion of Vilniaus Energija, the conclusion of the contract after the completion of an international public procurement procedure could not violate the provisions of the Law on Competition. Moreover, the Public Procurement Office had checked the above-mentioned public procurement in 2012 and had found no violations regarding either the procedure or the results of the tender.

Both companies had also insisted that the conclusions of the contested decision by the Council were based on an unjustified definition of the geographical market. The Council had wrongly decided that the geographical market was an area that was tlimited to 100 kms. around Vilnius. By defining the geographical market solely on the basis of biofuel transport distance analysis, the Council unreasonably ignored the fact that suppliers of biofuel to heat producers were competing in public tenders that were organized by the heat producers, and that all interested suppliers from all of the territories could participate. In such a market, by actually transporting biofuels to a particular buyer, the supplier is not in competition, because he already has a contract for supply; transport, in such a market, represents only the performance of the contract that has already been awarded. The Council ignored the fact that competition between suppliers does not occur when they transport biofuels to the buyer, but during the tendering process. The distance between which suppliers usually transport biofuels in the actual performance of those contracts does not, in itself, define the extent of the geographical scope of the competition between suppliers when competing in a public tender. By including only alternative sources of demand that are available to other suppliers that are located 100 kilometers from Vilnius, the Council has unreasonably ignored a large section of the demand sources that were rationally available to other suppliers (the competitors of Bionovus). According to the Commission Regulation, (EU) No 330/2010 of 20 April 2010. on the application of Article 101(3) of the Treaty on the Functioning of the European Union, on categories of vertical agreements and concerted practices (the *Block Exemption Regulation*), if the market share held by the supplier does not exceed 30 % of the relevant market within which it sells the contracted goods or services, and the market share held by the buyer does not exceed 30 % of the relevant market within which it purchases the contract goods or services, the block exemption is applied. As the Council has wrongly defined the geographical market, it has also misconstrued the market share and erroneously concluded that the block exemption is not applicable.

On 18 October 2016, the Vilnius regional administrative court upheld the Council's infringement decision but reduced the fines by 10 percent.

The Court agreed with the Council on the market definition and upheld the position of the Council that the field of competition law is not influenced by either civil relations or public procurement. The conclusion of the Public Procurement Office that the public tender was organized in accordance with the public procurement procedure is thus irrelevant for the assessment of the effects of the contract on competition, as the Public Procurement Office is not authorized to interpret and apply the Law on Competition, and it does not assess the economic consequences of a public contract on the relevant market. The organization of public procurement does not in itself diminish the requirements of competition law; the application of public procurement procedures cannot eliminate the application of the Law on Competition. In the opinion of the Court, the Council was right to conclude that, since the obligation to purchase from one supplier in the present case was not objectively necessary for the operation of the supplier of heating, and since other service providers could have competed in the relevant market if Vilniaus Energija were not obliged by the contract to buy from only one supplier (Bionovus), both companies that have entered into such a contract had violated Article 5 (1) of the Law on Competition.

The fines were reduced by the Court, taking into account the fact that both companies have voluntarily withdrawn Paragraph 6.1 of the exclusive purchase agreement immediately since the investigation of the Council was started.

On 13 June 2018, the Supreme Administrative Court of Lithuania annulled the decisions of the Competition Council and of the Vilnius Regional Administrative Court, and returned the case to the Competition Council for additional investigation.

The Supreme Administrative Court has pointed out that, according to Article 3 of the Regulation (EU) No 330/2010, the exemption provided for in Article 2 shall apply on the condition that the market share held by the supplier does not exceed 30 % of the relevant market *in which it sells the contracted goods or services*, and the market share held by the buyer does not exceed 30 % of the relevant market *within which it purchases the contracted goods or services*. According to Paragraph 110 of the Guidelines on Vertical Restraints by the European Commission, the assessment of a vertical restraint generally involves a need to establish the market shares of both the supplier and the buyer in the market in which they respectively sell and purchase the contracted products. The same methodology, in the opinion of the Supreme Administrative Court, must be followed by the competent authorities in the area concerned.

The Supreme Administrative Court has noted that by quoting the same provisions as those in the *Block Exemption Regulation*, the Competition Council has concluded, in the contested decision, that "it is apparent that, in relation to the buyer, the evaluation is made on the relevant market in which it purchases the contract goods or services", however, the Council mentioned nothing about the evaluation, using the same principles, of the supplier's market, which is also required by the Regulation. According to the geographical market, so defined, it is subsequently possible to determine the market share of Vilniaus Energija on the market where it purchases the biofuel, but it is not possible to identify the market share of Bionovus on the market in which it sells biofuel, since the latter has not necessarily been limited to a certain radius around the particular buyer of biofuel. Accordingly, in such circumstances, it is not possible to establish the possibility of the application of a block exemption under the *Block Exemption Regulation*; to objectively and correctly quantify the extent of the market closure, and, to assess other relevant legal criteria which are decisive on the assessment of the agreement between the companies. The definition of the relevant market and the determination of the market share of the individual operators have an impact on the final decision as a result of which their actions have caused significant damage to the interests that are protected by the law. Taking into account these consideratios, the Supreme Administrative Court obliged the Council to supplement the investigation with a reasoned definition of the geographical market, to establish the possibility of a block exemption under the *Block Exemption Regulation*, to quantify the extent of market closure, to reassess the material injury to the competition, and to address the appropriateness of the contractual commitments that are taken on by the companies.

Both Vilniaus Energija and the Competition Council have submitted petitions for the reopening of proceedings on the basis of the material violation of the norms of substantive law. By the ruling of the Supreme Administrative Court of 20 December, 2018 Vilniaus Energija’s petition was refused, however, the proceedings were reopened on the basis of the Competition Council’s petition, claiming material violation of the application of Paragraph 1 of Article 3 of the *Block Exemption Regulation* by deciding that, for the purposes of the evaluation of the vertical agreement, two separate geographical markets (for the supplier and the buyer) must be defined. In its petition to reopening the proceedings the Council, thus relied, *inter alia*, on some sources of legal doctrine, which presupposed the calculation of market shares in the same single market, as well as on the response of the Directorate General for Competition of the European Commission to the request of the Council, explaining that Article 3 (1) of the *Block Exemption Regulation*, and Paragraph 88 of the Guidelines on Vertical Restraints, taken together, mean that the relevant geographical market within which the supplier sells the contract goods, and in which the buyer purchases the contracted goods from the supplier, should be one and the same.

In the ruling to reopen the proceedings, the Supreme Administrative Court pointed out that while the conclusions of the Court were based on a linguistic and systematic assessment of Article 3 (1) of the *Block Exemption Regulation* and Paragraphs 88 and 110 of the *Guidelines on Vertical Restraints*, it appears that there are some differences in the different language versions of the *Guidelines on Vertical Restraints*: the English version uses the singular form of the word “market”, while the Lithuanian version – the plural form (“markets”). This, together with evidence presented by the Council, has been found by the Court to be sufficient to reopen proceedings on the basis of possible material violation of the application of the norms of substantive law.

After reopening the proceedings, the case was referred for a *de novo* hearing by the Supreme Administrative Court.

Comment

This is one of the most recent competition law cases heard by national courts. It is important from two aspects: firstly, it highlights competition enforcement challenges involving public procurement and the need for the scrutiny of public procurement contracts. The Court’s decision serves as a reminder that the tender rules should be devised in a way which in the future will take into account the possible market position of the successful bidder, and the fact that the agreement has been awarded in a public tender procedure will be no defence for the supplier. Secondly, it raises some interesting issues that are related to the application of the *Block Exemption Regulation* and the *Guidelines on Vertical Restraints*, which still have to be decided by the Supreme Administrative Court in its final ruling.

Renate Schohaj, Austrian Federal Finance Court

Facts of the dispute

Spar AG is the second largest food retailer in Austria, with a market share of around 30%.

In the years 2002 to 2012, agreements on selling prices were reached between Spar and the suppliers of dairy products, as part of purchase price negotiations. The Spar buying agents demanded "margin neutrality" in connection with the purchase price increases that were demanded by their suppliers. This meant, that a supplier who wanted to demand a higher purchase price from the retailer for his goods must ensure that Spar AG's margin remains the same in the event of a purchase price increase. Spar therefore had to be given the opportunity to raise its prices also.

For this purpose, the Spar buying agents asked their suppliers to set 'recommended selling prices' as indicative prices, and to inform the competitors to Spar AG. This was intended to ensure that Spar AG's competitors could also increase sales prices accordingly for the products affected by the purchase price increase. To prove the implementation, the suppliers were required to send price lists or cash receipts from competitors to Spar. The suppliers complied with Spar AG's demand and they also obtained a corresponding sales price adjustment from Spar AG's competitors.

Judgment of the Cartel Court

In its judgment of 26 November 2014, at the request of the Federal Competition Authority, the Cartel Court qualified this conduct as vertical sales price co-ordination with "horizontal hedging", and consequently imposed a fine of €3,000,000 for it.

The Ruling of the Supreme Cartel Court, OGH 16 Ok 2/15b, OGH 16 Ok 8/15k

In its ruling of 8 October 2015, the Supreme Cartel Court rejected Spar AG's appeal. It shared the substantive assessment of the Cartel Court, and it increased the fine imposed to €30,000,000.

Grounds for the Supreme Cartel Court's ruling

Price agreements contrary to cartel law can be agreements on minimum prices, price intervals, price surcharges and deductions, or the co-ordination of the amount and the timing of a price increase (...). In addition, Article 101 (1) TFEU also covers agreements on margins and discounts, credit conditions and indicative prices (...).

Agreed recommended prices may also be prohibited. An agreement between competitors to publish price recommendations was thus considered an infringement of Article 101(1) TFEU (ex Article 81 EC), although the actual final prices were determined individually. Price maintenance by buyers is covered by Art. 101 (1) TFEU if it has the object or effect of restricting competition (...).

(...) A most-favoured-nation clause exists when a customer imposes on its supplier the stipulation that it may not sell its goods or services to other customers at more favourable prices. (...) However, a generally inadmissible most-favoured-nation treatment is also given if the supplier's relationship is only of an economic nature. (...)

Non-binding recommended prices are generally permissible. However, a recommended price, as a concerted practice, may constitute an infringement of Article 101 (1) TFEU (...) if it has the effect of indirectly fixing prices. EK considered an obligation on buyers, on the part of the supplier, to recommend retail prices when reselling to retailers, to be inadmissible. However, this must also apply to the present case, in which a customer persuades the supplier to impose a certain price level on other customers. (...)

In contrast, proof of an 'obligation' to implement fixed or minimum prices is not required for a cartel infringement (...). Any internal reservations that the "agreement" is not, not consistently or only deviantly observed, are just as irrelevant here as the assertion that it would only be enacted in this way for the sake of appearances, or for reasons of "negotiating tactics".

An agreement may not only be an isolated act, but may also consist of a series of acts, continuous conduct and a set of arrangements, votes and rules, provided that they form part of an overall plan. (...)

In the case of star contracts, there is no problem as to whether an agreement has been reached at all, since it is clear that agreements were concluded between the partner and the individual parties. Rather, it is questionable whether the bundle of co-ordinated vertical agreements has resulted in a (horizontal) agreement between the parties.

In the practical case of a possible horizontal agreement that is based on a large number of vertical exchange agreements, [an agreement between the individual parties] can be presumed to exist, in particular if either the effectiveness of the individual agreement is dependent on the other agreements according to the will of the parties, i.e., the parallel links are only meaningful in the context of the parties' objectives, or if they are based on horizontal co-ordination between the tied companies. The main purpose of vertical agreements does not have to be horizontal co-ordination; it is sufficient for vertical agreements to be designed in such a way that the vertical contractual relationship cannot be entered into at all without agreeing to horizontal co-ordination. Article 101 (1) TFEU also recognises that a 'bundle' of vertical agreements may create a contractual framework which constitutes a horizontal agreement. (...)

There is no doubt as to the market power of the group concerned (in the sense of purchasing power) *vis-à-vis* its suppliers. In this context, the same criteria cannot be applied as in the case of the abuse of a dominant position. Rather, it should be borne in mind that suppliers regularly have low profit margins and therefore cannot compensate for the loss of a significant sales channel (...) without experiencing financial difficulties. (...)

The Cartel Court has correctly recognised that an infringement of the cartel prohibition exists if the dealer takes part in an objective exchange of information that is aimed at price moderation, or that even invokes an agreement with regard to prices with other trading companies *vis-à-vis* suppliers, because, on the one hand, this restricts (vertically) the price setting behaviour of suppliers *vis-à-vis* the other dealers, and, on the other, one dealer restricts (horizontally) his price setting behaviour *vis-à-vis* the others - with the consequence of a co-ordinated price at the level of trade. (...)

The upper limit provided for in § 29 KartG (anti-trust law) is not merely a "capping limit" but constitutes the penalty range within which the Cartel Court must orient itself when calculating the fine. On the other hand, according to the Guidelines, fines must be based on actual turnover; a certain percentage (generally a maximum of 30 %) of this amount then constitutes the basic amount of the fine, which must be increased or reduced depending on the grounds for aggravation and mitigation (*Guidelines on Fines* No 12 et seq.). Under Austrian law, this approach [is] out of the question, because it would not take sufficient account of the company's overall economic performance (16 Ok 5/08). (…)

The Guidelines on fines, according to which the basic amount is calculated by multiplying the number of years of infringement by a certain percentage of the turnover of the business concerned (up to 30 %) and according to the gravity of the infringement, are therefore not binding on the Cartel Court (16 Ok 2/13). For this reason, a detailed determination of "fact-related" sales is not necessary.

Personal comment

The ruling of the Cartel Supreme Court, in the cartel proceedings against Spar AG, for the first time provides details on price co-ordination in the dairy trade.

Accordingly, suppliers had to moderate prices for their large customers by setting 'recommended selling prices' for other dealers. Higher purchase prices for suppliers were made conditional on compliance with the recommended selling prices throughout Austria.

It is obvious why suppliers took part: Hardly anyone could afford to lose a large retail chain as a customer. In addition, there seemed to be some confusion about where to draw the line between legitimate price negotiations and prohibited price co-ordination.

Powerful retail chains, in particular, benefited from the price moderations, but weaker chains came under definite pressure as a result. In particular, at the insistence of competitors, suppliers often exerted pressure to take part in the co-ordination measures, or to comply with certain minimum prices. Suppliers threatened, and in some cases enforced, delivery restrictions and delivery blocks as enforcement measures.

It is central to the understanding of the ruling that the Cartel Court and the Supreme Cartel Court qualified the infringement as a restriction of competition by object, in an overall view of its vertical and horizontal dimensions. It was therefore not necessary to consider the actual impact on the market of the practices identified. In terms of time, a single infringement was adopted, thus excluding the limitation period for individual price co-ordination measures.

The judgment of the Supreme Cartel Court is also particularly important because of its comments on the assessment of fines. With regard to the appropriate fine, the Supreme Cartel Court emphasizes the purpose of prevention, as well as the importance of the discretion of the Cartel Court.

Here, it should be noted that the system of fines under Union Law (Article 23 of Regulation (EC) No 1/2003) is not identical to that under national Austrian law. An important difference concerns the question of the turnover to be used as the basis for determining the amount of the fine. According to Austrian law, this is based on total turnover.

The Supreme Cartel Court rejected the method applied by the Cartel Court, which was based on the relevant guidelines of the European Commission, and made it clear that the upper limit provided for in § 29 KartG (anti-trust law), according to which the fine may not exceed 10% of the total turnover, is not to be understood as being a mere capping limit under Regulation 1/2003, but forms the framework of the penalties within which the Cartel Court must orient itself when calculating the fine. The *Commission's Guidelines on the Method of Setting Fines* (OJ C 2006/210), according to which the basic amount is calculated by multiplying the number of years of infringement by a certain percentage of the turnover of the line of business concerned (up to 30 %), and according to the gravity of the infringement, are therefore not binding on the Cartel Court and a detailed calculation of 'factual' turnover is not necessary.

This system, which is preferred by the Supreme Cartel Court, means that fines imposed by Cartel Courts are much less easily comprehensible than those imposed by the European Commission. The total turnover in the last year of the infringement is both the starting point and the end point of the calculation.

Measured against the criteria of severity (core infringement), duration (10 years), the degree of intent and the financial strength of Spar AG, the Supreme Cartel Court considered the present infringement of cartel law to be clearly above average. In addition, the conduct continued even after indications of illegality were given by the Austrian Association of the Branded Goods Industry. On the other hand, account had to be taken of the fact that the conduct found concerned only a small section of the products that were offered by the group. The Supreme Cartel Court therefore considered a fine of €30,000,000 to be appropriate, and this corresponds to about 3.5 % of the legally permissible upper limit (10 % of the total turnover in the previous financial year).

The ruling of the Supreme Cartel Court is a landmark ruling, but it leaves much scope for future discussions, both regarding the facts of vertical agreements and the sanctioning of anti-trust violations.

Doina Visan, Bucharest Court of Appel

File no. 2588/2/2017, Bucharest Court of Appeal

The facts of the dispute

The Competition Council of Romania issued Decision no. 81/24.11.2016, by which, amongst others, it has sanctioned the plaintiff company, pursuant to Art. 55 Par. 1 lett. a) of Law no. 21/1996, with a civil fine *in quantum* of 93.503 lei, representing 0.5% of the turnover achieved by it in 2015 (para.. 26 of the operative part of the Decision).

According to the Decision, between 19.12.2005-07.10.2016, S.C. Boissigny Auto Distribution S.R.L. concluded contracts for the distribution of its products with 35 enterprises, of which, in the case of 32 enterprises, including the plaintiff, these represented vertical agreements for the establishment of sale prices to final clients, having, as object, the restriction of the capacity of the distributors to determine retail resale prices.

As for the relevant market, at para. 14-18 and 24 of the Decision, it was considered that the relevant market of the product was restricted, and was a niche market, being identified as a market of distribution and trading for steel and aluminium rims, wheels´ antitheft devices, products that are vehicle cosmetics and other accessories, and at para. 19-24 it was considered that the relevant geographical market is the national one, since S.C. Boissigny Auto Distribution S.R.L. trades products either directly to retailers and distributors, or to final consumers, in different regions of the country.

With respect to the relationship between S.C. Boissigny Auto Distribution S.R.L. and the plaintiff S.C. Railex S.R.L., at point. V.1 of the Decision it was considered that the parties concluded the sales purchase contract, no. 13/05.03.2011, which, at Art. 5, included the following clause: ”the unit price of each product is understood to be Franco-beneficiary in lei (i.e. it incudes the delivery costs, including installation accessories), according to the price lists of the seller, and represents the sale price to the public of the buyer, VAT included. The standard discount is 15% on steel and aluminium rims and 40% on accessories: anti-theft devices, hidden valves, emblems, installation kits. Commercial conditions of Premio network: discount of 20%.”

At para. 64 and 73 of the Decision, it was considered that this framework agreement represented a vertical agreement having, as object, the restriction of competition on the market for the distribution of steel and aluminium rims and vehicle accessories, by the restriction of the manufacturer, Boissigny, of the freedom of the distributor that relates to determining the resale prices, based on a vertical agreement, having, as object, the concerted determination, either directly and/or indirectly, by discounts, of the prices for resale, and it was meant to restrict or affect the internal competition by price.

The judicial proceedings

The Court of Appeal considered that it was necessary to present some of the issues that are related to vertical restrictions, from the perspective of the European Competition Law.

The vertical agreements are concluded between the parties, which are situated at different levels of the process of production, a typical example being the distribution agreement between the manufacturer and the seller of the products.

Since there are different categories of vertical restrictions (i.e., exclusive distribution, selective distribution, franchise, exclusive supply, related sale, imposing the sale price, management agreements per categories etc.), from the perspective of European Competition Law it must be determined whether these may be included in the provisions of Art. 101 Para. 1 of TFEU.

According to Rule no. 330/2010 and the *References of the Commission*, the imposing of a resale price is identified as being a flagrant and serious vertical restriction, this kind of agreement being presumed to restrict competition and to enter under the incidence of Art. 101 Par. TFEU.

As regards the case law of C.J.E.U. in the matter of vertical restrictions, it must be mentioned, firstly, that Paragraph 43 of the judgment of 14th March, 2013, in the case Allianz Hungária Biztosító and others, C-32/2011: ”\the circumstance, including vertical relations, does not exclude in any way the possibility that the agreement in question in the main case represents a restriction of competition ”by object”. Although the vertical agreements are often, by their nature, less harmful for competition than horizontal agreements, despite all of these, under certain circumstances, they may also have a very high potential to be restrictive. The Court had already decided on several occasions that a vertical agreement had, as object, the restriction of competition”.

Further, it must be mentioned the jurisprudence related to the delimitation that must be determined between practices with an anti-competitive object and those with an anti-competitive effect. Considering the constant nature of such jurisprudence, the Court of Appeal will refer to a more recent case:

By a judgment of 11.09.2014 in the case *Groupement des Cartes Bancaires (CB)*, C-67/13 P, the C.J.E.U. decided, in addition to the decision in the case Allianz Hungária Biztosító, the following:

> 51. It is known that certain collusive behaviours, such as those leading to the horizontal determination of prices by agreements, may be deemed as being, to a certain extent, susceptible to negative effects, mainly on the price, quantity or quality of products or services, since it may be deemed useless, for the enforcement of Art. 81 Para. 1, to prove that they have real effects on the market (see, mainly, the Decision Clair, 123/83, para.. 22). According to the experience, such behaviours entail reductions in production and increases in prices, leading to the improper assignment of resources, mainly to the detriment of consumers.

Ruling of the Court

Pursuant to analysing the jurisprudence presented, the Court of Appeal considers that, in order to determine whether an agreement presents, by its nature, a sufficient degree of harm to be considered a restriction of competition ”by object”, according to Art. 101 Para. 1 of TFEU,., its provisions must be analysed in regard to both the targets and the economic and legal context where this is includedm and these are two possible hypotheses: if the result is that the agreement is part of a category that is expressly stipulated by Art. 101 par. 1 of TFEU., the analysis of the economic and legal context may be only marginally undertaken; if, on the contrary, the result is that the agreement does not enter into the incidence of one of the hypotheses that are mentioned in Art. 101 Para. 1 of TFEU. or presents characteristics that make the agreement atypical or complex, the analysis of the economic and legal context must be more detailed. In the latter case, the nature of the goods or services affected, as well as the real conditions of the operation and structure of the market/markets in question, may be considered in relation to appreciating the economic or legal context, as well as, in exceptional cases, the additional characteristics that are included at para. 48 of the Decision Allianz Hungária Biztosító and others (C-32/11). These would include, respectively, the structure of the relevant market, the existence of alternative channels for distribution, and its importance, as well as the market value of such companies. In addition, although the intent of the parties is not an element that is necessary in order to determine the restrictive nature of an agreement, it is not forbidden to consider it.

Consequently, was the case in the relevant jurisprudence, above, the Court considers that it is not necessary to examine the effects of an agreement if the anti-competitive object of it is proven. On the other hand, it is essential to determine the anti-competition object of such an agreement. The Court also considers that the interest presented by the distinction between the restrictions of competition "by object ", and those "by effect", is evidence: in case of restrictions by object, the evidence of its anti-competitive effects is unnecessary, the determination of an anti-competitive object being enough to qualify as restriction on competition and, consequently, for the sanctioning of enterprises; if the anti-competitive object of the agreements considered is proven, then the investigation may end, and the breach is prove without it being necessary to prove the current or potential effects of such an agreement on competition.

Returning to the declarations of the plaintiff related to the absence of an anti-competitive agreement, the Court of Appeal considered it lacked grounds, in the context that the plaintiff, as the buyer (distributor), had breached, with S.C. Boissigny Auto Distribution S.R.L., the sale-purchase contract no. 13/05.03.2011, which, at Art. 5, included the following clause: ”*the unit price of each product is understood Franco-beneficiary in lei (ie. It incldes delivery costs) and installation accessories, according to the price lists of the list of the selle,r and represents the sale price to the public of the buyer, VAT included. The standard discount isf 15% on steel and aluminium rims and 40% on accessories: anti-theft devices, hidden valves, emblems, installation kits. The commercial conditions of the Premio network: discount of 20%”.*

The Court of Appeal noticed that, by the decision appealed, the Council did not understand that it should sanction the plaintiff for the frequency or regularity of their commercial relations with S.C. Boissigny Auto Distribution S.R.L., but for the agreement concluded related to the resale prices, with the consequence that it was affecting the consumer in relation to the possibility of obtaining purchase prices at a lower rate. Consequently, the share of commercial transactions is not relevant for the existence of an anti-competitive agreement, but on the date of the individualisation of the fine, an agreement consisting also of a singular action, or a range of actions (in the same respect, case C-49/92 P Commission vs. Anic Partecipazioni SpA).

The Court of Appeal considered that the price agreed in the contract is minimum/fixed, and is neither recommended nor maximum, thus limiting the freedom of the distributor to determine the resale price to final consumers. The Court determines that, by evidence, the Council has proven that the plaintiff and Boissigny had concluded a vertical anti-competitive agreement, having as object the determination of sale prices. By signing the contract, the plaintiff expressed its consent on its object and contents, including the clause in Art. 5, including restrictions of competition. The claim that it was impossible to negotiate the contract could not represent a clause for the removal of liability, or a justification of the breach of the provisions of Art. 5 P0ara. 1 lett. a) of Law no. 21/1996. In fact, the plaintiff agreed that by the above mentioned clause, the manufacturer/supplier had determined the prices and commercial increases, thus restricting its freedom relating to determining the prices for resale to consumers.

On the other hand, considering the declarations of the plaintiff, the Court of Appeal outlines that, to the extent that the anti-competitive behaviour is forbidden by its object, considering the degree of harm to competition, it is not necessary to characterise it by its economic impact.

Considering these decisions, the Court rejected, as lacked in groundd, the petition for the partial annulment of Decision no. 81/24.11.2016.

The case is currently on the docket of the High Court of Cassation and Justice in order that the second appeal may be settled.

Comment

The National Court extensively refers to the previous case law of the CJEU in its ruling.

The case law of the C.J.E.U. in the matter of vertical restrictions notes that, a restrictive agreement ”by object” is forbidden, regardless of the consequences caused, by the simple fact that potential danger is presented to normal competition, this being enough to prove that the agreement may produce negative effects on competition, without the analysis of its impact on competition being necessary.

Procedural Aspects in Competition Law Enforcement

Nina Korjus, Finnish Market Court

Finnish Competition and the Consumer Authority's Proposal to the Market Court 31.10.2014

The Market Court's decision 30.3.2016 MAO:183/16, Finnish Competition and Consumer Authority v Eltel Networks Oy and Eltel Group Oy

Supreme Administrative Court's request for a preliminary ruling 10.6.2019 KHO:2019:74; C-450/19

Introduction

This case concerns an alleged cartel between the two most significant power line contracting companies operating in Finland and, more precisely, the duration of that cartel. After the Finnish Competition and Consumer Authority's (FCCA) proposal to the Market Court and the appeal against the latter's decision to the Supreme Administrative Court, the case is currently pending before the Court of Justice of the European Union.

Finnish Competition and the Consumer Authority's Proposal to the Market Court

In 2014, the FCCA submitted a proposal to the Market Court to impose an €35,000,000 penalty on Eltel. According to the FCCA, Eltel and Empower had engaged in an unlawful collaboration between competitors in relation to power transmission line design and construction contracts in Finland. According to the FCCA, these prohibited actions began in October 2004, at the latest, and continued without interruption until March, 2011, or longer.

The FCCA initiated its investigation after Empower, the other party to the prohibited actions, provided the FCCA with information and evidence on the cartel's operations in order to be exempted from paying any fines. According to the FCCA, its investigations show that Eltel and Empower had agreed among themselves the prices, margins and distribution of contracts pertaining to future power line projects. The FCCA considered the actions of Eltel and Empower to be a serious violation of Finnish anti-trust legislation and the European Union's anti-trust regulations. The companies colluding in these actions were the two most significant power line contracting companies operating in Finland, and their harmful co-operation covered the entire country.

The FCCA granted an exemption from the fine for Empower, because it revealed the existence of the cartel in 2013 by providing the FCCA with related information and evidence. As regards the €35,000,000 fine on Eltel that was proposed, the FCCA took account of the nature, scope and duration of the violation, as well as Eltel's substantial net sales, amounting to around €1.1 billion in 2013, when determining the amount of this fine. The FCCA presented the Market Court with a penalty proposal on the matter at the end of October (31.10.), 2014.

Market Court's decision

According to the *Act on Competition Restrictions* that was applicable to the case at hand, a penalty payment should not be imposed unless the proposal to the Market Court were made within five years of the date on which the violation ended. In the current case, the FCCA should have shown that the cartel had existed until the end of October 2009. In the current FCCA *Act on Competition Measures,* to investigate the infringement shall reset the limitation period, which was not the case under the previous Act.

In its decision, the Market Court found that the FCCA's investigations did not provide sufficient legal evidence to show that the cartel had existed until the end of October 2009, and rejected the penalty proposal.

The Market Court found that it had been demonstrated that representatives of these companies met in 2004, 2005 and 2006. In these meetings, they had discussed future power transmission line projects and the distribution of at least some projects between the companies. The companies' representatives had engaged in phone conversations at least a few times a year, and had discussed certain power transmission line projects n, at the least, 2007. However, after an overall assessment, the FCCA failed to show that the violation did not end before the end of October 2009.

In this regard, the FCCA had argued that the economic consequences of an unlawful agreement continued throughout the whole period in which unlawful prices were applied, and the contractual obligations were in force. It is settled case-law that the system of competition established by Articles 101 TFEU and 102 TFEU is concerned with the economic consequences of agreements, or of any comparable form of concertation or co-ordination, rather than with their legal form. Consequently, in the case of agreements which have ceased to be in force, it is sufficient, in order for Article 101 TFEU to apply, that they produce their effects beyond the date on which the unlawful contacts formally came to an end. It follows that the duration of an infringement may be assessed by reference to the period during which the undertakings concerned engaged in conduct that is prohibited by that article (see, to that effect, judgment of 30 May, 2013, Quinn Barlo and Others v Commission, C-70/12 P, EU:C:2013:351, Para. 40, and the case-law cited). In this case, the FCCA relied on a project called Keminmaa–Petäjäskoski, of which the effects lasted the longest of all the projects that were agreed upon according to the FCCA. For this project, the unlawful agreement on tenders would have lasted until the last payment was made (7 January 2010), or, at least, until the project had been completed (12 November 2009).

The company, Eltel, on the other hand, argued that the effects of an agreement on tenders last only until the tenders are submitted (4 June 2007), or, if price negotiations are still possible, until the contract has been signed (19 June 2007). According to Eltel, the completion of a project, or its payment, has nothing to do with the effects of an eventual infringement, and it depends case by case on the specifics of a project or the solvency of the orderer. It would be purely coincidental to link legal prescription to the completion of the project or payment.

So, the interesting question was, how far can affects last in these kinds of construction projects? If following the FCCA's view, the effects might last several years after the actual agreement was made. If the crucial moment is the end of contractual obligations, will reclamations of eventual construction defects be taken into account? The Market Court had, after the oral hearing, asked the parties whether they considered a request for a preliminary ruling necessary on that question, which they did not.

Unfortunately, the Market Court did not have a chance to take a stand on this question, or to make the request for a preliminary ruling, since the FCCA failed to provide sufficient legal evidence that the only project that was completed after the crucial moment had been agreed upon.

The Market Court therefore rejected the FCCA's penalty proposal on the grounds that it had been submitted after the five-year time limit that is laid down in the *Act on Competition Restrictions*.

The Market Court ordered the FCCA to pay €300,000 of Eltel's court fees. In this regard, the Court took into account that the FCCA had failed to give Eltel access to the whole file before giving the penalty payment proposal to the Market Court. In EU competition law, infringement of the right of access to the Commission's file during the procedure prior to adoption of a decision, can, in principle, cause the decision to be annulled if the rights to a defence of the undertaking concerned have been infringed. In such a case, the infringement is not remedied by the mere fact that access was made possible during the judicial proceedings. Contrary to the EU system, in Finland, the FCCA only makes a proposal, and not a decision that can be appealed. Hence, the FCCA can still provide documents during the procedure at the Market Court without violating the rights to defense of the company concerned, since it can give its observations to the Market Court. However, in this case, the fact that the FCCA gave lots of the documents only at a late stage at the Market Court, was taken into account when assessing the court fees.

Supreme Administrative Court's request for a preliminary ruling

The FCCA made an appeal against the decision of the Market Court to the Supreme Administrative Court. The latter decided in June 2019, three years after the appeal, to make a request for a preliminary ruling to the Court of Justice concerning the duration of a cartel in these kinds of construction projects. More precisely, the Supreme Administrative Court asked the following question:

Can the system of competition established by Article 101 TFEU be interpreted in such a way that in a situation where a party to the cartel has made a contract with an outsider, agreed on in the cartel, the infringement lasts, due to its economic consequences, the whole time period during which the contractual obligations are fulfilled, or payments have been made, that is, until the last payment has been made, or at least until the project in question has been completed?

Or, can the infringement last only until the company liable for the infringement has submitted the tender or has signed the contract?

The Supreme Administrative Court did not assess the existence of the infringement and stated that the request for a preliminary ruling does not cover questions that are related to the evidence and the assessment of the alleged infringement.

Comment

This is an interesting case from several aspects. One question relates to the burden of proof and the overall assessment of the evidence.

Contrary to the FCCA, the Market Court had considered that the evidence was not sufficient for the last project. The Market Court recognized that coincidences and indicia, when evaluated overall, may provide information that is not just about the mere existence of anti-competitive practices or agreements, but also about the duration of continuing anti-competitive practices, or the period of application of anti-competitive agreements (judgment of 6 December, 2012, Commission v Verhuizingen Coppens, C-441/11 P, EU:C:2012:778, Para. 71, and the case-law cited). However, it followed the principle of the presumption of innocence, according to which, where the Court still a doubt, the benefit of that doubt must be given to the undertakings accused of the infringement (judgment of 22 November, 2012, E.ON Energie v Commission, C-89/11 P, EU:C:2012:738, Para. 72).

It is implicit from the request for a preliminary ruling of the Supreme Administrative Court that the latter considered the evidence sufficient for the last project too. Otherwise, it would not have been necessary to make the request. In the Finnish system, the parties can still provide more evidence at the highest court level, so it is possible that the FCCA has submitted more evidence. Of course, it is also possible that the Supreme Administrative Court has made a different overall assessment of the evidence that had already been submitted to the Market Court. We will discover this after the Supreme Administrative Court gives its final decision following the Court of Justice's ruling.

Meanwhile, it remains to be seen how the question relating to the effects of an agreement on tenders will be answered by the Court of Justice. This will be really interesting, since the case-law of the Court of Justice and the General Court is not very clear on this matter.

Markus Mattila, Finnish Market Court

Introduction

This case note is based on Decision no. 183/16 of the Finnish Market Court and the subsequent reference to a preliminary ruling made to the EU Court of Justice (CJEU) by the Finnish Supreme Administrative Court (SAC), where the matter is currently pending.[13]

The main issue in the Market Court's Decision is the duration of the alleged infringement of competition law. The Market Court held that the proposal for a fine filed by the Finnish Competition and Consumer Authority (FCCA) on 31 October, 2014, was time-barred because it could not be established that the cartel had continued until at least 31 October, 2009, or a later date, which meant that the FCCA proposal had not been filed within the statutory time limit of five years from the date when the infringement had ceased. The questions of the SAC in its reference for a preliminary ruling also related to the duration of the infringement, although from a slightly different perspective. Consequently, the focus of this case note is on the duration issue, and other potentially interesting questions, such as the standard of proof, are discussed to a lesser extent.

FCCA Proposal to the Market Court

In its proposal, the FCCA claimed that a fine of €35,000,000 should be imposed on Eltel Networks Oy and Eltel Group Oy (collectively, Eltel), based on their participation in an alleged cartel on the Finnish power transmission lines' design and construction market. According to the FCCA, Eltel and the other parties to the alleged cartel, Empower Oy and TPI Holding Oy (the latter, collectively, Empower), had agreed amongst themselves on the prices, margins and distribution of the work pertaining to future power line projects. Empower were granted leniency.

According to the FCCA proposal, the parties were engaged in a cartel from October 2004, at the latest, until March ,2011, or longer, and that it was a single and continuous infringement.

The FCCA argued that power line construction projects are long-term projects and consequently the effects of the prohibited co-operation extend over a period of several years. For example, tenders for the Petäjäskoski–Keminmaa power line construction project had to be submitted on 5 June 2007, at the latest, the project was completed on 12 November, 2009, and the payment of the last instalment was made on 7 January, 2010. According to the reasoning of the FCCA, the infringement had continued until this latest date in respect of this project. As described later, the questions asked by the SAC, in its reference for a preliminary ruling from the CJEU, are related to the duration of the infringement in respect of this specific project.

Further, according to the FCCA proposal, certain of the managers of Eltel and Empower exchanged information in telephone calls between them at least until the end of 2010, and an employee of Empower had, in October 2010, made a proposal to a third party that they should join the cartel. The managing directors of Eltel and Empower had also met each other in March 2011. According to the FCCA, these issues prove that the cartel was in existence at the respective times.

Market Court decision

According to the *Act on Competition Restrictions* (Statute No. 480 of 1992), which was applicable at the time of the alleged infringement, a fine shall not be imposed for a competition law infringement in

[13] C-450/19, Kilpailu- ja kuluttajavirasto.

the event that the proposal for the fine has been submitted to the Market Court within five years from the date when the infringement has ceased to exist, or when the FCCA became aware of the infringement.

Since the FCCA had submitted its proposal on 31 October 2014, the five-year limitation period was calculated from this date. The Market Court noted that the FCCA also has the burden of proof with respect to the duration of the infringement, even though the evidence must be assessed as a whole. It was therefore for the FCCA to produce sufficient proof to establish that the alleged infringement would have continued until at least 31 October 2009.

In its decision, the Market Court cited extensively the case law of the CJEU on the duration of the infringement and the standard of proof, amongst other issues. As to the duration of the infringement, the Market Court cited the judgment Quinn Barlo et al v. Commission, case C-70/12, Para. 40 (in the following) and therein cited prior case law:

In the first place, it is settled case-law that the system of competition established by Articles 101 TFEU and 102 TFEU is concerned with the economic consequences of agreements, or of any comparable form of concertation or co-ordination, rather than with their legal form. Consequently, in the case of agreements which have ceased to be in force, it is sufficient, in order for Article 101 TFEU to apply, that they produce their effects beyond the date on which the unlawful contacts formally come to an end. It follows that the duration of an infringement may be assessed with reference to the period during which the undertakings concerned engaged in conduct that is prohibited by that Article (see, to that effect, Case 51/75 *EMI Records* [1976] ECR 811, Para. 30; Case 86/75 *EMI Records* [1976] ECR 871, Para. 27; Case 96/75 *EMI Records* [1976] ECR 913, Para. 15; and Case 243/83 *Binon* [1985] ECR 2015, Para. 17). In other words, the General Court could, in theory, have found that there was an infringement, for example, throughout the whole period in which the unlawful prices were applied, which would have led, in the present case, to a result that wasobjectively less favourable to the appellants' interests.

As to the standard of proof, the Court also cited the judgment Total Marketing Services v. Commission, Case C-634/13 P, Paras. 26 and 27 (in the following) and therein cited prior case law:

It is settled case-law that, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see judgments in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, Para. 57, and in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, Para. 70).

As regards, in particular, an infringement extending over a number of years, the Court has held that the fact that direct evidence of an undertaking's participation in that infringement during a specified period has not been produced, does not preclude that participation from being regarded as having been established also during that period, provided that that finding is based on objective and consistent indicia (see, to that effect, judgments in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2006:592, Paras/ 97 and 98, and in *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, Para. 72).

The Court further cited the judgment Commission v. Verhuizingen Coppens, C-441/11 P, Paras. 71 and 72 (in the following):

Such coincidences and indicia, when evaluated overall, may provide information, not just about the mere existence of anti-competitive practices or agreements, but also about the duration of continuous anti-competitive practices, or the period of application of anti-competitive agreements (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, Paras. 95 and 96).

As regards the lack of any evidence that there was an agreement during certain specific periods or, at least, the lack of evidence of the implementation of such an agreement by an undertaking during a given period, it should be recalled that the fact that such evidence has not been produced in relation to certain specific periods does not preclude the infringement from being regarded as having been established during a longer overall period than those periods, provided that such a finding is supported by objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, Paras. 97 and 98).

According to the Market Court's Decision, it was proven that there had been meetings between representatives of Empower and Eltel in 2004, 2005 and 2006, at the least, in which the parties discussed future power line projects and the distribution of at least some of these projects amongst themselves. It was also proven that certain managers of the companies had had telephone discussions and, in at least 2007, discussed certain projects. With respect to the years 2009 and 2010, the evidence was not sufficient to prove that future projects were discussed. Further, according to the Decision, it could not be established with sufficient certainty that the meetings of the Managing Directors of Eltel and Empower were related to the alleged infringement. As to the proposal made by an Empower employee to a third company to join the cartel, it could not be established that this meeting would have been a part of a plan between Eltel and Empower.

With respect to the Petäjäskoski–Keminmaa power line construction project, tthe Market Court held that there was insufficient proof that Empower and Eltel had agreed on the project. The Market Court noted that although it is not necessary to prove collusion with regard to every single project, as this might be impossible, the duration of the cartel cannot nevertheless be established on the basis of a construction project about which collusion has not been sufficiently proven. even when the evidence is assessed as a whole. The Market Court expressly concluded that, for this reason, it was not necessary to state how long the construction project, for which a tender had been given on 4 June 2007, had continued to produce its effects.

The Market Court drew the conclusion that the evidence presented by the FCCA was too vague to establish that the alleged infringement would have continued until at least 31 October 2009, taking into consideration the burden of proof of the FCCA, and the presumption of innocence. Consequently, the FCCA proposal was time-barred and the Market Court dismissed the claims in their entirety without reviewing the merits of the case.

Appeal to the SAC and Reference for a preliminary ruling to the CJEU

The FCCA appealed the decision of the Market Court to the Supreme Administrative Court. By an interim decision on 10 June 2019, the SAC decided to request a preliminary ruling from the CJEU. The questions asked by the SAC relate to the duration of the alleged infringement in a situation such as the Petäjäskoski–Keminmaa power line construction project.

In this regard, the SAC argued that the cartel had economic effects until the payment of the last instalment of the purchase price on 7 January 2010, or, alternatively, at least until 12 November, 2009, when the construction project was completed. The FCCA further argued that the agreement has long-term effects on the purchaser, since the instalments are being paid over the course of a period of several years, based on the progress of the project. The effects are reflected in the costs and profits of the customer. i.e., the operator of the power line, and its activities on the market. The increased costs also had an effect on the prices paid by the end-customers for the transmission of electricity.

Eltel, on the other hand, argued that the duration of the infringement is assessed on the basis of the period during which the undertakings have acted in a manner that infringes competition law. In a situation where the construction project agreement has been awarded subject to a competitive bidding procedure, the limitation period starts to run when the tender is submitted, in this case on 4 June 2007. Alternatively, in cases where the price can be negotiated even after the tender has been submitted, the limitation period starts to run when the final agreement has been entered into (in this case 19 June 2007). According to Eltel, after the signing of the final agreement, the offered or agreed price does not produce any effects on the market, regardless of whether the project continues, or price instalments paid years afterwards. The progress of the project or the payment schedule do not have effects on competition, since the price no longer changes. Eltel has further argued that another interpretation would lead to arbitrary outcomes and would be against the principle of legal certainty.

According to the SAC, the case law of the CJEU is not entirely unequivocal with respect to the duration of a competition law infringement in a case where a construction project that is based on an agreement subject to a cartel is completed years after the signing of the agreement, and instalments of the contract price are paid even after completion. The SAC cited the CJEU judgment, Quinn Barlo, and therein cited a prior judgment, EMI Records v. CBS United Kingdom (Case 51/75). According to the SAC, the wording of the *Quinn Barlo* judgment of the CJEU would support the view that the infringement produces economic effects throughout the period that the agreed prices are in force. However, in the view of the SAC, the infringement in Quinn Barlo is different to the infringement in this case. The view that the infringement will last until the price has been paid in full is further supported by the case law, according to which the economic effects can continue even after the unlawful contract has formally come to an end. On the other hand, according to the SAC, the case law could also be seen as indirectly supporting the view of Eltel, since the price of the construction project does not produce effects on the market after the signing of the agreement, even if the project continues.

The SAC has therefore requested a preliminary ruling on the following question:[14]

> "Can the system of competition established by Article 101 TFEU be interpreted in such a manner that, in a situation where an infringing party belonging to a cartel, and a third party who is outside the cartel, have entered into a construction project agreement that is agreed upon within the cartel, the competition law infringement extends due to its economic effects over the entire period when obligations under the construction project agreement are being fulfilled, or when payment instalments are made, under the agreement between its parties, i.e., until the last instalment under the agreement has been paid, or at least until the project has been completed; or can the competition law infringement be considered to continue only until the infringing undertaking has submitted its tender for the construction project, or has entered into an agreement regarding the project?"

Comments

The case is interesting on several grounds. The National Courts have extensively referred to CJEU case law, for which further clarification may be needed. In addition, the fact that the SAC has considered it necessary to request a preliminary ruling concerning the duration of the infringement, with respect to the Petäjäskoski– Keminmaa power line construction project, may indicate that the SAC might be considering a different conclusion than the Market Court as to whether the said project was part of a single and continuous infringement. This would mean that the SAC applies the standard of proof differently. As noted earlier, the Market Court held that there was insufficient proof that Empower and Eltel had agreed upon the project, and consequently did not consider it necessary to state how long the construction project had continued to produce its effects.

---

[14] The questions havd not been officially translated into English at the time of the writing of this case note. Ther translations are therefore informal and may contain inaccuracies.

As to the specific issue, which is the subject of the request for a preliminary ruling, the wording of the existing case law (*Quinn Barlo* and *EMI Records*) would appear to suggest that the FCCA approach is the correct one, although the infringement in this case is different, as noted by the SAC. My personal opinion is that at least the mere fact that the price in a long-term agreement does not change after the signing of the agreement, should not, as such, lead to the conclusion that the agreement does not produce effects on the market beyond its signing date. The situation might, however, vary between different types of long-term agreements. In a construction project, there is usually just one delivery to the client upon the completion of the project, whereas, in other types of long-term agreements, there may be several, or continual separate, deliveries, each of which could individually have effects on the market, as competitors are foreclosed.

Abuse of Dominance

Fátima Reis Silva, Lisbon Court of Appeal

Name of the parties: National Portuguese Competition Authority, MEO – Serviços de Comunicações e Multimédia, SA and GDA – Co-operativa de Gestão dos Direitos dos Artistas, Intérpretes ou Executantes, CRL

Case nr. 77/16.7YUSTR

Court: Competition, Regulation and Supervision Court

Date: 9th June 2018.

Introduction

The present case deals with the interpretation of the concept of competitive disadvantage for the purposes of Subparagraph c) of the second paragraph of Article 102 TFEU, according to European and national legislation and case law and the ways in which the national court should deal with this.

Background

Meo, the provider of a paid television signal transmission service and television content, lodged a complaint with AdC (the National Portuguese Competition Suthority) against GDA, a non-profit co-operative that manages the rights of artists and performers, accusing them of the practice of discriminatory prices and, therefore, of the abuse of a dominant position.

The AdC opened an investigation, which led to a decision to close the case on the grounds that there was no evidence of an abuse of a dominant position.

Shortly afterwards, AdC concluded that, despite GDA having applied, between 2010 and 2013, different tariffs to different clients, there was no evidence that it had had restrictive effects on the relevant market (access to a paid television signal transmission service and television content) or, in the downstream market (triple pay). Concretely, there was no evidence that MEO had, because of the differentiated tariff, been placed at a competitive disadvantage.

MEO appealed to the Competition Court seeking the revoking of this decision, and requested a preliminary ruling concerning the interpretation of Article 102 TFEU that had grounded the decision.

AdC and GDA were heard, the appealed decision was supported, and the preliminary ruling request opposed.

The Court considered the facts of the case that had been established and determined that the preliminary ruling be referred to the Court of Justice on the discussed point of law - the interpretation made by the appealed decision of Subparagraph c) of the second paragraph Article 102 TFEU - and stayed the proceeding until after the ECJ ruling.

The ECJ has decided, in a judgment uttered on 19th April, 2018, ruling that:

> "The concept of 'competitive disadvantage', for the purposes of Subparagraph (c) of the second paragraph of Article 102 TFEU, must be interpreted to the effect that, where a dominant undertaking applies discriminatory prices to trade partners on the downstream market, it covers a situation in which that behaviour is capable of distorting competition between those trade partners. A finding of such a 'competitive disadvantage' does not require proof of actual quantifiable deterioration in the competitive situation, but must be based on an analysis of all the relevant circumstances of the case,

> leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest, of one or more of those partners, so that that conduct is such as to affect that situation."

The Court heard the parties and decided on a final ruling, confirming the appealed decision.

Facts

The GDA is a non-profi co-operative that manages the rights of artists and performers; it manages the rights relating to the copyright of its members, and of the members of foreign collecting societies with which it has concluded a representation agreement and/or a reciprocal agreement. GDA's principal activity is to collect the royalties which arise from the use of the related rights, and to pay themto the rights holders. The GDA is the sole body responsible for the collective management of related rights in Portugal.

Among the undertakings which make use of the directories of GDA's members, and of bodies with which the GDA has concluded a representation agreement, are entities which provide a paid television signal transmission service and television content. The applicant, MEO (and its predecessor PT Comunicações, SA), is one of those providers, and is a GDA customer.

GDA´s tariffs, by law, are set by agreement with its clients, and, if a settlement is not reached, by mandatory arbitration.

Between 2010 and 2013, as part of its wholesale offering, GDA applied three tariffs simultaneously, thereby imposing different tariffs on the various entities providing paid television signal transmission service and television content.

GDA applied to MEO the tariff which had been set by an arbitration decision of 10 April 2012.

In 2010, MEO had a share in the paid television signal transmission service and television content market of under 25% of the total and, in 2015, it´s market share was over 40%.

Evidence was produced regarding the costs structure of MEO and its main competitors (confidential).

The ruling of the Court

The Court analysed the scope of the jurisdictional control in this kind of decision, the legal qualification of the practice, the reasoning of the appealed decision and its compliance with European law, and, finally, the decision itself.

The first finding of the court, in procedural matters, regarded the scope of the jurisdictional control that the Court is allowed in this kind of decision. The Court analysed the applicable national rules and concluded that a decision that dismisses the case after the opening of an investigation is a final decision that has to be based on a very low (or inexistent) probability of conviction, and that the jurisdictional overview of this decision must focus on the existence of sufficient evidence, and, in the mandatory reasoning of the decision, never replacing the national authority but just checking the decision's adequacy.

On checking the appealed decision, the Court pointed that the definitions of the relevant market, relating to product and territory, of the downstream market, the existence of a dominant position and the use of different tariffs to different providers of paid television signal transmission service and television content, was not challenged. Supported by these facts, the argumentation of the appealed decision was analysed and the Court reached the conclusion that its base finding was correct: there was a likelihood that the discriminatory behaviour would place MEO at a competitive disadvantage.

Then the Court analysed the compliance of the authorities' findings with European and national law, focused on the concept and function of "competitive disadvantage" by looking at several decisions, namely, the British Airways Case (C-95/04), Solvay (C-109/10) and the Clearsteam decision (T-301/04), and argued that the relevant case law had not firmly stated the concept and function of competitive disadvantage for the purposes of Subparagraph c) of the second paragraph of Article 102º TFEU, and that the grounds of the appealed decision represented a development in European case law. This was the context for the preliminary ruling and the National Court, now taking the ECJ decision into account, concludes that a discrimination *per se* does not imply an anti-competitive effect and that the ECJ points out that a concrete judgment regarding the specific circumstances of the case is required. The Court analysed the facts and states that, in fact, the evidence collected leads to the conclusion that, in the given period of time, the discriminatory effect of the tariff applied was negligible and was not able to affect the competitive ability of the complainant.

The Court reached the conclusion that there was no probability of a defendant's conviction for the abuse of dominant position in this scenario, and dismissed the appeal, therefore confirming the ADC's decision.

Comment

This case shows perfectly the functioning of the preliminary ruling mechanism and its essentiality, as the European Court of Justice clarified the position that should be assumed in the face of a development of its caselaw on the matter of an abuse of a dominant position.

This, then, shows how the National Court took and applied the decision, highlighting that a major role is given to the National Courts, which must look upon the circumstances of the case from a very technical approach that relates to the economic approach to Article 102.

On the other hand, being such a clear-cut case, in terms of facts and substantive law (as there is only really one major issue to solve), it shows the importance of procedural rules, as the Court had, at first hand, to analyse its role and limits when deciding on an appeal against a dismissal decision that has been adopted by a national competition authority.

This highlights the relevance of national rules, especially in the context of the transposition of the Directive (EU) 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).

Adrian Engman, Swedish Patent and Market Court of Appeal

Background

Following the implementation, in 2007, by the MIFID (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004, on markets in financial instruments), the market for the services of stock exchanges in the EU were changing. Pan-European MTFs (multilateral trading facilities) challenged former national monopolies by offering services at a lower cost, and there was also a wave of mergers and acquisitions among stock exchanges.

At the same time, the technology used for trading services was developing, putting more emphasis on latency, which can be understood as the speed of communication or the distance between a trader and the trading facility (often measured in milliseconds). A new kind of trader emerged, a so called HFT (high frequency trader). HFT firms use algorithms to take advantage of tiny differences in value. They make up the low margins with incredibly high volumes of trades, numbering in the millions. Moving in and out of positions in seconds, or fractions of a second, they have a very short-term perspective on their investments.

Trading facilities across Europe were investing in new computer systems for trading and moving essential parts of these systems (matching engines) to specific computer centers. Because of latency, it was regarded as a competitive advantage for traders, and others, to be located close to, or in. the same computer center, as the primary trading platform.

Summary of facts

What were formerly the monopolies in Sweden, Denmark and Finland were, in 2010m owned by the American company Nasdaq. Nasdaq had invested in a computer center just outside Stockholm. The center consisted of four halls, one of which was reserved for Nasdaq, and those of its trading customers to whom it had granted the specific right of co-location.

Nasdaq had out sourced the computer center to the American company, Verizon, in 2007. Certain clauses in their agreement prevented Verizon from *i.a*. providing a co-location service with Nasdaq in the same hall of the computer center.

When the Nordic MTF Burgundy was established in 2009, there was already competition from pan-European MTFs, such as BATS, Chi-X and Turquoise. After a year, Burgundy's computer center was closing its business. Burgundy's service partner, Cinnober, entered into negotiations with Verizon and was close to a deal regarding Burgundy's move to the same computer center as Nasdaq. However, after contacts between Verizon and Nasdaq, the deal with Verizon was cancelled. Burgundy moved instead to another computer center, five kilometers further away.

Summary of judicial proceedings

The Swedish Competition Authority brought charges for the abuse of a dominant position. The relevant market was, in brief, defined as being the EEA market for services relating to trade transactions in transparent order books for Swedish, Danish and Finnish stocks. Nasdaq allegedly had a market share of at least 73 per cent.

According to the Competition Authority, Nasdaq, in October 2010, deterred Verizon from signing a deal with Cinnober/Burgundy, thereby preventing Burgundy from moving to the computer center. This led to a competitive disadvantage for Burgundy and less efficient trading for its customers. Among the negative effects, it was claimed that entry and expansion barriers were incurred, the costs for Burgundy and its customers increased, and there at least a potential risk of these negative effects.

Nasdaq denied the charges. In its defense it stated that the relevant product market included other modes of trading, other financial instruments, and stocks from all of the countries in the EEA.

Nasdaq also denied having threatened or pressured Verizon. Nasdaq did not oppose Burgundy moving to any of the other three halls in the computer center. Verizon had made an independent business decision. In any case, it was competition on the merits, and the alleged behaviour did not have negative effects on competition. Burgundy would not have achieved a low latency or an efficient trade by moving to the computer center.

Rulings of the Courts

4.1 Judgment of the Patent and Market Court, District Court of Stockholm, on 15 January 2018, Case PMT 7000-15

The definition of the relevant market, as claimed by the Competition Authority, was more or less accepted by the Court. The Court also found that Nasdaq was dominant on that market and that the company pressured Verizon not to accept a deal with Cinnober/Burgundy. However, Nasdaq's behaviour was not an obvious restriction on competition. It was, in fact, to be considered to be normal competition. Nasdaq had a contractual right to refuse Burgundy access to the same hall as Nasdaq within the computer center. In summary, for these reasons, the Court rejected the case.

The Judgment of the Patent and Market Court of Appeal, Svea Court of Appeal, 28 June 2019, Case PMT 1443-18

The Court jumped directly to the question of whether the behaviour had, or could have, negative effects on competition. The Court found that Burgundy was not as efficient a competitor as Nasdaq. Given that Burgundy did not have an efficient computer system, the increased latency due to the additional five-kilometer distance, was negligible. Furthermore, for the customers, the cost of trading with Burgundy was insignificant in relation to the business decision regarding which trading facility to use. In short, the refusal to let Burgundy move to the computer center had no negative effect. For these reasons, the Court rejected the case. The judgment was final.

A minority (two judges out of five) dissented. According to one of the judges, only if the computer center had been an essential facility, could there have been an abuse. However, this had not even been alleged by the Competition Authority.

The other judge stated that it should first be established whether the company had a dominant position on the relevant market. Finding that the relevant market was for services for trade in stocks from the entire EEA, but as the company had a market share of only 5–7 percent, this was not the case.

Comment

The case raises several interesting competition law issues. To begin, defining the relevant market presents many difficulties. This is also illustrated by, e.g., the Commission decision from 2012 (COMP/. 6166) in the merger case between Deutsche Börse and NYSE Euronext, in which the Commission left some issues open regarding the market definition.

Second, what seemed to be an interesting issue when the case started – whether it is always necessary to analyse the effects of allegedly restrictive measures – was clarified beforehand by the European Court of Justice in Intel, C-413/14 P.

To conclude, it seems that the Competition Authority had a difficult case to prove. Albeit for different reasons, the two Courts, including dissenting opinions, agreed to reject the case.

Marius Cristian Ispas, Bucharest Court of Appeal

Case no. 42540/3/2017, Decision nr.6683/28.11.2018 of the Bucharest Court of Appeal-Administrative and Fiscal Division, Romania

Summary of the facts

In 2016 a public tendering process for oncology medicines was started by the Romanian Ministry of Health. The acquisition criteria were "the lowest price". There were 4 competing companies, one of them a subsidiary of the worldwide producer, Hoffman La Roche, in Romania, and the others were different drug distributors from Romania. The authority has concluded the proceedings, and, on the first position, it was found that it was Hoffman la Roche which offered the lowest price for all of the lots.

One of the competing firms, Mediplus, started legal proceedings in Court in order to annul the decision on the grounds of an abuse of a dominant position, a margin squeeze because the public authority accepted prices lower than the price that Mediplus was paying for the same drugs from Hoffman LaRoche. Mediplus considered it could not compete with the producer under these circumstances.

Summary of judicial proceedings

First, the Court rejected the claim, but did not accept the analysis of the competition law issues, considering that anti-competition behavior should be discussed in front of the Competition Council and after a decision was issued, it might have implications in a trial.

The distributor, Mediplus, appealed and sought a remedy against an abuse of a dominant position:

a. competition law issues must be analyzed, according to the national law, European law imposes this even within a procurement case; Romanian Law no.98/2016, concerning the public tendering processes prohibits expressly all anti-competitive behaviors. If a company is abusing the market when anti-competitive agreements with other companies are concluded, then allowing a a company abusing its dominant position should also be banned. It is professional misconduct to abuse a dominant position, and this is sanctioned by the law of procurement. Directive 2014/24/UE on public tenders is transposed by Law no.98/2016 and the preamble to the Directive (points 59,92) states that "the aggregation and centralization of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs", or that "the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by arrangements that allow the information provided by the tenderers to be effectively verified";

b. if the Court is not analyzing the competition law issues according to the law of procurement, then it should have been analyzed under the main umbrella of Law nr.21/1996 on competition. The First Court also erred by refusing this analysis.

The distributor argues that the La Roche offer falls under the concept of a margin squeeze, because it deals with lower prices than those offered to the distributors in their private dealings.

The respondent, Hoffman La Roche, asserted in their defense that these prices are justified economically and that the claimant, Mediplus, has not proved anything to the contrary. There cannot be a simple mathematical comparison of prices among the competitive offers, but a complex analysis from the National Competition body is necessary. There was no proof that the Authority's Health Minister has hindered the competition process.

Ruling of the Court

The Appellate Court dismissed the appeal but considered that the First Court erred in not analyzing the competitive provisions of Law nr.98/2016 and Law nr. 21/1996. It also dismissed a preliminary question to the ECJ asked by appellant, who wanted to clarify whether:

a. under the notion of professional conduct stipulated at Article 57 alin. (1) lit. c) din Directive 2014/24/UE is included the abuse of dominant position;
b. if the Directive 2014/24/UE opposes to conclude the contract with a party that abused a dominant position;
c. if the practice of a dominant undertaking to offer in a procurement procedure lower prices than those offered to its distributors falls under the concept of anticompetitive practices under art. 102 of the Treaty.spacing

The reasoning of the appellate Court is as follows:

1. The First Court should have analyzed the competition law arguments, but it did not, and this was a mistake. The appellate Court had to analyze these arguments within the judgment. Both Laws nr. 98/2016 and nr.21/1996 allow a Court to observe competition rules, as well as Article 102 TUE;
2. Under the Cilfit doctrine, the Court rejected the preliminary questions, because:
    a. In Romanian law there is a clear provision regarding professional misconduct under Law nr.98/2016, and the ECJ does not have to clarify internal law;
    b. According to the obvious Article 18 Alin.2 from the Directive: a tender cannot be offered with the intention of excluding competitors or restricting competition between undertakings;
    c. It has thus far not been proven that there is a violation of Art. 102 TUE, if a public authority, during a procurement process and observing its previously agreed methodology and nondiscriminatory criteria, accepts the "lowest price" from a participant;
3. The appellate Court examined the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, and assessed that there was no proof of all the cumulative conditions that was required in order to establish an abuse of dominant position:
    a. There was no economic proof that there was a dominant position, since the Commission showed that when there is a holding of under 40%, there is no dominant position;
    b. The market structure was not analyzed by the appellant as to whether there are, or or not, entry barriers, who the competitors are, what the bargaining power of suppliers or customers is, whether there are substitute products or other threats to entry on this market for cancer drugs;
    c. There is no proof of anti-competitive foreclosure within this special situation of a procurement case;
    d. There are objective necessities and efficiencies that arise from having the prices of drugs sold to public authorities set, rather than those prices that are available between private competitors;
    e. There is no consumer harm that arises from having lower prices within the public medical system from a producer, such as Hoffman La Roche, rather than having prices offered by a distributor who also buys from producers;
    f. The case law provided is not really relevant, since it deals with cases from the Telecoms market and, secondly, these cases do not deal with procurement cases and the prices offered by

producers who are competing with distributors. Cases: Deutsche Telekom (T-271/03), TeliaSonera (C-52/09), Telefonica (T-336/07) were not considered to be relevant, since none of them dealt with these issues within a procurement process.

Personal note: the relevance of the case

This case is relevant because there is one firm that uses its dominant force (Hoffman La Roche) on the market for anti cancer drugs and fulfills the conditions set forth by a contracting authority. However, by fulfilling these conditions, a competitor who had a history of buying from Hoffman La Roche, notices that the prices offered to the public authority were lower than the prices it had secured as a distributor of La Roche for the same drugs. The Court states that this is normal within a procurement process, because these prices are offered to the public, and the producer can adapt its pricing strategy accordingly, without committing an abuse of its dominant position, as described by Art. 102 TUE.

Public procurement and competition law frictions:

Public procurement is a very relevant tool of public expense: states decide how to use the public budget on goods and services that are relevant to their citizens. The First Court refused to recognize the applicability of competition law within public procurement, maybe as a reflection of the macroeconomic idea that certain aspects of public procurement will escape the analytical framework used for competition evaluation—such as wealth redistribution and other social issues that are involved in the strategic phase of public procurement (project selection decisions should probably not be the object of strict competition law review, but should be left to political accountability mechanisms). Law no. 98/2016 concerning the public tendering processes expressly prohibits all anti-competitive behaviors, so there appeared to be no reason for the Court not to examine the competitive environment;

Public buyers as the agents of citizens: there is an agency relationship between the government (as agent) and citizens (as principals). In this regard, the public buyer shall conduct public procurement activities (in the same way, generally speaking, as all other activities) to satisfy the public interest;

Public buyers as market controllers or makers: public buyers seem to be entrusted with spreading contract opportunities according to non-market criteria (such as the pursuit of industrial or social 'secondary policies'). Central purchasing agencies may be considered to be market-makers, since they create a market platform or a two-sided market for the provision of goods and services to the final public buyers. The existence of such a platform can be legally reinforced by making acquisitions from the central agency mandatory for final public buyers (Art 37(1) in Directive 2014/24)—who would be prevented from acquiring those goods or services from the market, either in all circumstances, or when the conditions offered by undertakings are no more favorable than those offered by the central purchasing agency.

Public procurement is a mechanism of government economic intervention, and public procurement regulations and administrative practices can significantly alter the competitive structure of markets—particularly by altering the long-term incentives and competitive dynamics among public contractors (comments around paragraphs from "Public Procurement and the EU competition rules", 2nd edition, Albert Sánchez Graells).

Even though, in our case, there was a dominant player, Hoffmann La Roche, and it acted as a price setter, offering the public agency lower prices than those offered to its distributors, this might enhance social welfare and it could be considered that the public budget is well spent. However, several anti-competitive effects can be identified: firstly, a monopoly of such a large player-price setter (if there is no proof of monopolistic competition) might be considered a situation that harms most other suppliers in the market. Public procurement regulations could generate incentives for the collusion of all of the agents within the market. Arts. 101, 102 of TFEU can be invoked within the procurement process when “the purchasing activity is by itself capable of reducing or distorting competition in the market, or to generate the effects which competition rules seek to prevent” (Case C-113/07 P, SELEX Sistemi Integrati SpA):

In my opinion, the interpretation of the appellate Court may be right. If, under a framework analysis of 102 TFEU there is no harm to the consumer, or if there are market efficiencies, then there is no reason to consider that this is an abuse of a dominant position. Nevertheless, Hoffman La Roche seems to enjoy a dominant position in this market (an economic strength which enables the hindering of the maintenance of effective competition by allowing it to behave, to an appreciable extent, independently of its competitors, customers and consumer, *Abuse of Dominance in EU Competition Law: Emerging Trends*, Pier Luigi Parcu, Giorgio Monti, Marco Botta, p.98, with reference to Case 85/76 Hoffman La Roche);

Margin squeeze

A margin squeeze arises when a vertically integrated firm that is dominant in both the upstream and downstream markets sets the retail prices below the wholesale prices ("Margin squeeze abuse", Colley and Burnside, *European Competition Journal* 2006), with the incumbent sacrificing prices for some reason, like recoupment.

In our case, however, there were no retail prices that were lower than the wholesale prices, because selling to a public authority is not retail activity, from a legal point of law (this issue could be challenged economically). Since then, the appellant has not proved any recoupment, the tender was in 2016 and the trial in 2018. A margin squeeze, in telecommunication cases, could not be extrapolated by a Court in thprocurement process. Those cases assumed a framework for the economic analysis of margin squeeze in which there is: a unique network that is controlled by a vertically integrated firm that is dominant over an essential input that is supplied to its competitors in the downstream market (Labrador, "Margin squeeze in telecom") input, that is: a high and fixed proportion of the downstream costs (Gerardin "Margin squeeze in Telefonica”), with a positive outcome from the legal tests for a margin squeeze: the existence of exclusionary intent or object, and a material impact on competition.

However, in the national case, when Hoffman La Roche offered the pubalic authority lower prices than that it offered to the distributors, there is:

- no essential input supplied to its competitors: in this case, La Roche supplies final drugs, not inputs to make these (if drugs are considered an economic input within the main package of “drugs + distribution services”, then drugs are an input);
- no part of this product is a proportion of the downstream costs: distributors generally also buy those drugs from La Roche, but now they have to compete with the producer in a public tender; so there is an economic logic that a Producer can offer lower prices to a party other than a Distributor. It would have been counter-intuitive to see lower prices from distributors than those offered by the producer of the same products;
- the appellant has not proved exclusionary intent, since there is a distribution agreement between them and La Roche on this geographical market (still, if prices are lower than the average variable costs –AVC, then, as in the AKZO Case C-62/86, this was considered a presumption of exclusionary intent). Finally, there is no consumer harm in having access to these anti-cancer medications at a lower price within the public network for sanitary services.

Conclusion

Even if Hoffman La Roche has significant market power, it probably has a dominant position on this market, then there are other conditions to be fulfilled within the framework of Article 102 of TFEU. It seems that the appellant has failed to prove:

- anti-competitive Foreclosure: there is no proof that this procurement offer totally excludes competitors from the relevant market. Distributors can still sell wholesale to hospitals, pharmacies and other ambulatories;
- that Hoffman La Roche is sacrificing its profits by offering prices that are under costs, since there has been no recoupment in recent years. The appellant has failed to bring data about actual costs and the prices used in their commercial relations;
- the procurement process deals with public policy efficiencies and there is objective necessity for a public agency to buy anti- at a lower costcancer drugs;
- and, finally, consumer harm is non-existent, since buying these drugs from a public hospital that benefits from the lower costs of the procurement process is obviously a better solution, as opposed to buying at what would most probably be a higher price from private hospitals/centers of treatment that are supplied by distributors such as Mediplus.

Private Enforcement of Competition Law

Magda Teppey, Ljubljana Court of Appeal

- Judgment of the Court of Appeal of Ljubljana VSL I Cpg 125/2013, 28. 5. 2013 and

- Judgment of the Supreme Court VSRS III Ips 98/2013, 23. 5. 2014

Facts

By virtue of its Decision n. 3073-9 / 02-4 of 4 May, 2004, the Office of the Republic of Slovenia for the Protection of Competition found that the defendant (T., the biggest Slovenian telecommunication company) abused its dominant position in the voice telephony market when, in 1999, it rejected the plaintiff's offer of business co-operation - the inclusion of a CD-ROM with the internet access program in the ISDN package marketed by the defendant. The defendant had previously included S.'s CD-ROM in its ISDN package. S. was initially a business unit of the defendant, and then a legal entity that is solely owned by the defendant. The defendant continued to commit the same infringements until September, 2002. In the relevant period, S. concluded 37,759 internet access contracts with subscribers within the framework of ISDN packages. At the end of 1998, the plaintiff and 7 other companies were operating in the market together in Group A. The market share of Group A., at the end of 1998, amounted to 5-6 %.

The plaintiff claimed that the defendant had abused its dominant position and denied the plaintiff an equal competitive position with S. in the market for Internet access. Due to this violation, the plaintiff suffered a loss, since it did not acquire new subscribers under the defendant's ISDN packages.

The plaintiff requested that the defendant discontinue abuse of its dominant position and include its CD-ROM in the defendant's ISDN packages, paying the plaintiff a sum of €4,211,933.92 with default interest. The requested monetary compensation included lost profits, which the plaintiff would have earned with new subscribers had there been no infringement, in the period from 1999 to the end of September, 2002 (€364,078.80), plus the capitalized lost profits in the amount of the market value of new contracting parties in 2002(€3,847,855.12 with default interest).

Summary of the judicial proceedings

The Court of First Instance decided that the defendant acted unreasonably by refusing to deal with the plaintiff. According to its reasoning, this constituted an act of abuse of its dominant position, which is referred to in the fourth indent of the fifth paragraph of Article 10 of the Law on the Prevention of Restriction of Competition (ZPOmK). The Court of First Instance ordered the defendant to pay to the plaintiff the sum of €2,306,285.75 with the default interest.

The Court of Appeal considered that the following facts, in particular, were relevant to the decision on the amount of compensation: the number of subscribers (the market share of the two parties before the infringement), the number of subscribers obtained through the infringement by S., or its subsequent market share, profits per subscriber that were acquired during the period of the infringement by S., and the market value of the contracting parties at the moment when the claim was filed.

As a hypothetical situation without infringement, the Second-Instance Court assumed a situation in which the defendant would have offered the upgrade of the ISDN connection to all Internet access providers under the same conditions during the disputed period (CD-ROMs could therefore have been used by all of the providers with the ISDN defendant package). The Court also assumed that, in the hypothetical scenario, the plaintiff would have participated in the acquisition of new subscribers in the same way as the other providers, and in proportion to their market share at the end of 1998. In the absence of a well-founded reason to assume that the plaintiff would have had the full market share of Group A., the Second-Instance Court considered the plaintiff's market share to be 1/8 of Group A.'s share in the loss calculation. The Court of Appeal partially reversed the judgment of the Court of First Instance by rejecting the claim for the payment of €2,244,093.46 with default interest.

The Supreme Court stated that a hypothetical scenario (a "non-infringement" scenario) must be created in order to determine the amount of any lost profits. A hypothetical scenario can be approached in different ways. The Supreme Court rejected the hypothetical scenario of the Second-Instance Court, which takes into account all of the suppliers on the market, as well as the other extreme - the plaintiff's hypothetical scenario, which takes into account only the plaintiff and S. The Supreme Court considered that the likeliest hypothetical scenario is one in which at least a few other providers, in addition to S. and the plaintiff, would enter the market.

The Supreme Court considered that it is logical and rational to assume that an individual provider should start acquiring new subscribers in such a way that it does not require a high financial contribution in order to follow a certain proportion of the remaining users. If the defendant included the plaintiff's CD-ROM in the ISDN package, it would be reasonable to conclude that a certain proportion of the remaining providers on the market would also require a CD-ROM that was to be included in the ISDN packages of the defendant. On the other hand, it is also possible that some of the providers would not make such requests, as market operators act on the basis of different marketing strategies and use different approaches to market access. It should also be noted that the increase in the number of providers that would already have requested the inclusion of their CD-ROM in the defendants' ISDN packages would lead to a reduction in the economic incentive for each subsequent remaining provider to join the defendant’s ISDN package.

The fact that, in the actual scenario, the inclusion of a CD-ROM in the ISDN packages of the defendant was requested by one provider only, and a decision of the UVK was issued in that regard, cannot decisively influence a different assessment of the hypothetical scenario. It is crucial to assess how market operators would react in the absence of an infringement, if the dominant company had acted in accordance with the rules of competition law, and the way it should behave accordingly in relation to all market participants. The decision of the UVK allows the conclusion that, in the hypothetical scenario, fewer than the majority of providers would participate in the acquisition of new subscribers, but it does not allow the conclusion that, even in the absence of the violation, the inclusion of a CD-ROM in the ISDN packages would have been requested solely by the plaintiff. Taking into account only the plaintiff and S. in the hypothetical scenario, does not seem to be convincing either, because it is not logical that all of the remaining providers on the market would merely watch how their competitors are gaining new subscribers when they could use this tactic themselves. According to this reasoning, the most likely hypothetical scenario is that, in the absence of an infringement in regard to the acquisition of new subscribers through the inclusion of a CD-ROM in the ISDN packages of the defendant, in addition to S. and the plaintiff, there would be at least several other providers, although not the majority.

The Supreme Court estimated that, in such a hypothetical scenario, the plaintiff must be granted the full market share of Group A. with regard to the acquisition of new subscribers (5.5% of the total market share) in relation to all new subscribers in the disputed period. The Group A. providers, acting under the trademark A., were among the more successful in the market, and none of them at the time of the infringement (with the exception of the plaintiff) requested the inclusion of a CD-ROM in the defendant's ISDN packages. Since the plaintiff acted in Group A., and thus acted under the trademark A., it is reasonable to expect that, in the absence of the infringement, the plaintiff would cover the entire market share belonging to Group A. The other companies in Group A. did not request that their CD-ROMs be included in the defendant's ISDN packages, and they would not have made such a request even in the absence of the infringement. Accordingly, it is reasonable to assume that the plaintiff would be granted the entire market share of Group A. The plaintiff would have acquired 2,077 new subscribers on this basis. The Supreme Court further estimated that the plaintiff, in the hypothetical scenario, should be granted the acquisition of additional new subscribers on account of the fact that the plaintiff would be the first among the remaining providers to have their CD-ROM included in the defendant's ISDN package. The plaintiff would therefore have acquired all the subscribers for a given initial period, which would otherwise have been shared among the remaining providers. The remaining providers would only be involved in the acquisition of new subscribers after they had requested that their CD-ROM be included in the defendants' ISDN packages, which, according to the Supreme Court's assessment, would have occurred gradually. In view of the duration of the contested period (at least four years), the Supreme Court considered that the plaintiff would have acquired new subscribers on this account, which would otherwise be distributed among the remaining providers without the plaintiff (i.e., 2,158 new subscribers). In total, the plaintiff would, in the absence of the infringement, have obtained 4,235 new subscribers. In view of the number of new subscribers thus calculated, the plaintiff must be awarded compensation of €187,813.41, plus the market value of new subscribers when the claim was filed, in the amount of €753,448.85**.**

The Supreme Court decided that the profits realized by the defendant might be used as the point of reference for the calculation of the compensation. In the circumstances of this case, considering that the defendant abused its dominant position by giving priority to its business unit (subsidiary) S., in view of the availability of data and their quality, the profit of S. (from 1999 - 2002) was the most appropriate basis for determining what would have been the plaintiff's profit. Neither substantive nor procedural rules determine the single, and only possible, way in which the amount of losses should be calculated if a claim for recovery of lost profits is brought. This is all the more important when it comes to claims in the area of competition law, where the determination of the amount of losses is often very demanding. The choice of the appropriate method for calculating losses depends on the actual circumstances of the case and on the quality and accessibility of the data. In this regard, and in this case, the comparison of the profitability of the injured company with the profitability in the comparable company, S., was performed correctly. The Supreme Court partially changed the decision of the Court of Appeal.

Comment

In this case, the Supreme Court suggests a new trend in relation to the calculation of losses in the case of an abuse of a dominant position. The Supreme Court proceeded from the hypothetical scenario, taking into account all the factors that would have applied had the infringement not occurred. As a criterion for the determination of compensation, the profit gained by the infringer was taken into account. In this way, the plaintiff's position, in proving the existence and extent of the losses caused by the infringement of competition law, is greatly improved.

Jussi Karttunen, Finnish Market Court

Helsinki District Court, judgment of 28 November 2013

Helsinki Court of Appeal, judgment of 20 October 2016

European Court of Justice, judgment of 14 March ,2019 (C-724/17)

Supreme Court of Finland, judgment of 22 October 2019

On 31 March 2004 the Finnish Competition Authority (Kilpailuvirasto), after several years of investigations, made a proposal to the Market Court of Finland (markkinaoikeus) to impose fines on, *i.a.*, seven companies, for their setting up of a cartel in the asphalt market in Finland.

The Finnish Market Court gave its judgment on 19 December 2007. The Finnish Competition Authority and six of the seven companies appealed to the Supreme Administrative Court of Finland (Korkein hallinto-oikeus) against the judgment of the Finnish Market Court.

By the judgment of 29 September, 2009, the Finnish Supreme Administrative Court found that a cartel in the asphalt market in Finland had been set up between 1994 and 2002 and, in accordance with the economic continuity test that is recognised by the case-law of the Court of Justice, imposed fines, *i.a.*, on Skanska Industrial Solutions Oy for its own conduct, and that of Sata-Asfaltti Oy, on NCC Industry for the conduct of Interasfaltti Oy, and on Asfaltmix Oy for the conduct of Asfalttineliö Oy. On 22 March 2000, Skanska Industrial Solutions Oy (previously Skanska Asfaltti Oy) had acquired all of the shares n Sata-Asfaltti Oy. Later Sata-Asfaltti Oy was wound up due to a voluntary liquidation procedure, in the course of which its business was transferred to Skanska Asfaltti Oy (currently Skanska Industrial Solutions Oy).

NCC Industry Oy (previously NCC Roads Oy) was formed on 1 January 2003, when NCC Finland Oy was split into three entirely new companies. NCC Roads Oy (currently NCC Industry Oy) received the ownership of all of the shares in Interasfaltti Oy (which shares NCC Finland Oy had acquired on 31 October 2000). Later, Interasfaltti Oy was wound up following a voluntary liquidation procedure, pursuant to which its commercial activities were transferred to NCC Roads Oy (currently NCC Industry Oy).

Asfaltmix Oy (previously Rudus Asfaltti Oy) had acquired, on 20 June 2000, all of the shares in Asfalttineliö Oy. Later, Asfalttineliö Oy was wound up following a voluntary insolvency procedure, pursuant to which its commercial activities were transferred to Rudus Asfaltti Oy (currently Asfaltmix Oy).

All in all, 39 cities and the Republic of Finland brought actions for damages at the Helsinki District Court (Helsingin käräjäoikeus), based on the judgment of the Finnish Supreme Administrative Court.

The City of Vantaa brought an action for damages against Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy, claiming that those three companies were jointly and severally liable for the additional costs which it had to pay for asphalt works due to overpricing resulting from the cartel in question.

Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy claimed that they were not liable for the damage caused by the legally independent companies involved in the cartel in question, and they argued that the claim for compensation should have been lodged in the liquidation proceedings of the latter companies.

By a judgment of 28 November 2013, Helsinki District Court ordered Skanska Industrial Solutions Oy to pay damages on the basis of its own conduct and that of Sata-Asfaltti Oy, NCC Industry Oy, for the conduct of Interasfaltti Oy, and Asfaltmix Oy for the conduct of Asfalttineliö Oy.

The District Court held that, in a situation such as that at issue, it is practically impossible, or unreasonably difficult, for the party who has suffered damage as a result of an infringement of EU competition law to obtain compensation for the damage suffered as a result of that infringement under Finnish civil liability and company law. Furthermore, the Court held that, in order to ensure the effectiveness of Article 101 TFEU, the economic continuity test must be applied to the determination of liability for damage in the same way as that for the imposition of fines.

Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy appealed to the Helsinki Court of Appeal (Helsingin hovioikeus) against the judgment of the District Court.

By a judgment of 20 October 2013, the Helsinki Court of Appeal dismissed the City of Vantaa's claims, in so far as they were directed against Skanska Industrial Solution Oy, on account of Sata-Asfaltti Oy's conduct and that of NCC Industry Oy and Asfaltmix Oy.

The Court of Appeal held that the principle of effectiveness cannot call into question the fundamental characteristics of the Finnish rules on civil liability, and that the economic continuity test applied in relation to the imposition of fines cannot be applied to actions for damages in the absence of detailed rules or more specific provisions.

The City of Vantaa appealed to the Supreme Court of Finland (Korkein oikeus) against the judgment of the Court of Appeal.

The Finnish Supreme Court observed that Finnish law does not lay down rules on the attribution of liability for damage that has been caused by an infringement of EU competition law in a situation such as that at issue. According to the Supreme Court, the rules on civil liability in Finnish law are based on the principle that only the legal entity that caused the damage is liable. In the case of legal persons, it is possible to derogate from this basic rule by lifting the corporate veil. However, that approach is only possible if the operators concerned used the group structure, the relationship between the companies or the shareholder's control, in a reprehensible or artificial manner, resulting in the avoidance of legal liability.

Furthermore, the Finnish Supreme Court observed that it is clear from the case-law of the Court of Justice that any person may claim compensation for damage resulting from an infringement of Article 101 TFEU if there is a causal link between that damage and the infringement, and it is for the domestic legal order of each Member State to lay down the detailed rules for exercising that right. However, according to the Supreme Court, it is not clear from that case-law whether the persons who are required to provide compensation for such damage must be determined by the direct application of Article 101 TFEU, or whether the detailed rules laid down by the domestic legal order of each Member State are applicable. Furthermore, if the persons liable to provide compensation for damage resulting from an infringement of Article 101 TFEU are to be determined by the direct application of that article, it is not clear who may be held liable for the infringement of that article.

Hence, the Supreme Court decided to stay the proceedings and to refer, *i.a.*, the following questions to the Court of Justice for a preliminary ruling:

Is the determination of which parties are liable for the compensation for harm that is caused by conduct that is contrary to Article 101 TFEU, it is to be done by applying that provision directly, or on the basis of national provisions?

If the entities that are liable are to be determined directly on the basis of Article 101 TFEU, are the entities which fall within the concept of an "undertaking" that are mentioned in that article, those who are liable for compensation? When determining the entities liable for compensation, are the same principles applied by the Court of Justice to determine the entities that are liable in cases concerning fines to be applied, in accordance with which liability may be based, in particular, on belonging to the same economic unit, or on economic continuity?

Advocate General Wahl delivered his Opinion on 6 February 2019. As his Opinion, Advocate General Wahl proposed that the questions referred to the Court of Justice were to be answered as follows:

Article 101 TFEU must be interpreted as meaning that, in determining the person who is liable to pay compensation for harm caused by a breach of that provision, the principle of economic continuity is to be applied so that, in a private law action for damages before a National Court, an individual may seek compensation from a company that continued with the economic activity of a cartel participant.

By a judgment of 14 March 2019, the Court of Justice ruled, as an answer to the aforementioned questions, the following:

Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares in the companies that participated in a cartel which is prohibited by that Article, were acquired by other companies, which have dissolved the former companies and continued with their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question.

The Court of Justice stated that the determination of the entity which is required to provide compensation for the damage caused by an infringement of Article 101 TFEU, is directly governed by EU law (point 28). Furthermore, the Court of Justice stated that the concept of an “undertaking”, within the meaning of Article 101 TFEU, constitutes an autonomous concept of EU law and cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003. as compared with actions for damages for the infringement of EU competition rules.

The Supreme Court of Finland gave its final judgment on 22 October. 2019. By its judgment, the Supreme Court overturned the judgment of Helsinki Court of Appeal.

The Finnish Supreme Court held, referring quite extensively to the judgment of the Court of Justice, that the Court of Appeal should not, on the grounds it mentioned, have dismissed the City of Vantaa’s claims. Since the Court of Appeal had not expressed, *i.a.*, its view on the amount of damages, the Supreme Court reverted the case to the Court of Appeal.

Comment

The part of the Finnish asphalt cartel saga in question focuses on the relationship between national rules concerning liability for damages, and EU competition law rules in the context of damage litigation that is based on the infringement of competition law rules. At least for the Finnish judiciary, that issue seemed to have been not quite straightforward. However, the Court of Justice (as well as Advocate General Wahl) seemed to regard it as being quite clear and obvious that the determination of the entity, which is required to provide compensation for the damage that is caused by an infringement of Article 101 TFEU, and which is directly governed by EU law.

Interaction of IP and Competition Law

- Court of Turin: Ruling no. 1623/14 of 21 February, 2014, and Sentence n. 3174/2015 of 6 March, 2015.

- Court of Appeal of Turin: Judgment of 14 December, 2016.

- Parties to the First Instance Judgment:

• **Claimant**: Italvideo International s.r.l. (and other companies operating in the sector for the import of consumer electronic products);

• **Defendant**: Rovi Guides Inc., Starsight Telecast Inc. and United Video Properties Inc.

• **Other parties involved**: Card Mania Multimedia s.r.l. and another company who voluntarily intervened to support the reasons of the plaintiff and assert their rights towards the defendants, proposing questions identical to those of the plaintiff.

First Instance Judgment

Italvideo International S.r.l., were summoned to appear before the Court Rovi Guides Inc. (licensee) and two other companies (patent holders), in order to assess the invalidity of the Italian portion of three European patents (EP 0969662, EP 1377049 and EP 1613066, nationalized in Italy), as well as to declare that the conduct of Rovi Guides Inc. constituted unfair competition, pursuant to Articles 2595, 2597 and 2598, Paragraph 3, of the Italian Civil Code. The plaintiff asked the Court also to assess an abuse of a dominant position under Article 102 TFEU, as well as to order the granting of a license for use under FRAND conditions, with an indication of the relevant binding legal parameters.

Factual background and the reasoning of the plaintiff

The lawsuit's context is the transition from analogue to digital terrestrial television, pursuant to Laws nos. 51/2006, 22/2007 and the Ministerial Decree of 10 August 2008, which made it necessary to implement specific technologies, *i.e.*, devices which are able to receive and interpret new digital signals.

In the plaintiff's view, these technologies, covered by the respective patent monopolies, are essential to access and read the new generation signals since, without their use, the mandatory transition from the analog to the digital system is impossible.

Rovi holds the exclusive rights to the EPG (Electronic Program Guide) system, both in Italy and abroad. The system is subject to European patent registrations, and consists of a software, contained in DTT boxes and new digital televisions, which provides the user with a list of currently popular programs. It is therefore considered to be an essential technology, irreplaceable and necessary for deciphering the new signals.

Rovi is the licensee of the three patents indicated above, which have already been declared void by an English Judge, since a) Patent EP 0969662 concerned a software which is not patentable, as such, due to a lack of inventiveness; b) Patent EP 1377049 lacks the novelty requirement, and its object cannot be registered; c) Patent EP 1613066 does not meet the novelty and inventiveness requirements.

The claimants unsuccessfully tried to obtain the intellectual property rights, because Rovi imposed unreasonable, and therefore unacceptable, conditions, such as the excessive burden of royalties, high penalties and a refusal to provide a warranty.

Reasoning of the defendants

Rovi and the other defendants requested the rejection of the plaintiffs' claim and the assessment of the violation of the patents with ancillary questions, for instance:

- the lawsuit involves a television program guide system (EPG) which had been developed for almost twenty years by Rovi, and which was protected by numerous patents, including the three at stake in the judgment;
- the claimants produce, or sell, in Italy DTT boxes incorporating Rovi's technologies, which are also protected by the patents involved in the case, thus violating them;
- the Italian portion of the European patents has therefore been counterfeited by the plaintiff and the other parties involved. Consequently, the defendant requested the Court to order restraining provisions, as well as to award damages, in addition to the assessment of a fine and the publication of the judgment.

The key point of the lawsuit: technical expertise on the patents' validity and on the existence of counterfeiting.

The Court's non–definitive judgment (Decision no. 1623/14): Patents EP'662 and EP'049 valid and counterfeit. No abuse of a dominant position and no unfair competition.

The Court, once having assessed the patents' novelty and their inventive steps, declared, in a non-definitive judgment:

- that the request for the declaration of the nullity of the Italian portion of the European patents EP'662 and EP'049 was groundless;
- that the claimant, Italvideo International S.r.l., and the other party involved, Card Mania Multimedia S.r.l., who were responsible for counterfeiting the Italian portion of European Patents EP'662 and EP'049;
- that the request for the assessment and declaration of the nullity of the Italian portion of the European patent EP 1613066 had ceased, as the relevant patent was revoked by the EPO's Board of Appeal.

The Court rejected also the claims regarding unfair competition and the abuse of a dominant position. Consequently, the request for a license for use under FRAND conditions was denied, because:

- these claims assumed that the technology covered by the defendants' patents constitutes an essential facility for the functioning of the digital terrestrial system. Indeed, according to the claimant and other parties, these technologies are essential in order to access and read the new television signals. Without their use, and therefore without the exploitation of the relevant patents, the mandatory transition from an analog to a digital television system would not have been possible; the patents at stake, in the plaintiff's view, shall be considered to be *essential facilities,* because this technology is necessary to decode the signal that underlies the digital terrestrial system;
- the technical expert ascertained that some DTT boxes that had been submitted for the Court's examination do not incorporate parts of the patents at stake, and they do not interfere with the scope of the protection of the defendants' patents; the patented technologies are therefore not essential for the functioning of a DTT box, and they are also not difficult to replace. As a consequence, the defendants' illicit conduct did not exist.

The Court's judgment on the damages/recovery of profits claim made by the defendants (Decision no. 3174/15)

The Court then remitted the case to the preliminary investigation phase in order to assess the damage suffered by the defendants. The Court ordered the technical expert to ascertain the number of counterfeit devices that had been sold, as well as the revenue from sales and the profits made, in addition to the determination of the royalties that had been applied and that were potentially applicable in the market with reference to both the patents at stake, taking into account the negotiations made by the defendants and the general structure of the market. The Court, after the delivery of the expert's opinion, ordered:

- the recovery of profits, pursuant to Article 125, Paragraph 3, of the Italian Intellectual Property Code (CPI), according to which the return of the profits realized by the counterfeiter through the sale of the goods constituting the counterfeiting of the patent of others, is due to the patent holder "in any case", regardless of the activities carried out by the latter and his loss of earnings;
- the plaintiff, Italvideo International S.r.l., was to pay the defendants the sum of €450,376 in addition to the legal fees;
- the other party, Card Mania Multimedia S.r.l., in liquidation, to pay the defendants the sum of €281,220 plus legal fees.

Appeal judgment; parties who appealed

- Card Mania Multimedia S.r.l., in liquidation, and Italvideo International S.r.l. appealed the First Instance judgment, both in relation to the provisions on the patents and to the assessment of the damages/recovery of profits.
- Italvideo also challenged the First Instance decision in the part which rejected the unfair competition request, pursuant to Articles 2595, 2597 and 2598, Paragraph 3, of the Italian Civil Code, as well as the abuse of a dominant position claim. In this respect, Italvideo underlined that EP'662 and EP'049 patents, which were created to facilitate the access to information on television programs, can, in fact, be considered to be a *de facto* commercial standard, therefore awarding a dominant position to the owner. Without these patents, the devices cannot properly perform the EPG functionality. As a consequence, the application of discriminatory and unreasonable contractual conditions (including the refusal to negotiate) shall be considered relevant conducts pursuant to Article 2598, Paragraph 3, of the Italian Civil Code.

The Court of Appeal decision (judgment of 12 December, 2016)

The Court of Appeal of Turin decided as follows:

- with regards to Patent EP'662: the evidence attached by the appellant is all unsuitable in regard to the exclusion of the novelty and the inventive step of Rovi's EP'662 patent.

Validity confirmed.

- with regard to Patent EP'049: the reason for the appeal referred to the invalidity of Patent EP'049 for its lack of novelty, is accepted. **Declared invalid**.
- with regard to the counterfeiting: the ascertainment of the invalidity of Patent EP'049 entails the rejection of the counterfeit request that was made by Rovi in referring to this patent. The infringement of Patent EP'662 has been confirmed.
- with regard to unfair competition and the abuse of a dominant position, the Court observes that:

1. Italvideo, during the appeal trial, partially modified its position by no longer affirming the essential "legal" nature of the patents, but argued that the EP'662 and EP'049 systems can be considered to be *de facto* commercial standards, difficult to replace and therefore giving the holder a dominant position;
2. In the plaintiff's view, the companies who hold *de facto* standards would therefore have a dominant position in the market. Consequently, Rovi's behavior would integrate the conduct that is set forth in Article 2598, Paragraph 3, of the Italian Civil Code, due to the abuse of a dominant position and the application of discriminatory and unreasonable contractual conditions, including the refusal to negotiate, which is in violation of Articles 2595 and 2597 of the Italian Civil Code, and which constitute behaviors that are likely to affect the competitive structure of the market. As a result of the alleged illegality of this behavior, Italvideo reiterated the request for the issuance of a FRAND license for the EPG patents that are owned by the defendants, issuance which should specify the legal parameters that the parties should have followed while negotiating this compulsory license;
3. With regard to the characteristics of the standards that are essential, the technical expert ascertained that the functionality (in particular, of Patent EP'662) is not necessary, but is only optional;
4. Rovi's patent cannot be considered to be essential, since the technical specification - consisting of the functionality of managing the grid and the single-channel format, as well as the change from one channel to another - is not essential, since many of the examined decoders do not contain this functionality. The *de quo* patent cannot be considered to be a standard that is essential with respect to implementation in the relevant DTT boxes. In fact, the appellant has not provided any evidence that the management function referred to in the patent at stake has been strongly requested by the market, or that it has obtained a dominant position by public acceptance, so that even the invoked commercial standard has not been proven;
5. The violation of Art. 102 TFEU by Rovi, as envisaged by the appellant, has not been proven either. In fact, they did not even identify the relevant market in which Rovi sells its products and services, and they did not provide any proof of the existence of Rovi's dominant position on that market.

- with regard to the damage compensation/the recovery of profits: the criterion of the recovery of profits, pursuant to Article 125, Paragraph 3, of the CPI is not applicable. Assessment of the damage, pursuant to Article 125 of the CPI, Paragraph 2 (compensation for the damage based on the royalties that the appellants should have paid based on the concession of a regular license), on an equitable basis.

Concluding remarks

This judgment, in its *iter* from the First Instance trial to the appeal judgment, shows possible interactions between competition law and IP law. Indeed, it clearly shows how intellectual property rights may potentially grant a dominant position on the market, especially if the essential facility doctrine is involved. Furthermore, the parties' requests showed all the means which a Court could adopt in order to manage this kind of situation: the return of profits, the publication of the relevant judicial decision, the granting of a FRAND license, compensation for damages, *etc*. However, the particular situation described in this lawsuit demonstrates the importance of a correct assessment over the factual aspects at stake. This proof will often be reached through the appointment of a technical expert, which shall, for instance, define the relevant market, or demonstrate the substitutability of the technologies involved.

Birgit Herregodts, Brussels Commercial Court

So Easy System Sp.z.o.o. vs ALuK Belgium N.V. and AluK S.A., Voorz. Kh. Brussel (Nl.) nr. C/18/00034, C/18/00035, 23rd August 2018.

Brief summary of the facts of the dispute.

SEA is a Polish company that is part of a group of companies which are under the control of B. Holding N.V., which is a company under Belgian law. Alu Belgium, formerly called B. Alu NV, was part of the same group. Alu S.A. acquired by a written agreement of 13th January 2016, 100 % of the shares of B. Alu NV, which was renamed Alu Belgium. The closing took place on April 28th, 2016.

SEA is a producer and distributor of systems in aluminium that are being used for the construction of (sliding)windows and (sliding)doors.

The acquisition of an agreement, entitled "New Intellectual Property Rights Transfer and Licence Agreement" was closed between Alu Belgium, the licensor, and SEA, the licensee. According to this exclusive licence agreement, the exclusive use of different IP-rights was given to SEA for a defined territory, shown in the agreement, and for a very long period of time that was linked to the date of the expiry of the various types of IP-rights. The huge territory was said to cover Poland, the Czech Republic, Slovakia, Moldavia, Romania, Bulgaria, Estonia, Lithuania and Latvia, Ukraine and Hungary. This licensing agreement was a so-called royalty-free licence.

The necessity for closing such an agreement was to be found in the history of SEA. Alu Belgium/B. Holding was a holder of various IP-rights. Before the closing of the agreement, SEA and Alu Belgium, were both part of the B. Holding. SEA had always had access to products that were being produced by third party undertakers using moulds for this production. These moulds were the property of Alu Belgium, and they were only to be used with the permission of Alu Belgium. The parts that were produced by those undertakings were sold to SEA, after which SEA assembled the doors and windows with those parts and sold the end product. According to SEA, almost all of its activities were related to these products, and the sales of doors and windows would become impossible if they had no access to the IP-protected parts.

The licence agreement was executed by both parties until Alu Belgium sought to terminate the contractual relationship with SEA at the beginning of the summer of 2016. Alu Belgium's intention was to breach the contract on its own initiative, and without any judicial review. Both Alu Belgium and Alu SA wrote on the 19th October 2016, to SEA, stating that they considered the licensing agreement to be ended by November 2016, due to the non-compliance of SEA with certain contractual obligations.

Summary of the judicial proceedings.

SEA responded to the letter of 19th October 2016, with a summons, on 28th October 2016, in which the President of the Commercial Court of Brussels was asked to suspend the decision to terminate the contract. The Court of Appeal in Brussels later returned to the decision taken by the President, who had refused to grant the suspension of the termination for reasons of an absence of urgency. The Court of Appeal did decide, on 13th June 2017, to suspend the decision that had been announced in the letter of October 19th as being terminated. Following the ruling of the Court of Appeal, the parties had to accept that the contract was considered to still be binding on all parties.

Alu Belgium and Alu SA took action, and they responded by writing another letter of termination. They stopped their supply, which left SEA without new products. They also wrote to SEA's subcontractors asking them to stop production and the delivery of any order placed by SEA.

Several other judicial proceedings were submitted to different courts. These proceedings included a provisional seizure at the premises of one of SEA's subcontractors, a cease and desist order, a procedure on the merits of the case, which was also introduced but for which a decision has not been published.

Ruling of the Court

In this case note, two different proceedings are concerned. After the continuous attempts of Alu Belgium and Alu SA to end the contractual relationship with SEA, a unilateral request for a preliminary decision not to suspend the IPR-licence agreement was introduced by SEA. This was an *ex parte* proceeding, in which the President of the Court suspended the decision of termination. SEA was obliged to introduce a contradictory procedure seeking a preliminary injunction in which the other parties were to be heard.

The President of the Court decided, in her decision of 23rd August 2018, that both procedures, the opposition to the decision of the President of the 4th May, 2018, in the *ex parte* proceedings and the contradictory procedure seeking preliminary injunctions, could be heard and judged simultaneously.

According to the applicable national law, the President of the Commercial Court is competent to decide on the preliminary injunctions. In this specific proceeding, preliminary injunctions were sought by SEA requiring the suspension of the application of a contractual clause allowing Alu Belgium and Alu SA to terminate the licence agreement, since SEA considered the application of this clause to be wrongful and abusive.

The President ruled that both Alu Belgium and Alu SA had stated that SEA was in breach of the contractual obligations they had by selling products under licence outside the territory that was defined in the licence agreement, and by advertising the licensed products that they sold outside her territory.

The President had, *ex officio,* questioned the counsels of the parties during the hearing relating to the licence agreement and the compatibility of this agreement with the applicable rules of competition law. The lawyers of the parties did not request that an answer to these questions be made in written form, but had orally argued that they should be convinced that the transfer agreement met the requirements of Article 4c of the Commission Regulation (EU) No 316/2014 of 21 March, 2014, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

At first, the President indicated that, *prima facie,* it was very unclear which territory was exclusively kept by the licensor. Secondly, she indicated that the judge deciding on the merits of the case would have to decide whether the clause prohibiting the licensee to sell licensed products in his own territory whenever the buyer, in the territory of the licensee, bought these products from SEA and sold them, in its turn, outside the licensee's territory and in the territory of the licensor. According to the President, this possibly would have to be considered a hard-core restriction. because such a clause limits further sale by the licensee and, at the same time, prohibits parallel trade.

The ruling of the President ordered all parties to continue to give execution of the license agreement and to await the decision of the judges who were deciding on the merits of the case since, *prima facie,* there were no obvious and certain breaches of contractual obligations by SEA, which would mean Alu Belgium and Alu SA were allowed to apply the clause that they indicated, as the clause permitting them to unilaterally terminate the agreement with immediate effect.

Personal comment

This case is relevant for several reasons.

Competition law issues are mostly well hidden in judicial proceedings that are brought before the Belgian civil/commercial courts. Parties tend to focus on the issues relating to general commercial law and apparently do not raise, at their own initiative, issues of competition law. It is rather difficult to find any Belgian case-law in relation to competition law. In this case, *ex officio* intervention by the presiding judge was necessary in order to explicitly point out to the parties that the licensing agreement, for which, in the main proceedings, Alu Belgium and Alu SA sought dissolution, could be void because of possible hardcore restrictions. This is not really a surprise. The lawyers in this case admitted to having prepared the IP-transfer agreement.

The second reason why this case is relevant is because it refers explicitly to the Commission Regulation (EU) No 316/2014 of 21 March 2014, on the application of Article 101(3) of the Treaty on the Functioning of the European Union of categories of technology transfer agreements. The point of view, which was expressed orally by all parties, seems to be that the IPR-agreement does comply with this Regulation. The judge seemed to indicate that the conditions of Article 4, C, 1 of this Regulation are met, and that hardcore restrictions were to be found in the said agreement. The parties could therefore not apply the exemption in Article 2.

The President of the Court indicated that the judge deciding on the merits of the case would have to decide whether one might really argue that the IPR-agreement could be considered to be a non-reciprocal agreement, as required by Article 4 C,1. The Communication from the Commission, or the Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, will be very relevant literature.

The judge deciding on the merits of the case will finally have to decide whether the IPR-agreement constitutes an anti-competitive agreement, which is prohibited by Article 101 TFEU and Article IV.1 of the Belgian Economic Law Code.

List of Participants in ENTraNCE for Judges 2019

- Goda Ambrasaite – Balyniene, Court of Appeal of Lithuania.
- Gorana Aralica Martinoviu, High Commercial Court of Croatia.
- Gerald Ehgartner, Federal Finance Court of Austria.
- Adrian Engman, Patent and Market Court of Appeal of Sweden.
- Emanuela Germano, Court of Appeal of Turin.
- Aleksandra Gumzej, Administrative Court of Zagreb.
- Birgit Herregodts, Brussels Commercial Court.
- Marius Cristian-Ispas, Bucharest Court of Appeal.
- Jussi Karttunen, Market Court of Finland.
- Laura Konosonoka, Market Court of Finland.
- Nina Korjus, Market Court of Finland.
- Markus Mattila, Market Court of Finland.
- Eric Mille, Brussels Commercial Court.
- Andrea Moravcikova, Supreme Court of Slovakia.
- Iko Nomm, Tallinn Court of Appeal.
- Lauma Paeglkalna, Latvia Administrative Court of Appeal.
- Andrea Piletta Massaro, Court of Appeal of Turin.
- Gabriella Ratti, Court of Appeal of Turin.
- Fatima Reis Silva, Lisbon Appeal Court.
- Sigita Rudėnaitė, Supreme Court of Lithuania.
- Renate Schohaj, Federal Finance Court of Austria.
- Nikolaos Sekeroglou, Greek Council of State.
- Ewa Stefanska, Supreme Court of Poland.
- Judit Szabó Zsoltné Banu, Budapest Regional Court.
- Magda Teppey, Court of Appeal of Ljubljana.
- Maja Valusnig, Administraive Court of Zagreb.
- Doina Visan, Bucharest Court of Appel.

Editors:

Pier Luigi Parcu

Robert Schuman Centre for Advanced Studies, EUI

Villa Raimondi

Via Boccaccio 121/111

50133 Firenze

Italy

Email: pierluigi.parcu@eui.eu

Giorgio Monti

Robert Schuman Centre for Advanced Studies, EUI

Villa Schifanoia

Via Boccaccio 121

50133 Firenze

Italy

Email: Giorgio.monti@eui.eu

With the support of the
Erasmus+ Programme
of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.