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WORKING PAPER

ENTraNCE for Judges 2022

Challenges Faced by Judges When Enforcing EU Competition Law: EU and National Perspectives

Selected Case Notes

Pier Luigi Parcu, Giorgio Monti, Marco Botta and Niccolò Galli

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

This working paper is published in the context of ENTraNCE for Judges, a training programme for national judges who are involved in EU competition law. The training is organised by the CDS/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 focuses 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:

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Each working paper includes the case notes that are written by the national judges who have participated 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 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.

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, 2022). The training programme was organised by RSCAS between November, 2021, and October, 2022, 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. This working paper thus aims to increase the 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

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Introduction

When these judgments were presented in the Thomas More Conference Room of the Court of Justice of the European Union, on 28th and 29th September, 2022, four judges of the General Court participated in the discussion on the various points of law that were raised. All had some previous connections with the ENTRANCE programme: Krystyna Kowalik-Banczyk and Paul Nihoul had kindly given a keynote address in past editions, while Colm Mac Eochaidn and Iko Nõmm are judges who had attended one of the previous ENTRANCE training programmes. Completing the list of ENTRANCE alumni, Judge Irmantas Iarukaitis, of the ECJ, gave a keynote speech exploring the recent case-law of the CJEU on antitrust matters, in order to discuss the implication of national courts having become EU courts because of the direct effect of EU Law and of the importance of the principle of effective judicial protection. This direct effect has put private parties in a central position in enforcing EU Law, while effectiveness has led to the transformation of national private law rules. Many of the cases discussed here, notably, the trucks cartel saga, show that this impact of EU law stretches the capacities of national courts.

As expected, the cases raise a number of topical issues. One overarching theme from the discussions of these cases was the boundaries of judicial competence: How far should courts interfere with the decisions of national competition authorities? What is the appropriate scope of in-depth judicial review? Is it the judge's role to integrate environmental sustainability issues and to question the role of the consumer welfare standard? What is the role of experts in competition litigation, and how can experts and judges best work together? Can a Court increase a fine that has been set by an NCA, or can it just confirm or reduce it?[1]

Below, we introduce each judgment and highlight some of the salient issues that each raised. Readers are encouraged to review the case notes for a fuller account of the points that arise in each judgment.

Cartels & Bid Rigging

Ivana Manestar discussed a long running saga in which collusion occurred in a regulated market, that for bus transport in Croatia. Under the transport rules, a public authority may allow cooperation amongst undertakings in order to guarantee the provision of bus services. The logic behind this is that cooperation may be necessary in order to provide the public service in question. What was under challenge in this case was the continuation of a collaborative agreement amongst bus companies after the authorisation by the municipality had expired. The three undertakings had applied for a joint operating license, but this had not been granted because one of the three undertakings did not meet the eligibility requirements. They continued to cooperate in providing bus services, allocating markets to each other. The Croatian National Competition Authority (NCA) took the view that cooperation constituted an agreement that was restrictive of competition. However, on Appeal, the Constitutional Court was not convinced that the antitrust laws applied, given that the sector in question was subject to a specific regulatory framework. The case twice went as far as the Constitutional Court, because the Court was not convinced that the transport regulations were inapplicable. In the end, the NCA had to remake the decision and to explore why it was that the transport law was inapplicable on the facts (largely, because the conduct of the parties was autonomous and was neither required nor facilitated by the municipality which was competent to regulate this). As the learned judge notes, it is unclear why the Constitutional Court hesitated on this point. The Judgments on Appeal, however, also show the importance of the First Instance Court in carrying out a full review of the issues, and in not deferring uncritically to the decision of the National Competition Authority.

1 This issue led to some lively discussion. The GC may increase the fine (see, e.g., Tokai Carbon and others v Commission, Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, EU:T:2004:118, Para. 165). However, many judges felt uncomfortable in doing this, because the appellant cannot be made worse off if they elect to challenge the decision of the NCA (a rule against reformation in peius that applies in many Member States).

Pedro Marchão Marques discusses a bid rigging case in Portugal. On the facts, the purchaser had invited a small group of firms to bid (A, B, C, D and E).The winning bid was by firm A, which was selected. However, firm C challenged the procedure, because it considered that firms A and B were closely linked to each other, and that this raised questions as to whether there had been collusion between them. The Judgment is based on public procurement law, but it borrows elements from antitrust law. The Court found that the two companies are very closely associated (the two businesses were owned by the same family), and this suggests that A and B are a single undertaking. There is some case law from the ECJ on whether firms with close links are able to submit separate bids within the framework of public procurement law but, at the time, the ECJ found that this was not precluded[2]. In the same case, the ECJ, however, held that it might be possible to reject bids when these were made by two closely connected companies that presented themselves as different entities. The dispute under discussion here could therefore be resolved by applying public procurement rules. To further satisfy itself that A and B were closely linked, the Court looked into the past cooperation between A and B, (e.g., one instance where one of them submitted an abnormally low bid) and showed that they presented themselves on the market as separate entities. The Court's Judgment is based on a presumption of collusion which is based on the close contacts between the two firms, family relations, and practices in other tender procedures in which one of the two would submit an abnormally low bid[3]. With respect, the reference to antitrust rules of collusion seems to be more confusing than helpful, because the issue is not whether they have colluded (in antitrust law terms, A and B were one undertaking, so Article 101 TFEU would not apply), but, rather, whether they were to be treated as separate firms for the purposes of public procurement law.

Fernando Nieto Martín discussed an appeal against a bid-rigging agreement among four undertakings, who used a joint venture as a vehicle upon which to coordinate bids on multiple tenders for the supply of railway turnout services. The Decision of the Spanish NCA was quashed, because the Court found that the joint venture was indispensable, given the high complexity of the technology and the special features of the railway turnout market. The case appears to hinge on the application of Art 101(3) TFEU – that is to say, on whether the agreement's anti-competitive nature was compensated for by the efficiencies that resulted. The parties submitted expert reports to indicate that it was unlikely that there would have been competition between the firms unless they collaborated due to the specific requirements of the buyer in this market. The judge criticised the Court for not exploring the conditions required for exemption under Art 101(3) TFEU in a sufficiently detailed manner, not least given the clear anti-competitive effects found by the NCA, as well as the NCA's detailed assessment of the elements of Art 101(3) TFEU. The Judgment is also helpful in highlighting the importance of the link between public procurement and competition law, because while, on the one hand, the Commission is keen for purchasing bodies to be suspicious in relation to bid rigging, here, the buyer had appeared to encourage the joint venture.[4] The Judgment also raises questions about the role of expert reports and how Courts manage these, not least because, in many legal orders, there is no cross-examination of the authors of these reports. Some countries, like Germany, use a Court-appointed expert as a way of obtaining a more balanced view of the economic issues, but no EU jurisdiction appears to have opted for a hot tub procedure in which economic experts discuss their views with the judges.

Asim Vokshi presented a case about bid rigging in the market for the procurement of new vehicles. The Albanian NCA found several documents indicating that the parties had agreed to share this market by rotating the winner of each tender. As the judge notes, the Supreme Court seems not to apply competition law adequately when quashing for lack of evidence, on the basis that not all agreements were scrutinised, and not all parties were assessed. This approach is an outlier in Albania, and it seems to have been decided incorrectly – provided that there is evidence that the parties fined had colluded, this should be enough to sustain the decision of the Competition Authority.

2 Šiaulių regiono atliekų tvarkymo centras and „Ecoservice projektai" UAB, Case C-531/16, EU:C:2018:324

3 See *T –Mobile*, Case C-8/08 EU:2009:343 for the presumption.

4 Cf. Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground [2021] OJ C91/1.

It should not be the job of the Court to quash a decision because a more comprehensive analysis of the cartel could have revealed more collusion, but to check whether the decision is valid, given the evidence presented.

Jukka Koivusalo discussed a cartel case in which two issues were discussed: the first is the role of witness evidence and the standards by which one tests the reliability of this evidence.Here, the National Court finds inspiration from the experience of the EU Courts and applies the same standards as those that are used there.[5] Secondly, the Court also gives some guidelines on the criteria for setting fines, with an emphasis on the fact that fining policy should be predictable, but it may also evolve over time as competition agencies pursue a policy of deterrence. This is important, as it reveals the need to balance the foreseeability of punishment with the capacity of the NCA and the Court to consider all the relevant factors in order to arrive at a fine which achieves the deterrent aims of the competition laws.

Jesus Angel Suarez Ramos discussed collusion amongst car manufacturers, who used the system of selective distribution as a means for gathering data to share with rivals so as to facilitate an alignment of prices. One of the issues that the Court struggled with on Appeal is that the decision of the NCA was in 2015 but, on appeal, the parties claimed that the decision was not consistent with the more recent case-law of the ECJ, in particular, the Judgment in Budapest Bank, as a result of which the NCA had applied an incorrect test.[6] The National Court, however, found that the essential requirements set out in Budapest Bank were found within the decision of the NCA, and the decision was upheld. It seems unusual to judge the NCA's decision with an eye to subsequent case-law, but this seems to be common practice.

Maja Valusnig reported on an Appeal against a Decision condemning driving schools who agreed to raise the price of hourly lessons. The Court upholds the finding of an infringement relying, inter alia, on evidence from Whatsapp chat. This Decision is interesting, because it uncovered evidence that the parties had tried to convince each other to stick to the agreement in the face of media pressure following the price announcement. This is a good case to demonstrate the value of NCAs to the public, given the media attention that the issue raised. One remarkable aspect of Croatian administrative procedure is that there is no rule excluding illegally obtained evidence – this is a matter where the legislator should urgently cover this gap because, given that competition proceedings are quasi-criminal, greater due process protections should be available.

Vertical Restraints

Nathalie Bonhomme-Iouck considered a judgment in which Energetica (a manufacturer of food supplements) terminated its distribution agreement with Newpharma, which was a low-price seller. Energetica devised a selective distribution agreement which served to render Newpharma ineligible. Procedurally, the case shows that Belgian civil law possesses tools that allow for an interim injunction to prevent harm to the distributor, but an injunction would only be granted in situations where the balance of interests was considered and when it was clear that there was a prima facie infringement – this is not the case here. The interim order was not granted, largely, it seems, because the claimant changed their pleas midway, but a full trial is expected, and this raises a number of issues about the legality of selective distribution under the Vertical Block Exemption Regulation (VBER).

Emanuela Germano discussed Shiseido v Amazon. Here, Amazon was found to be a platform on which buyers of Shiseido perfume bought these, in breach of the selective distribution agreement. Rather than pursuing each distributor for breach of contract, the claimant brought an action against Amazon to stop sales of these perfumes via its website. This led the Court to determine whether the system of selective distribution was lawful (which would allow Shiseido to challenge Amazon), or whether it was contrary to Art 101 TFEU, in which case the claim would fail. The Court applied

5 *JFE Engineering and Others v Commission*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00. T-67/00, EU:T:2004:221 and *Infineon Technologies v Commission*, Case C-99/17, EU:C:2018:773, Para. 65.

6 *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, Case C-228/18, EU:C:2020:265.

the Metro criteria, asking whether the perfumes were indeed luxury brands, such that limits on distribution channels could be placed and, after a close analysis of the marketing strategy, found that some of the brands were luxurious and thus benefitted from the Metro criteria. This is extremely useful as a precedent for other Courts on this vexed question. However, the Court appears to go too far in reading the ECJ's Coty Judgment as being an authority for the proposition that the supplier of luxury goods may bring non-contractual actions against third party platforms when the sale of those articles on these platforms can, and does, lead to the impairment of the qualitative characteristics of those articles. It does not seem that this claim follows from Coty directly.[7] Indeed, it is not clear what the legal basis is for suing the distributor, for they are not in breach of the selective distribution agreement. The Court referred to the E-Commerce Directive, but even this feels as if the regulations in the Directive have been stretched. However, one cannot deny the usefulness of allowing a manufacturer to avail itself of the power to sue Amazon in order to block sales of goods by multiple distributors who act in breach of contract with the manufacturer by selling via an unauthorized outlet.

Birgit Burm-Herregodts reported on a judgment that challenged the remedies designed by the Belgian NCA. The NCA had identified an illegal resale price maintenance agreement that was orchestrated by a cosmetics maker, Caudalie. The NCA was aided by the French NCA, which helped to gather evidence. The legal issue at play was not the illegality of the conduct, which was clear, but the way in which the NCA had resolved the issue. It accepted certain commitments from Caudalie and reduced the fine. The Decision looked a bit like an infringement decision (the fine imposed) and a bit like a commitment decision (accepting a promise from the firm). However, in the national procedure (as under the rules governing the Commission in Regulation 1/2003), these are two distinct solutions and it seems to be inappropriate to use both simultaneously. The party appealed, because it had offered the commitments as a way of trying to avoid a fine. The Court agreed that the NCA had misapplied the law, but this will likely prove to be a pyrrhic victory, because the Court concluded that Caudalie had conceded that it had infringed the law, suggesting that any subsequent decision may result in a higher fine. The judgment is nevertheless significant, because the NCA must make the enforcement path it proposes to use clear to the parties, so that the parties can respond adequately.

Ana Paula Lobo considered an NCA Decision that also found resale price maintenance agreements, this time ones that were orchestrated by Super Bock in the markets for beer, water, soft drinks, iced tea, still wines, sangrias and ciders. The case has given rise to a referral for a Preliminary Ruling (Super Bock Bebidas, S.A., AN, BQ v Autoridade da Concorrência, Case C-211/22, lodged on 11th July, 2022) which will give the ECJ the occasion to determine whether RPM agreements remain restrictions by object. Indeed, following on from cases like Cartes Bancaires and Budapest Bank, it is not clear that one can say that vertical restraints imposing minimum retail prices are anti-competitive, at least when there is lively inter-brand competition. On the facts of this case, it seems that the undertaking enjoys significant market power, making the anti-competitive effects plausible.

References from the ECJ and national responses

Andreea Marchidan discusses a judgment in which the question was the adequate basis for calculating a fine for a collective boycott. The NCA set a fine that was based on a percentage of the undertakings' turnover. However, the appellant considered that the company's turnover was not an adequate basis for estimating the anti-competitive impact of its conduct, because it was an intermediary who invoiced clients, and thus much of its turnover was immediately passed on to the party on the other side of the market […]. A better basis for estimating the competitive impact was the size of the commissions that the appellant earned. This was the approach taken in merger control. A reference has been made to the ECJ (Zenith Media Communications SRL v Consiliul Concurenței, Case C-385/21).

7 *Coty v Parfumerie Akzente*, Case C-230/16, EU:C:2017:941.

Jenni Poropudas reported on the outcome of a reference for a preliminary ruling in Competition and Consumer Authority v Eltel Networks Oy and Eltel Group[8]. The case concerned the limitation period, which is five years from the point at which the harm to competition ended, or the NCA became aware of the infringement. The undertaking, in this case, had participated in a bid-rigging agreement, but had exited the cartel early. The undertaking had won one tender before exiting the cartel, and the question was whether the limitation period began to run from the moment the contract was signed with the purchaser, or later, when he was paid for the last instalment of the contract. The NCA argued that the later date should be used, as this would have brought the undertaking inside the limitation period. According to Eltel, the limitation period begins to run from the date on which the tender is submitted, and this was the position favoured by the ECJ: time starts running at the time of 'the conclusion of a contract between the successful tenderer and the contracting authority, as it is at that moment that the latter is definitively deprived of the opportunity to obtain the goods, works or services in question under normal market conditions.'[9]As may be expected, the Supreme Administrative Court of Finland, in applying this approach, found that the proposal to impose a fine on this undertaking was time-barred.

Katalin Surányi reported on the aftermath of the famous Budapest Bank case, in which the Court of Justice confirmed that it was lawful for a National Competition Authority to proceed against an agreement by testing both its anti-competitive object and effect, but making it clear that both limbs of the prohibition had to be fully reasoned. While the Court did not manage to draw a clear line between the evidence required to show object and effect, it provided some indicators about the evidence necessary in an effects case[10]. Back in the National Court, the Supreme Court confirmed the ruling of the lower Court that quashed the Decision of the NCA because it was not properly reasoned, in order to reveal anti-competitive effects.

Abuse of dominance

Elita Gavriel discussed Cyprus Telecommunications Authority (CYTA) v. National Committee for the Protection of Competition – an excessive pricing case for access to submarine cables. This is the first review on the merits of an NCA Decision in Cyprus. The Court confirmed that CYTA had a dominant position because it enjoyed privileged access to the cables, and it was an obligatory partner with third parties who were seeking access. The difficult question was whether there was an exploitative abuse. The Court faulted the NCA for insufficient analysis in determining whether the prices were excessive. It appears that the NCA applied an approach which determined the excessive nature of the price, focusing only on the level set by the dominant firm, compared to the cost of providing access. The National Court held that the NCA should have also carried out a comparative market analysis. This demanding approach follows from the ECJ's case law, which seems to require the use of multiple methods to verify whether prices are excessive.[11]

Andrea Postiglione discussed a discrimination case: Medov Civitavecchia S.R.L. v. Port Mobility S.P.A. In this case, the defendant (Port Mobility) has a concession for operating the management of the port of Civitavecchia. Medov offers services to passengers using the port, and it has to pay a fee to Port Mobility. Medov complained that Port Mobility requests a higher rate from them than it does from other firms offering services in the harbour. It transpired that another downstream actor, Royal Bus, was partially owned by Port Mobility and paid lower fees. This looks like a clear case of anti-competitive discrimination that is used to foreclose rivals in the downstream market. It is important to note that this was a stand-alone claim. This led the National Court to appoint an expert to effectively carry out a factual and economic analysis of the case. The damages award was made but the defendants, who then counterclaimed that the claimant could have passed on the excessive price, but this point was raised late in the trial, and no evidence was presented about the possibility

8 Case C-450/19, EU:C:2021:10.
9 Ibid, Para. 35.
10 Above, N. 6.
11 *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome*, Case C-177/16, EU:C:2017:689.

of passing on the excessive costs. An appeal against the judgment is pending, and it remains to be seen if the defendants will manage to plead a passing on defence, so as to reduce their liability, a point that had not been raised at the First Instance.

Enerjeta Shehaj presented the assessment of excessive pricing in the wholesale and retail sale of paramedics' supplies. The NCA finds that firms in these markets are pricing excessively and requests transparency in pricing. All prices must be set on a cost basis. This was a temporary measure resulting from the Covid-19 pandemic. The plaintiff sells products that are covered by the NCA Decision, and the NCA finds that it did not implement the temporary measure, and thus a fine was imposed. On an appeal against this, the undertaking tried to explain that prices were higher because of the Pandemic, which raised production costs, and so excused the higher prices set. The Court evaluated the evidence submitted and appointed an expert to compare the costs both before and after the pandemic. It was found that costs had risen by 35%, so the risk that the price would be higher was real, but that the price rise from the undertaking was much higher than this, and the Decision of the NCA was confirmed. This is a somewhat unusual case, because it is not clear if the undertaking was dominant, which is necessary in order to regulate prices under competition law. It also raises a more general question about whether price gauging is the proper province of a competition authority, or whether the legislator is better placed to regulate prices in an emergency.

Altin Shkurti presented an excessive pricing case relating to one of two telecommunications operators who held a duopoly. It seems hard to understand how the Court supported a finding that there was a single firm dominance, not least as the NCA pursued both duopoly players separately. With respect, this seems as if the NCA should have run this case as an abuse of collective dominance.

Jelena Čuveljak discussed a follow-on damages action in ZOLA d.o.o. Zagreb vs. Croatian Composer's Society. The Croatian NCA found that the collecting society had imposed unfairly high charges on the producers of memory cards on which music could be stored. Once the decision was issued, the collecting society recalculated the rates that should have been paid by customers and refunded the overcharges. The plaintiff wished for additional damages, claiming that it had lost profits as a result pf the levy. The claim was for approximately EUR 26,000. However, the Court hired an accounting expert, who showed that the claimant had not suffered any economic losses due to the levy, as this had an insignificant effect on the final price of the goods sold. No causal link was therefore found between the infringement of competition law and lost profits. However, the Court awarded non-material damages that were based on the possible loss to the claimant's reputation because of the price increase, but without much explanation. The Court of Appeal, however, quashed the award, stating that the claimant had not shown how the abuse of a dominant position had harmed the claimant's reputation. Here, it seems that the First Instance Court wished to award some compensation to the claimant and had found a creative way to surmount the lack of any evidence of a causal connection.

Rosa Perna discussed a judgment of the Tribunale Amministrativo del Lazio, which overturned a Decision of the NCA. The NCA had condemned Vodafone for margin squeeze when it sold packages of sms termination services to aggregators, who would then sell these, together with other bundles of telecom services, in the retail market. The Judgment reveals that the Court is willing to test the application of a more economic approach by NCAs, and to review closely the accuracy of their application as an efficient competitor test. However, the Judgment of the Court is somewhat surprising. In an unusual move, the Court found that what one has to consider is the overall retail price for rivals, and that this was affected by the price paid to obtain sms termination services from all other mobile network operators. However, if we apply this approach, it becomes impossible to ever prove a margin squeeze – the point is that Vodafone, by squeezing a rival, gains an advantage, irrespective of the other commercial relations into which the rival enters. The Court also seems to require a showing of intent when proving margin squeeze, but this requirement is not consistent with the case-law of the ECJ. The NCA has appealed, and we await the JJudgment of the Council of

State.

Trucks cartel

Three judges reported on follow-on claims in the trucks' cartel in the Netherlands, Germany and Belgium[12]. Martin Vaessen discussed the manner in which a claim involving some 24 claimants, who had bought 200,000 trucks, were seeking compensation for overcharging caused by the cartel. The case involved two Courts (Amsterdam and de Bosch) agreeing to merge the claims brought by both entities into a single proceeding, with judges from both Courts. The Court's approach was to manage the case actively in order to address all the preliminary points (e.g., jurisdiction, applicable law, the viability of the claim) before addressing quantum. The expectation was that if the case were allowed to proceed in order to assess the quantum of damages, parties would then settle before that stage. One of the issues of which the Court had to dispose was the defendants' claim that the cartel had caused no damage. This preceded the Damages Directive, which includes a presumption of loss. The Court called upon economic experts to determine that damage had been caused. It is surprising how many resources have been devoted to this one, relatively obvious, question.

Similar longwinded proceedings are found in Germany, as Axel Walz explains. He discussed two Judgments of the Federal Court of Justice. The first confirms that the binding effect of Commission Decisions applies also to Settlement Decisions, like the one in the trucks' cartel. However, some interpretative issues arose. One intriguing point was that the Commission Decision excluded military trucks, but it was not clear which vehicles were in this set. The National Courts have asked the Commission for clarification, but the issue remains uncertain. A second Judgment of the FCJ explained the burden and the standard of proof that is required in order for claimants to show loss, and for defendants, if they wish, to establish the passing- on defence. However, lower Courts have not supported claimants, and there are hundreds of claims in front of multiple Courts. One Court has held that the cartel did not result in higher prices (although it looks likely that this will be quashed on appeal). Another Court has held that the claimant must commission an expert report in order to quantify damages. One difference between the approaches in the Netherlands and in Germany may emerge once some of the expert reports that calculated damages have become available in the German Courts – at this stage, defendants might choose to settle, rather than to litigate further points about the viability of the claimant's arguments on points of law. Here, we see different case-management approaches: the Dutch Court holding up damages quantification until all other issues are clear, and thus expecting a settlement; while the German Courts take the view that giving defendants an impression of likely damages is a good incentive to settle a case.

Finally, a more hopeful result has been obtained in Belgium, as Anne-Marie Witters explained. This concerns a claim that is solely against one cartel member (DAF), and that comes from one claimant (AJ Veurnick BV), who has been buying and leasing DAF trucks since the 1990s. The claimant bought 54 trucks, and he alleged that the price was inflated by the cartel and sought damages of approximately €1 million (the total overcharge caused by the cartel). The claimant relied on a damages calculation by a Court in Spain, which had estimated that the overcharge was some 20% higher than the competitive price would have been, had the cartel been absent. The Court applied recent case-law from the ECJ (Sumal)[13], in order to trace the claim to the parent company, and it made reference to Spanish case-law in order to determine that the overcharge was 7.5%. Based on evidence about which trucks the claimant had bought from DAF, the Court awarded damages of a little over €300,000. It is noteworthy that the Court refused the request to appoint an expert to calculate damages, and it used its powers to award damages ex aequo et bono.

12 Case AT.39824– trucks (Decision of 16th July, 2019).
13 *Sumal SL v Mercedes Benz Trucks España SL*, Case C-882/19, EU:C:2021:800.

In sum, these three jurisdictions are faced with a large number of claims, which are costly to process, and in which the defendants raise a number of points of law that are to be determined, and in which each claimant is seeking a relatively modest sum. Two hopeful signs arise: active case management processes are set up to accelerate proceedings, and the Courts are looking into the experience of other judges in other jurisdictions. Nevertheless, one must wonder if the massive costs that are faced by multiple Courts are the most efficient way to manage those follow-on actions from cartels that affect a large number of claimants. Might the EU consider establishing an ad hoc tribunal to consider all these claims collectively?

Follow-on actions and procedural opportunities

Carlos Manuel Goncalves de Melo Marinho discussed the procedural controversy in Portuguese NCA v Beiersdorf. The issue at play is the request for a third party to non-confidential documents, that have been seized by the competition authority pending a decision by that authority. He claimed that these documents were the only way to know how the case was proceeding in order to prepare possible damages claim, but the First Instance Court and the Court of Appeal denied the claim. The dissenting judge argued that the Damages Directive, especially Art. 4, indicated the importance of facilitating follow-on damages actions and suggested that a right to access information was supported by EU Law. However, it is arguable that a would-be claimant will be able to secure sufficient access once the NCA issues a final decision, and the granting of anticipatory access appears disproportionate to the interests of potential claimants. The dissenting judgment noted the way in which EU law created, in national courts, a hybrid system in which national rules are to be read in the light of EU Law.As we will see in the final case, this may have significant effects.

Karina De Koning discusses CDC vs Kemira.[14]This is a follow-on damages action that is based on the sodium chlorate cartel that was discovered by the Commission. The cases were heard in The Netherlands but, for each purchaser, the applicable law was that relevant to the place in which they had bought the cartel goods (Spain, Sweden and Finland). At issue was the question of whether the limitation periods in the various Member States were consistent with EU Law. At the time, the Damages Directive was not yet in force, and under the existing laws on limitation in all the Member States the case would thus be time barred. On Appeal, the Court had to rely on the general principles of EU Law in order to test the validity of national limitation periods that were based on the principles that had been established by the ECJ in Cocego.[15] The Court of Appeal read national law in a manner that ensured that national law conformed with EU law, as a result of which it was found that the claims were not time-barred. For example, with reference to Spanish law, the Court held that the limitation period should start one year from the judgment of the General Court confirming the infringement, and that the time should stop running pending public enforcement. As the learned judge explained, the reason for stretching limitation periods is that preparing a follow-on damages claim is a complex affair, and nothing can really start until the Commission decision is available so that a case can be built upon it. However, as the judge also observes, the interpretation of foreign law by the Dutch court is ‘tricky business’, especially when the national courts in Spain, Sweden and Finland have not given an authoritative interpretation on the impact of EU law on national limitation periods. Luckily, the Damages Directive now harmonises the limitation periods in such a manner that this will facilitate follow-on damages claims.

14 ECLI:GHAMS:2020:194.
15 C-637/17, EU:C:2019:263

Conclusion

This is a very rich collection of national court judgments. It reveals that EU competition law has come of age before the national courts. A number of comparative reflections arise from these case summaries. When it comes to damages claims, we see the beginnings of a fruitful judicial conversation about the quantification of damages, which can hopefully be extended to other aspects of the management of these claims. Turning to the judicial review of NCA decisions, we see that Courts generally review decisions fully, taking the lesson from the Menarini Judgment seriously.[16] Sometimes one may wonder if the national courts go too far in criticizing the NCA, however. Increasingly, experts in antitrust economics populate the Courts. In other areas of law in which expertise is used, the relationship between the judge and the expert is more well-established (e.g., in some countries there is a list of experts, and an expert may be removed from the list based on poor performance). Economic experts are a novelty, and more attention should be paid in relation to the way in which they manage their evidence. The ECJ's case-law is well understood by national Courts, and it is applied attentively. While the Damages Directive is expected to facilitate follow-on damages claims in the future, it is likely that many more references for preliminary ruling will be received by the ECJ, because not all issues are codified in the Directive. This will inevitably slow down the ability of national courts to offer prompt compensation for losses that have been suffered by cartel victims. Shaping an adequate scheme for private antitrust enforcement will take some time yet.

16 *A. Menarini Diagnostics S.r.l. v. Italy* - 43509/08 (Judgment of the European Court of Human Rights, 27.9.2011).

Public Procurement and Bid-Rigging

Ivana Manestar, Zagreb Commercial Court

Decision of the High Administrative Court of Croatia, Ref. No. UsII-335/21-6 of 9th March, 2022.

Facts

The judgment that I will be analysing here represents the last, but possibly not the final, one on the bus transport saga in the Croatian Međimurje County, which started in 2011.

Namely, the main bus transport operator in that geographical area until 2010, Tours Ltd., went bankrupt, and so Međimurje County, whose administrative body had competence for the issuance of licenses for the provision of public bus transport services, needed to regulate that situation, which was of public interest, which it did by temporarily allowing 4 undertakings to provide bus transport services on those routes (the undertakings being: Tourist, Tours, Rudi-express and Rob Toni) until the completion of a public tender for bus transport services on the bus routes which had previously been operated by the bankrupt company, offering, in total, 106 licenses for 106 bus lines to the most suitable bidder.

The temporary bus transport situation described lasted from June to December, 2010, at which point the public procurement procedure was completed and the bidder, the Presečki Group, was selected as being the most suitable, with one of the main criteria for the selection being the price offered for a daily one-way ticket, and the ability to take over the workers of the bankrupt bus company but, in reality, the Presečki Group did not provide bus transport services for the ticket prices that it had offered during the public procurement procedure.

The conditions and the procedure for the issuance of licenses for public bus transport, the reasons for the cessation of licenses before their regular expiry date, and the overall rules for public road transport, are prescribed by the Croatian Road Transport Act.

According to the Road Transport Act, a bus transport operator can provide bus transport services individually on the basis of an individually issued license; jointly, with other bus transport operators, on the basis of a joint license and a previously signed partnership agreement or, as an exception, by using bus transport sub-operators, on the basis of an administrative approval and a previously signed contract with those sub-operators, but only for a limited time of 90 consecutive days in one calendar year.

So, although the Presečki Group had won the public tender and was issued with 106 licenses for the provision of public bus transport services, at the end of 2010 it sought and received administrative approval to provide bus transport services on those 106 bus lines, temporarily, until 3rd March, 2011, by using bus transport sub-operators, namely, Rudi-Express and Tours (Art. 40 of RTA).

However, before the expiry of that temporary approval, the Presečki Group, Rudi-Express and Tours submitted an application for the issuance of a joint license for the joint provision of public bus transport services (Art. 42 of the RTA), having previously entered into two partnership agreements that were supposed to regulate their future business relations.

Although the joint license was never issued (because the Presečki Group didn't meet all of the formal requirements – as it had unpaid tax dues), the partnership agreements, one of which was called a Business Cooperation Agreement, and the other a Joint Provision of Transport Services Agreement, remained in force.

It should be noted that Art. 8 (1) of the Croatian Competition Protection Act is practically identical to Art. 101 (1) of TFEU, so it states that all agreements between two or more independent undertakings, all decisions of associations of undertakings, and all concerted practices which distort competition on the relevant market, by either their object or their effect, are prohibited, especially those which, amongst other things, directly or indirectly, fix prices, and/or limit production or share markets.

The provisions of those partnership agreements which captured the attention of the Croatian National Competition Agency (hereinafter referred to as: NCA), due to their anti-competitive nature, are:

- Art. 4 (2) and Art. 8 of the Business Cooperation Agreement – stating that all of the bus transport ticket prices shall be determined jointly, and all of the bus transport operators will implement the same prices,
- Arts. 6 (1) and (3) of the Provision of Transport Services Agreement – regulating the division of the 106 licenses that were issued to the Presečki Group for public bus transport on the territory of Međimurje County -- by agreeing that 65% of bus transport should be provided by the Presečki Group, 25% by Rudi–Express, and 10% by Tours, and that none of the three mentioned undertakings will provide bus transport services on the bus lines for which the permits were issued to the fourth undertaking involved, the Tourist:
- Art. 9 of the Business Cooperation Agreement, and Art. 15 (3) of the Provision of Transport Services Agreement – stating that the contracting parties will monitor the demand for bus transport services in Međimurje County, and that they should agree jointly on how to reply to that demand and will register new bus lines exclusively as an association (not individually),
- Art. 6 of the Business Cooperation Agreement – stating that the contracting partieswill submit bids in all future public procurement procedures regarding special bus transport services for pupils in elementary schools only as a group of tenderers, and never individually.

The conclusion of the NCA was, of course, that the said undertakings had formed a cartel which fixed the sales prices of public bus transport services, had divided the market of public bus transport services in order to eliminate any possible competition that might have occurred in normal circumstances, had limited the ‘’production’’ of public bus transport services, as they had agreed that they would register new bus lines only jointly, and had limited the ‘’production’’ of the special bus transport services for pupils in elementary schools, sincethey had agreed to bid in all of the pro futuro public procurement procedures relating to those services only as a group of tenderers, regardless of the tender conditions and of the procurement entity that was involved.

Beforehand, the NCA had dismissed the main objections that had been posed by the undertakings accused:

- there is no place for the application of Art. 42 of Road Transport Agreement (joint provision of public bus transport services), which obliges the providers to conclude an agreement on the way that those services will be provided, and this would, in a way, derogate the provisions of the Competition Protection Act, due to the maxim lex specialis derogat legi generali, because the joint license for the joint provision of bus transport services was never issued, and because the said agreements contained provisions that were not absolutely necessary for the joint provision of services,
- the facts of the case that was opened was based on the initiative of the Presečki Group, in relation to which the NCA decided, in January, 2012, to dismiss the initiative since there were no grounds for the application of the Competition Protection Act, but only for the application of the Road Transport Act, which are not comparable with the facts of this case, and so those legal standpoints cannot be applied in this case,

- although Rudi–Express and Tours had no licenses for the provision of public bus transport services in Međimurje County, they were potential competitors to the Presečki Group (a company that was given 106 licenses for 106 bus lines) and to Tourist (a company that was given 4 licenses for 4 bus lines), so the said partnership agreements aimed to eliminate any possible competition.

The NCA concluded that the prohibited agreements, a cartel, had lasted from 1st March, 2011 (at which point, the sub-transport contracts had expired) to 9th September. 2011 (at which point the 106 licenses that were given to the Presečki Group were removed and, as a result of this, the three undertakings stopped providing bus transport services in Međimurje County) and since this distorted competition in the market for public bus transport services and special bus transport services for pupils of elementary schools in Međimurje County, by its object, it was therefore unnecessary to determine the actual anti-competitive effects that the agreement had on the relevant market. The NCA declared the prohibited agreements null and void, and imposed fines upon the accused undertakings, the biggest one being given to the Presečki Group, since it was concluded that it was the initiator of the cartel.

Summary of the judicial proceedings and the ruling of the court

The Presečki Group filed a lawsuit against the NCA with the Administrative Court of Zagreb (which then had jurisdiction over the legality of the NCA's decisions), stating mainly that the two partnership agreements were never applied in practice because the undertakings involved hadn't been issued with a license for conducting public bus transport services jointly, and that the fact that Rudi-Express and Tours continued to provide bus transport services, even after the expiry of bus transport sub-operator contracts, does not unequivocally mean that those services were provided on the basis of the annulled partnership agreements, but that it was simply illegal behaviour, which should have been sanctioned according to the provisions of the Road Transport Act, and not according to the provisions of the Competition Protection Act. The NCA stated that the fact that the Presečki Group, Rudi-Express and Tours had never submitted any request for the issuance of licenses for bus transport services on the bus lines which were operated by Tourist shows that they were respecting the provisions of those partnership agreements.

The Administrative Court, firstly, in its Judgment UsII-65/13 of 20th February 2014, dismissed the lawsuit, agreeing on everything with the NCA.

However, the Presečki Group filed a lawsuit with the Constitutional Court, claiming that the said judgment infringed upon some of its constitutional rights.

The Constitutional Court agreed with the plaintiff, stating that the Administrative Court, in its judgment, had merely repeated the factual determinations of the NCA, and that it had not explained why, in the circumstances of this particular case, there was no space for the application of the Road Transport Act, namely, in relation to those provisions which regulate the joint provision of bus transport services, the provision of bus transport services through sub-operators, etc., which provisions it had earlier applied in another case of the same factual and legal nature as the case in question.

So, the Constitutional Court overturned the Judgment of the Administrative Court of Zagreb and again referred the case for trial, on this occasion, before the competent High Administrative Court.

The High Administrative Court basically repeated the overturned Judgment of the Administrative Court, so the plaintiff, the Presečki Group, filed a lawsuit at the Constitutional Court again, and the Constitutional Court again overturned the Judgment of the High Administrative Court for the same reasons.

As the High Administrative Court evidently couldn't find suitable reasons in relation to the NCA's disputed decision for the application of the Competition Protection Act, and not the Road Transport Act, in the circumstances of the case in question, so it annulled the decision that came with the instruction that the NCA assess the plaintiff's objections regarding the application of the Road Transport Act, in accordance with the instructions of the Constitutional Court.

In the repeated procedure the NCA, it was again found that the two partnership agreements were null and void, due to their anti–competitiveness, stating that:

- from 30th December, 2010, until 1st March, 2011, Rudi-Express and Tours provided bus transport services in Međimurje County on the basis of bus transport sub-operator contracts, which they had previously concluded with the Presečki Group, and on the basis of a license issued by the competent administrative body, as stipulated in Art. 42 of the Road Transport Act, so, on those contracts, the rules of competition law do not apply,
- however, after the expiry of those bus transport sub-operator contracts there is no basis for the application of the Road Transport Act, since the same parties had concluded the two partnership agreements, hoping that the competent administrative body would issue them with a joint permit for the joint provision of bus transport services, which has never happened, so there was no basis for the application of Art. 40 of the Road Transport Act, which regulates the joint provision of bus transport services, but only for the application of those coercive norms that are contained in the Competition Protection Act,
- the factual and legal nature of this case is not identical to those of the case which was started on the initiative of the Presečki Group, and which ended with NCA's dismissal of the initiative from the legal standpoint that, in those circumstances, there was no basis for the application of competition law rules, but only the rules of the Road Transport Act – namely, that, in that case, the Presečki Group thought that the behaviour that followed constituted an infringement of competition law: 1) the Parent Association of Međimurje County and some other municipalities entered into agreements with certain bus transport operators with the aim of providing special bus transport services to high school students, allegedly for prices which were below those of the market, and since high school students were the most common users of regular public bus transport, which was operated mainly by the Presečki Group and its associates, this led to the fact that there were not enough users of the regular bus transport lines left, and that made the provision of bus transport services by the Presečki Group unprofitable; 2) The Presečki Group thought that those agreements with other bus transport operators were fictive, and had concluded with the intent of pushing the Presečki Group out of the market; 3) Also, the Presečki Group stated that some of those municipalities had concluded bus transport services agreements without previously conducting a public procurement procedure, which meant that they were applying different conditions to different bus transport operators who were in the same situations, which put the Presečki Group in an unfavourable position, 4) Međimurje County allowed for that type of special bus transport for high school students before acquiring an opinion from the competent ministry, 5) As a result of those facts, the Presečki Group claimed that it was forced to notify Međimurje County that, as of 10th October, 2011, it would no longer provide public bus transport services in that area, thus leading to an administrative decision which meant that all of the licenses which were issued to the Presečki Group were removed, although the Presečki Group has never submitted a formal claim in that regard, but merely a notification. The NCA determined, from the information gathered from Međimurje County and the competent ministry that, under the Road Transport Act, Međimurje County does not have the authority to approve or disapprove special bus transport services, because under Art. 44 of the said Act, the client and the bus transport operator are free to conclude a contract without any license or previous approval from either the County orthe competent ministry, and that, although bus transport services had been contracted separately for a special group of passengers had been contracted separately, this regularly impacts on the demand for regular bus transport services, this is not a reason for

prohibiting that type of transportation. The NCA thus concluded that, in those circumstances, which are entirely different to those set out in this case, in which the legal protection is secured throughout the provisions of the Road Transport Act and the Public Procurement Act, which is beyond the scope of competence of NCA, so decided to dismiss the initiative of the Presečki Group.

The Presečki Group has once again filed a lawsuit against the NCA with the High Administrative Court, its main statement being that the limitation period had expired (absolute limitation period, according to the Croatian Competition Protection Act, is 10 years, which are counted from the day of the infringement or, in the case of continuous infringements, from the day the infringements ceased), so the proceedings, in its opinion needed to be terminated, and its previous arguments regarding the application of the Road Transport Act should remain as the only applicable material law in this case, and regarding the legal standpoint as to whether the undertakings in question were even potential competitors, i.e., can we even talk about competition, and its restriction, in the circumstances of this case?

The High Administrative Court, in its latest Judgment of 9th March, 2022, basically agreed with the legal standpoints of the NCA, underlining that, if the main condition for jointly providing bus transport services is the issuance of a special administrative license, and that the license was never issued, than there is no room for the application of Art. 40 of the Road Transport Act, and so the two agreements cannot be construed as lawful. The Court was convinced by the NCA's arguments that the case, for which the initiative came from the Presečki Group, and was dismissed by the NCA because the whole situation was legally covered by the Road Transport Act and the Public Procurement Act, and neither factually nor legally had it anything to do with the case in question, so there really wasn't a case for different legal practices being used in identical situations. Additionally, the Court agreed with the NCA'a reasoning regarding the assessment of the undertakings in question being potential competitors, and this was done by using the criterion of the real and concrete possibility of entering the market in question, which entails the capability to enter the market fast enough to put competitive pressure on the other undertakings that already exist in the market, and that had the mere intent of entering the market. Namely, that Rudi-Express and Tours had also, like the Presečki Group, applied for the public tender for the issuance of 106 permits for public bus transport services and had, beforehand, provided those services on those bus lines temporarily. When they didn't win the public tender, they appealed against Međimurje County's decision which, in the eyes of the Court, meant that they had both the intent and the capability to enter the market for public bus transport services in which the other two undertakings, the Presečki Group and Tourist, were already present. The Court also agreed that the mere fact that those undertakings had concluded those agreements in which they were, amongst others, dividing the market for public bus transport services, supports the thesis that Rudi-Express and Tours were potential competitors to Tourist and the Presečki Group in that market. On the other hand, all four undertakings were real competitors in the market for special bus transport services for the pupils of elementary schools, as they all had certain contracts with certain schools for that type of transportation. The Court also agreed with the NCA that the prohibited agreements did not need to be implemented in order for them to be construed as infringing competition law rules, because their object was to eliminate/restrict competition in the relevant markets, which is, in itself, harmful to competition, and so it is of no relevance whether the agreements had any real negative effects on competition. On the other hand, the Court gathered that, despite the plaintiff's claims, the agreements have actually been implemented, because all of the undertakings were providing public bus transport services exactly according to the previously agreed division of the market's shares. The conclusion was thus that the parties in question had concluded prohibited anti–competitive horizontal agreements with the object of distorting competition in the relevant markets for public bus transport services and special bus transport services for the pupils of elementary schools in Međimurje County by dividing and restricting them, and also by agreeing on how to behave in future public procurement procedures.

Regarding the objection that, by that time, the limitation period for determining the infringement and the penalty had expired, because, if counted from the day the continuous infringement ceased, more than ten years had passed (double the time of the limitation period for starting the proceedings before the NCA), the Court stated that the NCA brought its final decision, determining the infringement and the penalty, on 7th October, 2021, meaning that this was before the expiry of the 10 year limitation period, which, counting from the day the cartel in question ceased, 9th October, 2011, would have been on 10th October, 2021.

The Court thus dismissed the lawsuit begun by the Presečki Group once again.

Comment

I agree totally with the last Judgment of the High Administrative Court, however, justice could have been given a little more quickly in this case since, for me, it was obvious, even from the NCA's first decision, that the provisions of the Road Transport Act, namely, those that regulate the joint provision ofbus transport services, could not apply to the agreements in question, because the prescribed license was never issued, and yet the agreements stayed in force and the undertakings in question coordinated their behaviour accordingly. It was also clear to me that the undertakings in question were real/potential competitors, so the agreements did have the object of eliminating the competition process that would have occurred in normal circumstances. Finally, factually, the case that was dismissed by the NCA was completely different to this case, so the legal standpoints from that case were inapplicable in this one. However, even if we had been talking about two factually identical cases, the NCA is not bound by its previous decisions, so if the later decision differs from a previous decision that was arrived at in a factually identical case, this is not a reason to overturn the later decision, if that decision contains reasonable and good argumentation over all. In any case, it was for the plaintiff, the Presečki Group, to prove that those cases were factually identical so that it could effectively ''attack'' the legal standpoints of the NCA in this case, which, in my opinion, it did not do, so, again, in my opinion, all of those overturned decisions and judgments caused a lot of wasted time.

Pedro Marchão Marques, Lisbon Central Administrative Court (Court of Appeal)

Judgment of the Central Administrative Court Case, Number 123/17.7BELSB of 4th March, 2021.

Key points

Competition Law; Companies with strong interdependence links; price fixing; agreements, decisions and concerted practices; Article 101 TFEU.

Facts

A State Department started a procurement procedure for services in the IT area.

In addition to the Author, the companies, A....., Lda, B....., Lda, C.....,S.A., D....., S.A., D....., S.A. and E..... -....., LDA were invited to participate.

Company A submitted its bid for an amount corresponding to EUR x....., and Company B for the amount of EUR y....., C company presented the third best bid.

The best prices were presented by Competitors A and B, and since competitor A presented the most advantageous conditions, it was chosen.

Competitor C challenged the administrative decision on the grounds of the infringement of competition law, because the bids of A and B were linked to each other, as strong ties of interdependence exist between them.

Applied legislation of European Union Competition Law

Article 101 of the Treaty on the Functioning of the European Union

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have, as their object or effect, the prevention, restriction or distortion of competition within the internal market and, in particular, those which:

(a) directly or indirectly fix purchase or selling prices, or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of Paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Related Jurisprudence of the Court of Justice of the European Union:

JUDGMENT OF THE COURT (Fourth Chamber), Case C-531/16, 17th May, 2018.

Reference for a preliminary ruling — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Links between tenderers having submitted separate tenders in the same procedure — Obligations of the tenderers, of the contracting authority and of the national court)

Request for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), which was given in a decision of 11th October, 2016, received at the Court on 18th October, 2016.

The Ruling of the Court

The Central Administrative Court ruled that the Applicant (a Portuguese Public Department) was not able, either procedurally or in terms of the procedure, to refute the presumption that the parties to the proceedings in their corporate structure and the strong ties that bound them to eachother, in this case, had no mutual knowledge of the proposals and/or of price coordination, and that there was no real possibility of such knowledge. The presumption that there was, or was likely to be, an imbalance of positions arising from that mutual knowledge, which favoured it over other competitors, since it was able to collude on prices, and that such an imbalance was capable of distorting competition.

The Central Administrative Court ruled that the judgment of the Court of First Instance was incorrect, and that it revoked the court's judgment. The Appeal Court annulled the decision to award the contract, due to a violation of competition law.

Summary

I - Article 70(2)(g) of the Portuguese Public Procurement Code (CCP) refers to the rules of Competition Law and, in particular, to Law 19/2012 of 8th May, which approved the new legal competition regime;

II - Companies which are legally distinct, but which maintain strong ties of interdependence should be considered a single company, for the purposes of Art. 3 of Law no. 19/2012, of 08/05;

III - Two private limited companies, owned by two partners, who are married to each other, and in which the husband holds the majority of the capital in both companies, should be considered a single company, for the purposes of that Article;

IV- On the matter of competition law, and for the definition of a company, it is necessary to consider, above all, its capacity for economic self-determination, rather than its legal status or the way it operates;

V - If two companies with strong ties of interdependence present two bidsin the same public procedure, it must be presumed that there may be mutual knowledge of the proposals presented;

VI - If, in addition to this presumption, which arises from the corporate and personal structure of the said companies, it is also verified that both companies operate in the same business area, offer the same type of products on the market, carry out their activity in very close locations, present proposals with identical layouts, make an identical error in those proposals and, in relation to the tie-breaker criterion, present answers at the preliminary hearing that also have similar reasoning and texts, then they appear to present electronic platforms which share physical hardware and communication systems to and from the Internet, but, in their tenders, they quote very different prices, one of which is abnormally low and the other above that level, then the contracting authority is entitled to conclude that there is a strong real possibility that those undertakings had prior mutual knowledge of the tenders submitted and had colluded on the prices proposed in order to increase their chances of winning the tender through that price difference;

VII - The fact that such companies showed the same behaviour and price pattern in four other procedures also militates in that sense;

VIII - In a procedure in which the award criterion is the best price, the submission, by undertakings with strong ties of interdependence, of two prices with disparate values, one of them being an abnormally low price, increases the chances that one of them will win the contract;

IX- In a limited access procedure, which is already restrictive of competition, special care must be taken to ensure that the candidates invited present themselves effectively under equal conditions. It is also required that the (almost non-existent) competition is not defrauded through the duplicate participation of companies that do not operate in the market with either autonomy or independence;

X - The assessment of behaviour that has the purpose and effect of distorting competition must be based on a case-by-case analysis of the set of circumstances surrounding the situation, in order to ascertain whether such behaviour has affected, or is likely to affect, competition. Only in the light of the specific circumstances of the conduct of those undertakings in the procedure, and of the analysis of the proposals they submit, will the jury be able to assess whether competition was distorted, and such a judgment cannot be based on a mere presumption, one that is derived from a given corporate position;

XI - The evidence of the strong probability of the practice of conducts that affect, or are susceptible to, the distortion of competition, can be taken from the corporate structure, family relations, proposed prices, previous patterns of participation in bidding procedures or awards, the behaviour of the competitors in previous bidding procedures, the contents of the proposals presented, or to other answers given within the scope of the bid;

XII – The examination and analysis of this set of circumstances is the responsibility of the adjudicating entities;

XIII - Once the jury has gathered evidence of any practices that objectively aim to, or may distort, competition, the competitors must be given the opportunity to contradict those indications, proving procedurally that the referred-to distortion did not occur, nor could it have occurred;

XIV - Companies cannot be excluded from the procedure in an abstract, automatic or immediate manner that is based on mere assumptions;

XV - The fulfilment of the undetermined concept that integrates the expression “strong indications of acts, agreements, practices or information susceptible of distorting competition rules”, refers to objective, real, concordant and circumstantial proof, but this does not have to be made through direct, firm and irrefutable proof, since it may be based on a set of factual elements from which presumed facts are drawn;

XVI - The awarding entity also only has to prove the existence of strong indications, not the effective practice of the anti-competitive conduct;

XVII - It is in the administrative procedure that such proof must be provided, and the administrative entity enjoys some discretion in the integration of the indeterminate concept, which includes the expression “strong indications of acts, agreements, practices or information capable of distorting competition rules”;

XVIII- The integration of such a concept is therefore the primary responsibility of the jury of the competition, and it is for the Court to evaluate that assessment in order to verify whether it is vitiated by a gross error of fact or manifest error;

XIX - On the other hand, the competitors that are referred must procedurally rebut the jury’s presumption, proving, in the referred administrative procedure, that they presented autonomous and independent proposals. It is up to the competitors to prove that, despite their corporate structure, they could not have had mutual knowledge of the proposals, and that they did not do it by concerted prices;

XX - If the initial presumption of the jury is not rebutted, it may decide to exclude the referred competitors, under the terms of Arts. 70, no. 2, al. g) and 146, no. 2, of the CCP;

XXI - Once this decision is taken, the companies may then question it judicially, but, in this instance, the jurisdictional appreciation cannot focus on the discretionary aspects of the administrative decision.

Comment

This case is very interesting because it analyses the relations between companies operating in the same business area that have strong links, and their effects, in terms of the distortion of competition.

As the Court stated, in competition matters, for the definition of a company, it is necessary to consider, above all, its capacity for economic self-determination, and its legal status, or the way it operates, are far less important.

If two companies with strong ties of interdependence present two proposals in the same public procedure, it must be presumed that there may be mutual knowledge of the proposals presented. The evidence of the strong probability of the practice of conducts that affect, or that are susceptible to the distortion of competition, can be taken from their corporate structure, family relations, and the proposed prices, or previous arrangements, for participation.

We always bear in mind that competition law aims to protect the market itself, as well as the competitive dynamics, and so there is considered to be a breach of Article 101 of Treaty on the Functioning of the European Union when an undertaking can gain an advantageous position by colluding on prices with another competitor, especially when the undertaking has strong ties of interdependence with another competitor.

The competition cannot be defrauded through the duplicate participation of companies that operate in the same market with no independence, due to the existence of shared - or presumaly shared - management powers, with another company.

Fernando Nieto Martín, Administrative Chamber of the High Court of Justice of the Valencian Community

Resolution of the National Competition Commission of 30th June, 2016. Fines for Collusive Behaviour. Railway Turnout Services Market. Decision of the Spanish National High Court of 28th January, 2022. Invalidity of the Agreement related to Duro Felguera Rail S.A.U.

1.On 30th June, 2016, the National Competition Commission imposed a fine of €1.476.000 on Duro Felguera Rail S.A.U.[17], along with three other undertakings that operate in the railway turnout market, as noted in administrative record S/0519/14INFRAESTRUCTURAS FERROVIARIAS.

The fine stemmed from the development of a prohibited conduct, which was classified as a very serious infringement of Art. 62.4.a) of the Spanish Antitrust Law. The first point of its operative section establishes that:

> "… HAS DECIDED THE FOLLOWING. To declare the existence of a single and continuous infringement of Article 1 of Law 15/2007, of July 3rd, 2007, on the Defence of Competition [Spanish Antitrust Law], and Article 101 of the Treaty on the Functioning of the European Union, in relation to agreements or concerted practices for market sharing, price fixing or other commercial conditions, and the exchange of sensitive information in relation to the supply of railway turnout services in the procurement procedures called by GIF/ADIF, which have been carried out at least since July 1st, 1999, and until at least October 7th, 2014".

For the CNMC, Amurrio Ferrocarril y Equipos S.A.[18], Jez Sistemas Ferroviarios S.L.[19], Talleres Alegría S.A. and Duro Felguera Rail S.A.U., made use, without plausible justification and in a permanent manner, of a so-called Temporary Joint Venture.

As a result, they managed to be awarded 72 % of the fifty-two contracts that were tendered between July, 1999, and October, 2014. With an estimated price, between 2005 and 2014 alone, of four hundred and seventy-four million euros.

These four undertakings: without out-competing each other; defined the prices and adjusted the supply, as had been agreed at frequent meetings.

2. Duro Felguera Rail S.A.U. ("DF Rail", hereinafter) challenged the National Competition Commission decision of 30th June, 2016, before the Spanish National High Court.

The CNMC Decision was overturned by the Sixth Division of the Spanish National High Court. It understood that the creation of joint ventures was indispensable, given the:

- technological requirements of the railway turnout market;
- the special features of the railway turnout market.

The reference number of the Judgment of 28th January, 2022, is ECLI: ES: AN: 2022: 402.

3. Before explaining the reasoning of the Court, I will provide more details about the facts described by the National Competition Commission and the legal approach that was adopted.

The structure of the market is very restricted: "... The supply in Spain (...) is characterized by the existence of a small group of undertakings that manufacture and sell them (...) From a demand perspective, in Spain, this is concentrated in a few entities dedicated to the construction and administration of railway infrastructure, mainly by the state-owned company ADIF [Railway Infrastructure Administrator]" (p. 11).

17 S.A.U. stands for *Sociedad Anónima Unipersonal*, it is a single shareholder company.
18 S.A. stands for *Sociedad Anónima*, the equivalent of an LLC (Limited Liability Company).
19 S.L. stands for *Sociedad Limitada,* the equivalent of an ltd.

In the section: “IV. PROVEN FACTS”, the National Commission for Markets and Competition points out that, on 1st July, 1999, representatives of Amurrio Ferrocarril y Equipos S.A., Jez Sistemas Ferroviarios S.L. and Talleres Alegría S.A. “decided to form a Temporary Joint Venture” (p. 13). The three undertakings: “... Reached different agreements on the bids to be submitted for each of the procurement records, on the prices to be negotiated, and on the distribution of the turnouts to be supplied” (p. 14).

DF Rail joined the Temporary Joint Venture in a tender dossier that was launched during the month of June, 2007.

The contacts and the meetings that were held among the four undertakings are explained in detail in the aforementioned document.

4. For the Commission, it was legally attested that: “…a) The parties have shared the market, have agreed on prices and have exchanged sensitive commercial information for 15 years”; and that “…The proven agreements and concerted practices (...) would have had the object and effect of distorting competition” (pp.. 37 & 39).

Then, the Commission considers the economic and technical solvency that the four undertakings would have to compete with separately.

In this regard, the decision shows the annual turnover breakdown of the four undertakings that were allegedly involved in the collusion. In the example of 2010, it was: €33,301,618; €23,752,920; €21,504,204 and €19,921,130. And says that: “... in relation to the awarding price of most of the contracts (...) all the undertakings could have individually participated in most of the tenders” (p. 47).

As regards technical capacity, the Commission provides three explanations: “…they might have established other types of bilateral alliances”; “... taking into account the long period of time in which the undertakings had competed in Temporary Joint Ventures, it would have been reasonable, from a competitive point of view, for the undertakings to have requested the licenses they did not have, in order to position themselves in the market with respect to the rest of the competitors”; “... in the case of conventional turnouts there was no technological requirement.” (pp. 48 & 49).

5. For the National Commission for Markets and Competition: “… d) the aforementioned behaviour is not exempted by Article 1.3 of the Spanish Anti-Trust Law, nor by Article 101.3 of the TFEU” (p. 50).

After revising each of the points required by Para. 34 of the Guidelines on the application of Article 101(3) of the TFEU (2004/C 101/08), it concludes that these collusive practices constitute a single and continuous infringement (p. 53).

It also explains the “effects of such behaviour on the market” (p. 56), and arrives at the conclusion that “…It is highly unlikely that in a competitive environment there would have been such a high number of contracts without low offers, taking into account that price is one of the variables that the parties use to differentiate themselves from other bidders (...) and that resulted in higher prices for the contracts awarded by GIF/ADIF than those that would have existed in a competitive environment, thus damaging the public interest” (p. 59);

The also tells us about the role played by GIF and ADIF in promoting the creation of the successive joint ventures. For this reason, the assigned penalty was reduced by between 6.5% and 8 %.

This role, however, did not exclude the liability of the undertakings that were involved in the collusion: “... it is not possible to rely on the trust that the parties may have placed in GIF/ADIF” (p. 64).

In any case, the penalty imposed on Duro Felguera Rail S.A.U. (€1,476,614) is based on the following calculations: turnover in the affected market: €81,203,259; a market share of the collusive agreement: 9.7%; total turnover in 2015: €22,717,143; penalty rate: 7%; attenuated penalty rate: 6.5%.

6. The Judgment of 28th January, 2022, of the Sixth Division of the Spanish High National Court(ECLI: ES: AN: 2022: 402), focuses on two questions that will be essential to the outcome of the legal dispute. The first is whether: "... the formation of the Temporary Joint Venture, as well as actions of the undertakings involved, were valid and in accordance with competition rules". The second is whether: "... such joint action (...) may be justified given the productive and economic peculiarities of the affected market in which the sanctioned undertakings were acting" (p. 16).

The question that was the basis of the judicial decision was the second one. The technological, productive and economic peculiarities of the railroad turnout market legitimises the behaviour of the sanctioned undertakings.

Before arriving at this conclusion, it summarises the pleas in law that are contained in the claim statement: the complexity of the market and the technological and production requirements; DF Rail's lack of the economic capacity to deliver the supplies within the time frame requested by ADIF; ADIF's instructions; the reduction of costs; the failure to comply with the principle of proportionality.

In analysing the evidence, the Court reached the following conclusions: - the behaviour of the public entity that builds and manages the railway infrastructures: "... constitutes a circumstance to be assessed as regards the proof of the objective necessity of the Temporary Joint Venture which, without a doubt, must be taken into account" (p.17); - Duro Felguera Rail S.A.U. provided, in the proceedings, two expert reports that revealed "the objective necessity or indispensability" (p. 17 of the Judgment) of entering into a joint venture:

> "…In the expert reports (...) it is pointed out that railway turnouts are products with very stringent technical requirements, for reasons of safety and passenger comfort (...) In this sense, it is also highlighted that three technical solutions were required together (...) and Duro Felguera did not have, at the time of these tenders, access to that technology (...) And, therefore, the expert concludes that the lack of technical capacity by DF RAIL prevented it from participating individually in the tenders advertised by ADIF for the high speed rail turnouts" (p. 18).
>
> "Likewise, DF RAIL has provided a report, issued by the consulting firm Global Economics, that analyses the economic and productive capacity that the undertaking had in order to be able to bid individually (...) the appellant undertaking did not have the productive capacity to bid individually for some of the tenders, since it had facilities-related limitations that restricted its capacity to bid independently from the Temporary Joint Venture" (p. 18).

7. At the end of the sixth point of law, the Chamber states that, in the administrative procedure, there is no evidence that: "... the undertakings could have maintained agreements, if any, on a bilateral basis and on an ad hoc basis in the tenders in which the individual participation of the undertakings was possible"; and that "this assertion is based only on the particular assessment of the Commission, and lacks any other evidentiary support that would suggest that the viability of procurement through bilateral alliances could be maintained, despite the urgency of the required deadlines".

In its closing considerations, it summarises the reason for the annulment:

> "…In short, the appeal must be upheld because the evidence in the administrative file, and the expert reports that are provided by the plaintiff would allow, in a joint assessment, the consideration of the objective need - derived from technological, economic and productive capacity reasons - to jointly compete in the tenders, evidence that was not contradicted" (p. 20).

8. In other words, it reaches a diametrically opposed conclusion to that given by the National Commission for Markets and Competition: "... they chose without justification, and in a recurring manner, to submit joint bids in the form of a Temporary Joint Venture in GIF/ADIF public tenders" (Decision of 30th June, 2016, p. 37).

In my view, the said judgment has failed to take into consideration several relevant aspects, amongst which we would stress the following: a more precise and detailed analysis of the cumulative requirements, as per Article 101.3 TFEU. It should have checked the specific extent to which DF Rail (on whom the burden of proof rested) respected them, or not;

- the extensive references contained in the agreement of 30/06/2016, in terms of the economic volume of the undertakings that participated in the Temporary Joint Ventures vis-à-vis the estimated price of the contracts;
- the Judgment of 28th January, 2022, does not take the time to scrutinise the accuracy (or lack thereof) of the National Commission for Markets and Competition's assertions that: "... the parties had alternatives to the Temporary Joint Venture when entering into the contracts (...) it would have been reasonable, from a competitive point of view, for the undertakings to have applied for the licenses that were not available to them" (p. 48);
- the Judgment says nothing about the effects of such collusive behaviour in therailway turnout market. This is an issue that was stressed by the National Commission for Markets and Competition, who said that it may "have resulted in higher prices" (p. 59);
- the agreement of 30th June, 2016, lays down the course of action for the behaviour undertaken by each of the numerous temporary joint ventures that were formed. The Court rules out the analysis of such facts;
- it seems to me that the Court should have delved deeper into the role of the rail infrastructure manager.

9. Application of Article 101.3 TFEU.

The National Commission for Markets and Competition mentions the four requirements of Para. 34 of the Guidelines 2004/C 101/08: "(a) The agreement must contribute to improving the production or distribution of goods, or contribute to promoting technical or economic progress; (b) Consumers must receive a fair share of the resulting benefits; (c) The restrictions must be indispensable to the attainment of these objectives, and, finally; (d) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question".

The National High Court overlooks an in-depth analysis of whether all four (cumulative) conditions are met. In fact, the only mention it makes of Para. 34 of the guidelines is a reference to a Supreme Court Judgment of 17th March, 2021, which was issued in Cassation 1363/2020.

In my opinion, this was one of the points on which the Court should have focused its attention.

Beyond that, and according to the notes of the agreement of 30th June, 2016, and the Judgment of 28th January, 2022, it seems that DF Rail did not provide sufficient evidence regarding strict compliance with each of these four requirements. For example, it did not give sufficient credit to which of the improvements in the efficiency of the market that were generated by the undertakings' participation in the Temporary Joint Venture were, but evidenced the features of this efficiency, likelihood and magnitude.

10. Economic expert report provided by Duro Felguera Rail S.A.U.

The explanation given by the National Commission for Markets and Competition was very solid in relation to the undertakings having sufficient economic and productive capacity to participate independently in the bidding procedures. As an example, it states that: "... in 2012 and 2013, ADIF only tendered one file each year" (p. 49). In comparing the prizes for each of those two tenders with the economic magnitude of each of the four undertakings:-

The Court simply assumes, without further details, that the conclusions of the party expert report are correct, stating that this "... requires a large amount of space, so that the productive capacity of the undertakings is limited mainly by the size of its workshops" (p. 18). The sentence did not clarify which study the expert carried out for each of the numerous tenders.

11. The technological expert evidence of Duro Felguera Rail S.A.U. versus "... it would have been reasonable (…) have applied for the licenses they did not have".

This is by far the most complex question in the judicial dispute. The administrative decision should have been much more detailed here, thus providing a greater number of factual and technical references to support its position.

The abovementioned did not relieve DF Rail of the burden of accurately showing that autonomous participation in the various contracting procedures was not possible. The National Commission for Markets and Competition had observed that this undertaking had no problem in bidding alone between the years 1999 and June, 2007, (the year when it became part of the various Temporary Joint Ventures); the four sanctioned undertakings submitted autonomous bids in 2014 "... which implies an implicit mutual licensing of the technologies included in these turnouts" (p. 52).

The expert report of a Full Professor of Transport Engineering and Infrastructures did not (I believe) meet this burden of proof. It only proved that DF Rail lacked all the necessary patents needed to compete. However, it does not demonstrate the inaccuracy of the legal position that was maintained by the National Commission for Markets and Competition. That is, that there were legitimate options other than participation in a joint venture.

The importance of this evidence was paramount to the proceedings, when it was established by the National Competition Authority that: "... the agreement between the undertakings has completely eliminated competition in the railroad turnout market during the years of the duration of such conduct" (p. 52).

12. "…to compete separately and then share" (in the example on p. 40, Decision of 30th June, 2016)

The National Commission for Markets and Competition made a great effort to demonstrate the performance of the four undertakings over a long period of time and in relation to a large number of procurement contracts.

The Judgment rules out the existence of collusion without looking, in our view, at a sufficient number of tenders, especially given that several of them presented unique features, such as: the 2014 Fabrides Temporary Joint Venture: "... to compete separately and then share"; these tenders related to conventional turnouts (not high speed), a field in which there were no patent problems.

13. "…have resulted in higher prices" (p. 59, National Commission for Markets and Competition resolution)

Not one line of text in the National High CourtJudgment is devoted to the effects of collusion. Despite the insistence of the National Commission for Markets and Competition that the behaviour of the sanctioned undertakings was harmful to public interests: "...It is highly unlikely that in a competitive environment there would have been such a high number of contracts without low offers (...) and that resulted in higher prices for the contracts awarded (…) thus damaging the public interest" (p. 59).

The references of the National Commission for Markets and Competition are powerful: "… 43 of the 50 contracts (…) had withdrawals that were lower than 1%, and in 23 of them there were no withdrawals" (Decision of 30th June, 2016, p. 59). It also explained that contracts with higher withdrawals: "... occurred when ADIF promoted greater competition by communicating to the undertakings that it did not want more joint bids".

14."…does not affect (...) the undertakings' degree of responsibility in the conducts sanctioned herein" (p. 100).

The National Commission for Markets and Competition reduced the punitive measure imposed on Duro Felguera Rail S.A.U., given that the permissive attitude shown by both railway infrastructure operators towards the undertakings should have acted as an attenuating circumstance. However, this is not enough to exclude the infringement on the principle of legitimate expectations.

The Court does not exclude unlawfulness either. What it does is to hold: "... that it is the public entity that instigates the agreement between bidders (...) and that does constitute a circumstance that should be assessed when proving the objective necessity of the joint venture". (Judgment of 28 January, 2022, p. 17).

Here, I agree with the Commission. If the sanctioned undertakings did not demonstrate, by hypothesis, the four cumulative requirements for the application of Article 101.3 of the TFEU, the fact that GIF/ADIF incited them to participate in a Temporary Joint Venture should only serve to reduce the punishment imposed on DF Rail. A reduction that, in Court, could perhaps have been greater.

Asim Vokshi, Albanian Supreme Court

Decision of the Albanian Supreme Court No.00-2016-2064 (228) of 7.4.2016

Facts

The Albanian Competition Authority monitored the market for the procurement of new vehicles (for the years 2007-2009) and, based on the findings, decided in 2009 to open a preliminary investigation procedure in this relevant market. This investigation aimed to find whether the companies operating in this market manifested behaviour that distorted competition.

The preliminary investigation provided evidence (in electronic and written form) of participants' cooperation in public procurement between four companies "Classic" sh.pk, "Ultra motors" sh.pk, "Noti" sh.pk and "Hyundai Auto Albania sh.pk., which, in the assessment of the Competition Authority, raised doubts about an existing prohibited agreement between enterprises operating in the relevant market.

After the preliminary investigation, the Competition Authority decided to open an in-depth-investigation procedure.

The in-depth investigation procedure showed that these companies were engaged in the following actions: A small number of bidders participated in the relevant market; Rotation of bids; Signs of communication between bidders; Relationships between bidders after the announcement of the successful bid, according to pre-existing agreements; Similar terms on documents submitted by different bidders.

The companies under investigation have used the covered bid scheme by agreeing in advance as to which company would submit the winning bid. The use of the "rotation scheme", by following which the winning company is announced on a rotating basis, is also considered to be a violation of the law. The investigation considered the existence of "similar marks" in the documents that were deposited with the contracting authorities, such as spelling errors, certificates issued on the same date and consecutive serial numbers from the same insurance company; the same or consecutive protocol numbers; notarisations by the same notary public, translations by the same certified translators; the same wording, formatting, size and font used in the writing, the same representatives in the authorisations.

For these reasons, the Commission of the Competition Authority, according to the powers given to it by the law, imposed fines on these companies.

Summary of the judicial proceedings

Against the decision of the Competition Authority to impose fines for prohibited agreements in the market for the procurement of new vehicles, two of these companies (Noti sh.p.k. and Classic sh.p.k.) filed a lawsuit with the Tirana District Court (the Court of First Instance) claiming the annulment of the Decision, No. 154, dated 01.10.2010, of the Commission of the Competition Authority, which had imposed fines for participation in the prohibited agreement.

The District Court of Tirana delivered Decision No.3171, dated 03.04.2012, in which it decided: "Acceptance of the lawsuit. Partial annulment of Decision No. 154, dated 01.10.2010, of the Commission of the Competition Authority, regarding the fine for participation in the prohibited agreement in the bids for the companies "Classic" sh.p.k. and "Noti" sh.p.k.

The argument of the Tirana District Court was that the evidence presented by the respondent party may raise doubts about the possibility of the existence of the agreement, but it may not create certainty in the existence of these alleged agreements. The investigation conducted by the respondent was not comprehensive, and the indicators of this situation are the investigated periods, the lack of any request for additional information from the administrative bodies which have a legal mission to verify

the implementation of public procurement rules (Agency of Procurement, Procurement Advocate), etc. Basically, there was no clear proof of the existence of an agreement that had fixed the prices.

The Competition Authority filed an Appeal with the Tirana Court of Appeal. The Appeal Court delivered its Decision, No. 2906, dated 10.12.2012, in which it decided to quash the decision of the Tirana District Court and dismiss the claim. The arguments of this Court were that the Competition Authority provided enough evidence to prove the existence of the agreement that had, both directly and indirectly determined the prices of the bids submitted in the public procurement procedures, which was in violation of competition law. The Court of Appeal also reasoned that Classic, Noti, and the other companies under investigation, have used the subcontracting (supply) scheme, to purchase procured vehicles from each other. The vehicles were bought and sold at the same price, thus maintaining the resale price.

The Ruling of the Supreme Court

After the decision of the Tirana Court of Appeal, the plaintiffs lodged a Cassation Appeal with the Supreme Court. The Supreme Court, with its Decision, No.00-2016-2064 (228), dated 7.4.2016, quashed the decision of the Court of Appeal of Tirana and left in force the decision of the Tirana District Court. The Supreme Court reasoned that the Court of Appeal had erroneously applied the substantive law, and therefore its decision should be quashed.

The Administrative Bench of the Supreme Court found that the administrative investigation conducted by the respondent was not comprehensive. According to the Supreme Court, the defendant did not request additional information from administrative bodies which, due to their competences, can verify the implementation of public procurement rules (Public Procurement Agency, Procurement Advocate). The defendant conducted an administrative investigation only against these companies, and not against all of the companies operating in the market for the sale of new vehicles and has not extended the investigation to other companies which were not announced as being successful bidders within the same limits of the funding for procurement. An administrative investigation was also carried out for only a limited period, 01.01.2007-20.12.2009, verifying the data for only a proportion of the tenders held during the investigation period, and not for all the tenders in this period.

The Court concluded that the existence of a prohibited agreement between undertakings operating in the relevant market that was agreed upon in order to prevent the participation of other entities, is unproven. Likewise, the administrative bench of the Supreme Court concluded that there was no evidence of an agreement that fixed the prices. This agreement is not proven to have been concluded, either in writing or in any other form of expression of will, in the manner prescribed by the Civil Code. It was also not proven that the parties were in any fictitious or simulated agreement that had been arrived at in order to conceal the concrete actions of their participation in procurements.

The Administrative Bench of the Supreme Court argued that the Tirana Court of Appeals does not determine what the illegal conduct of the plaintiff that may have prevented other potential competitors (commercial operators exercising the same commercial activity) from participating in the relevant tenders in the field of procurement controlled by the Authority is. Actions that would prevent this possibility might constitute the conduct of distorting competition. It does not appear that there was an obstacle for those companies that exercise this type of activity to participate in the public procurement procedures for vehicles.

Lastly, the Supreme Court holds that, in public procurement procedures and more specifically for vehicle procurement, the bidding entity has the vehicle for which it submits a bid to the contracting authority, as with the vehicle, according to the relevant technical specifications the entity participates in the procurement procedures and the vehicle offered is selected by the winning company. It cannot be accepted that these companies have used the sub-contracting (supply) scheme, according to which the winning company has purchased the vehicle from the other company in line with a pre-existing “agreement”.

Comment

In this case, the ruling of the Supreme Court is somehow inconsistent with the principles of competition law. In cases that deal with concerted practices (one form of prohibited agreements), the standard of proof is such that it does not demand direct evidence of a classic agreement between undertakings. This stance has also been consistently emphasised by the jurisprudence of the CJEU. According to the facts of the case, the defendants have knowingly coordinated their behaviour and have cooperated with one another, where it was expected that they would compete in the relevant market. Clearly, they have not formally agreed to produce any rights and/or obligation as regards their participation in the public procurement tenders, but they have distorted the competition between bidders through the concertation of their actions. The agreement to purchase vehicles, by the successful bidder, from other "competing" companies is an expression of the anti-competitive effect that the concerted action produced. The Court of Appeal has therefore evaluated the case more accurately and in accordance with its legal powers as a court of fact and law.

This case reveals the need for the continuous training of judges in relation to competition law concepts and principles. It is important to highlight the characteristics and specificities of competition law which distinguish this branch of law from classic civil law principles and concepts.

Horizontal Cartels

Jukka Koivusalo, Finnish Supreme Administrative Court

Decision of the Finnish Supreme Administrative Court, No. KHO 2022:86 of 1.7.2022.

The Finnish Competition and Consumer Authority´s Proposal to the Market Court, 4.12.2018.

The Market Court´s Decision, 3.3.2021, MAO 70/21, The Finnish Competition and Consumer Authority v. UK-Muovi Oy (currently, Inora Oy) and Jackon Finland Oy (previously ThermiSol Oy).

The Supreme Administrative Court´s Decision, 1.7.2022, KHO 2022:86, Inora Oy v The Finnish Competition and Consumer Authority.

Introduction

This case concerns a cartel between producers of expanded polystyrene (EPS) foam. EPS foam is commonly used as insulation for walls, foundations and roofing. The three companies concerned are the leading producers of EPS foam in Finland.

This is a classic cartel case, as it concerns price-fixing. The companies coordinated their prices between the Autumn of 2012 and the Summer of 2014. The Finnish Competition and Consumer Authority (FCCA) granted an exemption from the fine to a company called Styroplast, because it had helped to reveal the existence of the cartel.

In The Market Court, amongst the issues that were disputed were the existence of a cartel, the assessment of evidence, the duration of the infringement, the question of whether there was a single or a continuous infringement, and the amount of the fine. The focus of the Supreme Administrative Court´s Decision was on the assessment of evidence and on the amount of the fine. Hence, the focus of this case note is also on those two issues.

Summary of the Judicial Proceedings

The FCCA submitted a proposal to the Market Court to impose a €275,800 penalty on ThermiSol Oy, and a penalty of €1, 530,000 on UK-Muovi Oy. According to the FCCA, the companies coordinated their prices between the Autumn of 2012 and 2014.

In its Decision, the Market Court had more or less accepted the FCCA´s arguments and its proposal. The only major exception from the proposal was that, according to the Market Court, the cartel had already ended in Summer, 2014. For their infringement of competition law, the Market Court imposed a fine of €2,000,000 on ThermiSol Oy, and a fine of €1,200,000 on UK-Muovi Oy.

In the assessment of the evidence, the Market Court gave weight to the witness statement of Mr. D., the former CEO of Styroplast, a company to which the FCCA had granted an exemption from the fine. According to the Market Court, a particularly high probative value could be given to a witness statement that satisfies those criteria that were used by the General Court in the case JFE Engineering and Others v Commission (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00). According to the said case, a particularly high probative value may be attached to those statements which are, firstly, reliable; secondly, that are made on behalf of an undertaking; thirdly, are made by a person who is under a professional obligation to act in the interests of that undertaking; fourthly, that go against the interests of the person making the statement; fifthly, are made by a direct witness of the circumstances to which they relate, and, sixthly, were provided in writing deliberately and after mature reflection (hereinafter, the “JFE Engineering criteria”).

The Market Court found that Mr. D´s witness statement had, in principle, to be regarded as being of high probative value. However, the Market Court also stated that, according to EU case-law, a statement by one undertaking that is accused of having participated in a cartel, the accuracy of which is contested by several other undertakings that are similarly accused, cannot be regarded as constituting adequate proof of an infringement being committed by the latter, unless it is supported by other evidence, although the 'degree of corroboration required' may be less, in view of the reliability of the statements that are at issue.

Inora Oy appealed to the Supreme Administrative Court. In the Appeal it claimed, inter alia, that Mr. D´s statement did not fulfil the six JFE Engineering criteria. and that it was thus not of high probative value.

In the Appeal, Inora Oy also claimed, inter alia, the fine imposed on it was disproportionate, if compared to the fine imposed on ThermiSol, and when compared to previous cartel cases.

The Ruling of the Supreme Administrative Court

The Supreme Administrative Court dismissed the Appeal.

The Court stated that, according to EU case-law (for example, case Infineon Technologies c-99/17, Para. 65), the only relevant criterion for the purpose of assessing the probative value of evidence that is lawfully adduced relates to its credibility. The Supreme Administrative Court also referred to joined Cases C-239/11 P, C-489/11 P and C-498/11 P - Siemens v Commission. The aforementioned case was an Appeal of the General Court´s judgment in which the General Court had stated that particularly high probative value could be given to a witness statement which satisfies the six JFE Engineering criteria. However, in Siemens v Commission, the CJEU noted that the General Court had not just applied those criteria in a mechanical fashion. In Siemens v Commission, the CJEU stated that, even supposing some of the six JFE Engineering criteria were not satisfied, the General Court was able to regard witness statements as being of high probative value, since, following an overall and concrete assessment of the reliability of that witness statement, it had concluded that it was credible, while stating that that evidence still needed to be corroborated by other evidence.

The Supreme Administrative Court also stated that, according to national law (Administrative Judicial Procedure Act), the Administrative Court should consider all the points of fact arising and then determine the points on which a decision can be based.

In the light of the foregoing, the Supreme Administrative Court found that it is possible to use the JFE Engineering criteria in assessing evidence. However, this should not be done in mechanical fashion. A witness statement can be found to be credible and of high probative value, even though some of the JFE Engineering criteria are not satisfied. On the other hand, a witness statement is not necessarily credible and of high probative value if it only fulfils the JFE Engineering criteria. The Supreme Administrative Court also highlighted the principles of the unfettered evaluation of evidence and the overall assessment of evidence.

Regardless of the foregoing, the Supreme Administrative Court did not alter the Market Court´s decision. This was due to the fact, that Market Court´s decision was not based solely on the Statement of Mr. D. The Supreme Administrative Court also found that the Market Court´s overall assessment of evidence was correct.

Regarding the amount of the fine, the Supreme Administrative Court highlighted the assessment of the infringement in question, and the undertaking's individual conduct. According to the Supreme Administrative Court, the principle of equal treatment and the predictability of a fine must also be taken into account when the amount of the fine is determined. However, in the course of time, case-law concerning the amount of a possible fine may evolve. In the light of the foregoing, the circumstances of the case and its overall assessment are decisive factors. The Supreme Administrative Court did not alter the Market Court´s Decision concerning the amount of the fine.

Personal comment

This is an interesting case from at least two aspects. The first relates to the assessment of the evidence. In this case, the Supreme Administrative Court found that evidence should not be assessed too mechanically. Although it may be useful to use some criteria in relation to the classification of evidence, the assessment and weighting of evidence is always a matter that is related to the overall assessment of both the case and the evidence at hand. In its decision, the Supreme Administrative Court also applied the CJEU case-law concerning the assessment of evidence.

The second aspect relates to the amount of the fine. There are few competition law cases in the Finnish courts. This case sheds some light on how to determine the amount of a fine.

Jesus Angel Suarez Ramos, Spanish General Council of the Judiciary

Decision of the Spanish Supreme Court, No. 1.420/2021 of 1st December, 2021.

1. TheMotor VehicleMakers' Cartel ("The horizontal agreement").Decision of theSpanish Competition Authority, 23rd July, 2015, Case S/0482/13:

- Facts:

- Vertical agreements are the usual method employed car makers in the Spanish market when selling cars. All of them use a selective distribution system that must comply with Commission Regulation (EU) No 461/2010 of 27th May, 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.
- The "Members Club": starting in 2004,under the principle of "quid pro quo", meant that some undertakings in the motor vehicle sector in Spain started sharing confidential economic data, especially those relating to margins of benefit, strategies and marketing plans for their selective distribution system:
- There was a common structure in the sharing of information. In addition to meetings of Directors (twice annually), emails were used and also phone calls.
- The amount of shared data was huge, detailed and granular (de-aggregated).
- The "founding members" could invite other undertakings into this circle, on the condition that they also shared their data.
- A consulting firm (Snap-on) was later hired to organise the meetings, and they followed certain protocols. A contract of confidentiality was signed, and they agreed to keep this secret, thus using letters instead of the names of the brands, and the taking of Minutes at the gatherings was banned.
- Some of the undertakings decided to further enhance the exchange of information, and hired a new consulting firm (Urban), then creating a list of meetings of Marketing Directors to share future marketing strategies and to assess the margins relating to their selective distribution system. Urban gathered and organised the data in order to make reports.
- A website with all the information was set up, with access restricted to members only.

- The NCA found that there was a single and continuous Article 101 infringement by object, consisting of the sharing of confidential and very detailed information, actual and future, about marketing strategies (margins, prices), within the framework of a complex agreement, from February, 2006, to August, 2013, with the assistance of two consulting firms:

- Data relates to all of the activities of the selective distribution system and the resellers ("horizontal agreement") relating to new and second hand cars, maintenance services, repairs and spare parts.
- Evidence in the file consists mainly of: emails found that were found during dawn raids, handwritten notes, meetings between competitors, information provided by the undertakings and information provided by leniency applicants.

- The NCA imposed fines on 21 car makers and undertakings, including Toyota España S.L.U.

2. The Case: Toyota España S.L.U., challenged the legality of the Decision. Their challenge was based on the following grounds:

- The behaviour of the competitors is lawful, because it does not relate to future prices or quantities, nor is it intended to fix prices or quantities, so it cannot be considered an infraction by object.
- The behaviour of the competitors could not be considered to constitute a Cartel.
- The behaviour did not produce any effect in the market.
- The NCA Decision fails to take into account the recent developments in European Case Law, namely, the ECJ Judgment of the 2nd of April, 2020, In Case C-228/18 "Budapest Bank":

  "54[...] the concept of restriction of competition 'by object' must be interpreted restrictively. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition for it to be found that there is no need to examine their effects, as otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of competition".

  "67. In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of competition, it is necessary to take into consideration all relevant aspects — having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets — of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market (Judgment of 11th September, 2014, CB v Commission, C-67/13 P, EU:C:2014:2204, Paragraph 78)".

3. Judicial Proceedings (Judicial Review of the NCA Decision).

The NCA Decision was upheld by the First Instance Administrative Court (Sección Sexta de la Sala de lo Contencioso-Administrativo de la Audiencia Nacional). Judgment of23rd December,2019, resulting in the dismissal of Toyota´s case.

Toyota continues and lodges anAppeal with the Spanish Supreme Court.

4. The Spanish Supreme Court Judgment,1st December 2021 (1.420/2021) Case7267/2020.

The Court addresses three issues as being points of law:

- Infringement by object:

- According to the findings of the NCA, the information shared relates to the remuneration and commercial margins of the authorised distributors, with a huge amount of highly detailed data that is highly relevant to the final resale price (e.g., to bonuses and incentives in relation to marketing).
- It was shared in a confidential and secretive manner, according to a time scale (monthly or annually).
- The data was not publicly available, so only the undertakings in this scheme were able to know the final prices and the margins of benefit that were used by the car makers within their distribution system.
- This scheme reduced or eliminated uncertainty about the future behaviour of all of the undertakings in the market. It is a concerted practice that should be considered an infringement by object.

- By its own nature, the information helps undertakings to "adapt" or "align" their behaviour in such a way that it hampers the market.
- The Court rejects the "Benchmarking" excuse or defence by the infringer (that the aim was only to promote good practices and further mutual "know how" in the industry). That aim has not been proven.
- The NCA Decision contains all the requisites of recent ECJ Case Law: an assessment of the functioning of the market, its regulation, the legal and economic context, and details of all the circumstances, such as the number of independent players, supply and demand.
- The agreement to exchange information led to an artificial level of transparency in the market, which is incompatible with the autonomy of the behaviour of the undertakings in a competitive market. The mutual knowledge of commercial practices and contractual terms was aimed at restricting competition, and thus should be considered, as being a restriction by object.

- Characterisation as a "Cartel":

- According to the infringer, an agreement can only be deemed to be a "Cartel", in Spanish Law, if the exchange of information is related to prices or quantities.That pleading was dismissed by the Supreme Court, on the following grounds:
- Not all infringements of competition law should be labelled "Cartels", and, according to Spanish Law, there is an open definition of what constitutes a Cartel.
- As the data shared have a strong indirect influence on the final price, this is a Cartel anyway, because prices are bound to be affected.

- A continuous and single infringement:

- The exchange of information took place in different ways, and over many years but followed a single comprehensive and collective plan.
- This is consistent with ECJ case law, and can be regarded as being a single infringement, because the same economic intention was found: to weather the effects of the economic crises in the car market.

- Conclusion: the Appeal was rejected, so the NCA decision was affirmed in its entirety.

Relevance of the case: uncertainty and risk as an element of competitive markets

(A) Interaction and interplay between Vertical agreements and Horizontal agreements: in this case, we see how vertical agreements, which are lawful and usual in this particular market, may be used by undertakings to restrict competition by aligning themselves in an horizontal agreement on how to deal with those vertical distribution systems.

(B) The importance of taking into account all the nuances and requisites of later developments in European Case Law. The blurring of the limits between restriction by object and by effect, which is apparent in the ECJ Judgment of the2nd April, 2020, in Case C-228/18, "Budapest Bank".

(C) The difficulty of reviewing NCA Decisions (in the year 2015) according to those criteria that were later set up by ECJ Case Law (in 2020).

(D) The highlighted role of uncertainty and risk in the markets. The takeaway is that real competition entails that competitors need to take their chances to challenge and fight themselves, to try to find new commercial strategies and new ways of running their businesses independently. Agreements or concerted practices which reduce or eliminate that uncertainty and tamper with the real competition game hamper both the markets and consumers in the long run, and thus are tantamount to traditional

cartels.

Maja Valusnig, Zagreb Administrative Court

Decision of the Croatian High Administrative Court, No. UsII-121/20 -21 of 21st July, 2021.

Facts

1. Plaintiffs: Bul d.o.o. (a driving school) and 4 other driving schools brought an action against the Decision of the Defendant: the Croatian Competition Authority: Klasa: UP/I-034-03/2018-01/002, urbroj: 580-09/64-2019-178- 30th December, 2019, before the High Administrative Court of the Republic of Croatia, seeking its annulment.

2. The Croatian Competition Authority, in its Decision, concluded that the plaintiff, along with 13 other driving schools (all located around the town of Split) have, through explicit agreement, and through chats on WhatsApp groups, agreed on raising the price for a one hour driving school class (from 1st January, 2018), thereby distorting competition in the period from 15th December, 2017, until 28th May, 2019, by direct pricing within the meaning of Art. 8 Para. 1 of the Competition Act, and, by doing so, that they concluded a prohibited agreement which limited competition in the relevant driving school market, and this represents a breach of the national competition law. In its decision, the Croatian Competition Authority declared their agreement to be void, and fined all of them with different amounts of fine (rangingfrom 10.000,00 kn., as the lowest fine, to 50.000,00 kn., as the highest fine, which was imposed on the plaintiff). One driving school was exempted, because no evidence of its participation in agreements with other entrepreneurs was established.

3. The plaintiffs claim that the increase in prices did not occur only at the level of the driving schools in question, but at the level of the entire Republic of Croatia, which is not, and cannot be, a consequence of any agreement, but is only the consequence of competition. The fact is that the plaintiff raised its prices from 1st January, 2018, not because of any agreement, but solely because of the fact that most of the driving schools in Dalmatia and Croatia had raised their prices, which can be seen from various websites and similar open sources, and the members of the WhatsApp group informed each other about this in a timely manner. They state that a number of reasons had prompted them to raise the price of driving class hours in 2018, primarily, because the price had not changed for many years, costs had risen, as well as their plan for acquiring vehicles in the A1 and A2 categories. The plaintiffs concluded that the aim of forming the WhatsApp groups was not to reach a secret prohibited agreement, but to publish the prices charged by certain driving schools to these groups, after applying the calculation methodology about which they had previously agreed, given the ambiguities in the regulations had taken effect.

4. The plaintiffs also explained that the adoption of the Law on Amendments to the Law on Road Traffic Safety repealed the “Ordinance on the unique minimum calculation elements of the value of a lesson in a driving school”, which left a number of inconsistencies and unknowns about the number of hours prescribed for the successful training of candidates. For that reason, the plaintiffs, held a series of meetings and ultimately formed the WhatsApp groups, not to agree on the final price of the service, but to develop a methodology for calculating the cost of an hour, and the amount was never discussed.

5. The plaintiffs also claimed that it was necessary to completely exclude from the evidence all mutual correspondence from the WhatsApp group, as this was considered to be illegally obtained evidence, since the final decision cannot be based on illegally obtained evidence. They assert that the Court Order for an unannounced search of business premises was not well founded.

6. In response to the plaintiff’s lawsuits, the defendant essentially pointed out that the subject of the proceedings is not the determination of price increases, nor is it the defendant’s responsibility to examine price increases and their economic reasons, in the case of independent decisions by entrepreneurs, but that the subject of the conducted procedure is the existence of a prohibited agreement on a joint price increase, in the sense of Art. 8 of The Competition Act.

7. The defendant pointed out that the plaintiffs in the lawsuit are repeating the contradictory allegations they made during the proceedings, in that the correspondence in WhatsApp groups was frivolous, and that it did not represent business communication, only later to state that the same groups were created precisely for the reason of elaborating upon a methodology for calculating the cost of an hour.

8. Taking into account only the means of communication, and since consultations on professional problems in associations are held on the premises of associations, or are otherwise available to all members, and the content of the WhatsApp correspondence, the defendant claims that it is clear that this is a closed group – one that aims to come to a secret agreement whose goal is to protect the interests of the members of the WhatsApp group only.

9. The defendant considers that the intention of the cartel association and the elimination of competition is evident, not only from the correspondence in the WhatsApp groups about previous meetings, the agreement on price increases and encouragement in regard to how they should all adhere to agreements, but also in relation to warning about a common problem that is posed by those driving schools which have not raised prices, which are also members of the professional associations mentioned by the plaintiff, and of the joint struggle against them.

10. The defendant also points out that the decisions of this Court on the implementation of the announced search in the Driving School, Hajduk d.o.o., were fully founded, and that they were adopted in accordance with the provisions of Art. 42, Paras. 1 and 2 of the Competition Act.

11. With regard to the plaintiff's objections that they did not conduct additional analyses and tests on the relevant market, they note that, in proceedings to establish prohibited horizontal agreements that are aimed at distorting competition, the precise determination of the relevant market and the market power of undertakings is not decisive, as their market shares do not affect whether there has been a violation of the provisions of the Competition Act.

Summary of the judicial proceedings

1. In analysing the data from the case file, the applicable law, and the proceedings that preceded the adoption of the disputed decision, in which the parties and the witnesses were heard, and an analysis of driving school prices was performed, The Court founds that the defendant's finding: that entrepreneurs, 14 driving schools from Split, had distorted competition by concluding a prohibited agreement that was aimed at preventing, restricting or distorting competition by agreeing on a future increase in the prices of training for candidates for the management of Category B motor vehicles, which has been in force since 1st January, 2018, was correct.

2. The Court also finds the plaintiff's allegations that the correspondence between the mentioned driving schools that were in the WhatsApp groups was illegally obtained evidence, that the defendant could not base his decision on it, and that, given its benign content and manner of communication, it cannot be sufficient business documentation to establish decisive facts, to be unfounded.

3. Namely, the mentioned correspondence between the members of the mentioned driving schools was obtained in a procedure that was conducted on the basis of Art. 42 of the Competition Act, after the decision of this Court, and represents the plaintiff's business documentation, on which the defendant could base his decision.

4. It was also established that these driving schools supported and encouraged each other in insisting on the application of the new price lists, and in not giving in to pressure from the candidates and the media to reduce prices, and also warned of the existence of driving schools that did not raise prices, encouraging them to fight against them. Correspondence showed the existence of a prior agreement on price increases. In addition, the participation of the plaintiff's responsible persons in relation to the prohibited agreement is evident from the above-mentioned correspondence, and their awareness of the illegal conduct is also visible.

5. The existence of the above-mentioned agreement was established, since the mentioned driving schools eliminated uncertainty about their future application by an agreement on a price increase in the next year, and thus removed the risks of mutual competition. It is precisely this conduct that has, as its object and effect, the distortion of competition in the relevant market.

6. The defendant was therefore correct not to accept the plaintiff's allegations that other entrepreneurs had also increased the prices for their services, because, as stated, the self-determination of prices was not prohibited, nor was it established that other entrepreneurs had participated in such negotiations.

Ruling of the Court

1. The Court confirmed the decision of the Croatian Competition Authority, and rejected the plaintiff's claim completely.

My personal comment

1. I completely agree with the Judgment of the High Administrative Court of the Republic of Croatia that the disputed agreement was a prohibited agreement which limited competition in the relevant driving school market, which represents a breach of the national competition law, because the evidence was abundantly clear that 14 driving schools from Split had distorted competition by concluding a prohibited agreement that aimed to prevent, restrict or distort competition by agreeing on a future increase in the prices for the training of candidates for the management of Category B motor vehicles. The conclusion of such agreements is prohibited to all entrepreneurs, regardless of their market share in the relevant market, and even for companies with a negligible market share, in terms of the regulation of agreements that are of minor importance. In view of what has been said, above, I agree that, in the present case, there was no need to carry out a detailed economic analysis.

2. The curious aspect of this case is the attempt of the plaintiffs to import the legal concepts of criminal law into competition law by claiming that the ruling was based on illegally obtained evidence, because they stated that the Court Order for an unannounced search of business premises was not well founded. However, there is no notion of the exclusion of illegally obtained evidence, at least not in Croatian Administrative Law.

Vertical Agreements

Lucie Mikulíková, Municipal Court of Prague

Judgment of the Regional Court in Brno in the Case: Booking.Com of 31st January, 2022, Case No. 30 AF 2/2020-135:

Vertical agreements in violation of Article 101(1) TFEU, and Section 3(1) of the Czech Competition Act, parity clauses, relevant market and anti-competitive effects

On 6th February, 2013, the Office for the Protection of Competition ("the Office") received a complaint from www.skoosh.com (the operator of an online accommodation booking portal) against the price parity practice that was being applied by Booking.com. The company substantiated its complaint by stating that Tržiště, a. s. (a company operating hotels in Prague) had written to the company complaining about its failure to comply with price parity.

In 2014, the Office conducted an investigation and contacted hundreds of accommodation facilities (hotels, guesthouses, hotel-type establishments). The Office requested contractual documentation with online booking portals from these accommodation providers. The portals included Booking.com. A total of 445 accommodation facilities responded. The investigation revealed that Booking.com included price parity in its general terms and conditions in the period from at least 2009 to 30th June, 2015. Specifically, it required that the contractual partner (the accommodation establishment) be obliged to provide Booking.com with identical, or better, accommodation prices for the same accommodation establishment, under the same conditions (term, beds, room type) to those that were available on the accommodation establishment's website, apps, call centres (including their customer reservation system), directly at the accommodation establishment, through any competitor of the claimant, and/or through any third party in a relationship with the accommodation establishment. This parity clause was defined as being "broad". On 1st July, 2015, Booking.com modified its general terms and conditions by introducing a so-called "narrow" parity, which differed from the broad parity in that it did not apply to prices offered through other online booking portals, prices offered through offline channels, or prices that were not published (provided that such prices were not advertised online). It therefore only covered direct offers by establishments that were published online.

In its investigation, the Office ascertained that (i) 90 % of the accommodation establishments cooperated with Booking.com, (ii) 85 % of 392 accommodation establishments indicated that they complied with the price parity clause, (iii) 62 % of 304 accommodation establishments were concerned about being penalised for non-compliance with the price parity clause, and (iv) 36 % of 269 accommodation establishments indicated that compliance with the price parity clause constrained, or negatively influenced them, when pricing accommodation on other distribution channels. Furthermore, the Office relied on survey, in which the responses from 106 accommodation establishments indicated that: (i) for the vast majority, Booking.com is one of the most important booking channels, and (ii) if they did not have to comply with the price parity commitment, then approximately 27% of respondents would offer lower prices on their websites, (iii) through other online booking portals that require a lower commission, approximately 18% of respondents would offer a lower price in such a situation. The Office also used data from a survey that was carried out by the European Commission, together with the Office, within the framework of a monitoring group that was set up to assess the impact of narrowing parity clauses in EU countries. The market analysis showed that Booking.com had a significant position in the relevant market between 2009 and 2015, with a market share of between 41.90% (2009) and 73.15% (2014), well above 30%.

On 1st October, 2015, the Office initiated formal administrative proceedings in the case. As a result, it decided that broad price parity clauses and availability provisions that were applied from 1st May, 2009, to 30th June, 2015, by Booking.com, were in breach of Article 101(1) Treaty on the Functioning of the European Union ("TFEU") and Section 3(1) of Act No 143/2001 Coll., on the Protection of Competition, as amended[20]. Booking.com was fined CZK 8,336,000 for this anti-competitive conduct. In the case of the narrow parity clause, which had been applied since 1st July, 2015, the Office found no reason to intervene.

Booking.com filed a lawsuit against the Competition Authority's Decision with the Regional Court in Brno ("the Court"). In particular, Booking.com argued that: (1) the relevant market was incorrectly defined, (2) that Booking.com's market power was incorrectly assessed, (3) that there were no anti-competitive effects, as a result of the nature of the so-called broad parity clauses in the contractual terms of booking.com and its business partners. Nevertheless, the Court did not find the action to be well-founded, and dismissed it, upholding the Competition Authority's decision. The Court reached the following conclusions in its judgment.

According to the Court, the Office correctly defined the relevant markets in the case, namely, the market for the provision of accommodation services and the market for the reservation of accommodation. Travel agencies were not included in the relevant market. The Court recognised that the services offered by a travel agent may be similar, in some respects, to those that Booking.com offers – booking accommodation. However, there were obvious differences. Travel agents offer their product as a package of sub-services. When booking accommodation with a travel agent, the consumer sees a price that includes many other items be sides accommodation – e.g., transport, transport to the accommodation (in the case of air travel), commission to the travel agent, etc. The price paid to the travel agent often includes the services of a so-called delegate, who has some relationship with the travel agent and assists the consumer at the chosen destination. However, in the case of online booking platforms, the price does not include such things, as the consumer only pays the price of the accommodation, and the commission is then paid by the accommodation provider. In Booking.com's case, the consumer only books the accommodation and provides the rest of the services himself. Nor can it be ignored, as the defendant correctly pointed out, that travel agencies and online booking portals operate on a different economic model. Travel agents purchase the capacity from the accommodation establishments, arrange the other circumstances (e.g., transport), price the stay as such (taking into account their margin also), and then enter into a contractual relationship with the consumer. Online booking portals only act as intermediaries between the consumer and the accommodation provider, implementing their relationship through the booking portal. In addition, the offer of accommodation via the booking portal is freely available to the accommodation provider. This is not the case for travel agencies, since travel agencies themselves dispose of the accommodation purchased. The consumer's freedom is also limited, to a certain extent, as s/he is restricted to a precise time limit for the offer from the travel agencies. The Court therefore concluded that travel agencies do not fall within the relevant market, as they are not substitutable services, in view of the differences mentioned above. Booking.com, as a plaintiff, did not submit any specific evidence that would indicate that accommodation establishments are likely to switch to travel agencies. In addition, this hypothetical threat does not correspond with the data that was gathered by the Office. On the contrary, those data show that Booking.com is consolidating its market position, rather than losing customers. The direct distribution channels were also not considered to be a part of the relevant market. The Court concluded that the intermediation element, which is key to the definition of the relevant market, is completely absent. Direct sales were thus considered to be just another way of selling accommodation capacity which is not substitutable by intermediated sales.

20 The Decision of the Office for the Protection of Competition of 12th December, 2018, Ref. No. ÚOHS-S0664/2015/KD-37030/2018/830/DKl, was confirmed by the Decision of the Chairman of the Office for the Protection of Competition of 1st November, 2019, Ref. No. ÚOHS-R0219/2018/HS-29914/2019/310/AŠi.

According to the Court, it was not necessary for the Office to carry out the SSNIP test. The Court noted that this is not a mandatory tool and that it does not have to be used to define the relevant market. In the present case, even without that method, it was possible to reliably assess travel agencies and their services and, where appropriate, to compare its substitutability with Booking.com's services. There was therefore no need to carry out the SSNIP test at all. It was clearly established that the travel agencies and direct distribution channels did not constitute competitors to booking.com, and they were not part of the same relevant market. The Court added that the companies, such as Google, Amazon, Facebook, etc., were not genuine competitors, as they did not operate a platform for booking accommodation. Booking.com, in its lawsuit, argued that it had a huge number of competitors who, although they did not actually provide accommodation, could have done so at any time. Their possible entry into the market was presented by booking.com as being a significant competitive constraint. However, the Court did not recognise this as a defence. It reiterated that the definition of the relevant market was primarily used to identify real competitors and competing services or goods, not to identify hypothetical and vague competitive threats[21].

As regards the distortion of competition that was caused by the anti-competitive vertical agreements in question, or at least the possibility of such distortion, the Court held that it was not necessary for the distortion itself to have actually occurred. In its view, the Office had correctly noted that the parity clauses restricted the accommodation establishments, in particular, in relation to their pricing, since, when formulating the price for a particular accommodation capacity, they always had to consider the price at which the capacity was offered on Booking.com. Two booking portals might therefore have different margins for a booking, but the portal with the lower margin could not allow the accommodation provider to advertise particular accommodation for a lower price. It would then have to offer that price to the applicant, which, given Booking.com's higher margin, may not be economically advantageous. Similarly, the accommodation provider could not offer a better price on its own website. In addition, Booking.com had instruments at its disposal to enforce parity (e.g., the termination of cooperation, exclusion from the preferential programme).

Booking.com tried to justify its conduct by claiming that, after the introduction of closed groups, its conduct could not have had anti-competitive effects. However, according to the Court, the effects of parity clauses were not affected by the closed groups and continued to apply in the same wording and to the same extent. It is true that prices within the closed groups did not have to respect the parity provision. Since the accommodation establishments could offer a better price to 'their' closed group of consumers, this may have mitigated price parity, to some extent. However, the Court added that many of the accommodation opportunities, especially those for small and medium-sized accommodation, had problems with forming closed groups. In particular, since it required a certain level of investment, and it is questionable whether these establishments had enough regular clients to form a closed group.

Since new competitors entered the market during the relevant period, there was no elimination of competition. On the other hand, the Court agreed with the Office that the wide price parity constituted a certain barrier to new competitors. The price parity may have deterred existing establishments from offering their accommodation on the new booking portal. Indeed, if it wanted to offer a lower price to this new competitor, it would presumably have a lower commission and it would have to offer the same price to Booking.com, whose commission would be higher than that of a new competitor. Given the size of Booking.com's market share, and the number of bookings made through Booking.com, the accommodation establishments might even end up losing out through this step.

21 The German Bundeskartellamt has defined the relevant market in the same way in Decision No. B 9-121/13, which is available at at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-121-13.pdf.

The Court also concluded that Booking.com had sufficient market power, because it was not subject to pressure from multi-homing and competitors. According to the data collected, Booking.com's market position was strong not only because of its market share, but also because of the large proportion of accommodation establishments in the Czech Republic (90%) that were in a contractual relationship with Booking.com. Booking.com tried to convince the Court that no dominant player with a strong market share could emerge in this market, since a market share is very fragile and is always at risk of consumer and accommodation exit. However, this argument was not supported by the data that was discovered by the Office, and it remained merely an allegation. This was confirmed by the accommodation establishments, tens of percentages of which complied with the parity clause only because they were contractually obliged to do so and feared sanctions. In this context, Booking.com's defence, that prices were not in line with parity because establishments did not comply with the parity clause, or that Booking.com did not enforce parity consistently, was found to be unconvincing. Furthermore, Booking.com sees market pressure from entities such as Google, Facebook and Amazon. Booking.com listed only hypothetical threats which were not substantiated during the period in question. The fact that Google's search engine can simply add accommodation booking functionality does not affect the assessment of the relevant market, or of booking.com's position in it. During the relevant period, other companies did not provide direct booking facilities and did not constitute a real competitor to Booking.com.

In conclusion, the Regional Court in Brno upheld the Office's findings, and it concluded that in the relevant market, Booking.com's market power, the anti-competitive effects and the nature of the parity clauses had been correctly assessed by the Office and thus dismissed the action. For the sake of completeness, it should be noted that the Judgment of the Regional Court in Brno was challenged by Booking.com with a cassation complaint, which has not yet been decided upon by the Supreme Administrative Court of the Czech Republic[22].

22 At the Supreme Administrative Court of the Czech Republic, the case is registered under Ref. No. 6 As 35/2022.

Nathalie Bonhomme-Iouck, Liège Commercial Court

Decisions of the Commercial Court of Liège of 8th February, 2022, and of 21st April, 2022, NEWPHARMA / ENERGETICA NATURA BV

Facts

1. The dispute was between 2 companies that were active in the pharmaceutical and parapharmaceutical sector.

2. The first, ENERGETICA NATURA BV, is a Dutch company, specialised in the manufacture and distribution of food supplements.

For 30 years, it has been distributing its products in BENELUX, France and Germany, either directly (via its website: www.energeticanatura.com) or through independent wholesalers and resellers (such as NEWPHARMA).

3. NEWPHARMA is a Belgian online pharmacy, active on the Internet. It is an important player in this sector at the European level. It sells pharmaceutical and parapharmaceutical products from its website: www.newpharma.be.

It has been selling ENERGETICA products for several years.

NEWPHARMA has developed a commercial policy that is based on low and competitive prices. In NEWPHARMA's point of view, the selling price is the only element of differentiation between competitors that are active in the market for the sale of pharmaceutical products (the products sold being identical, and being manufactured by the same third parties).

4. In September, 2021, ENERGETICA decided to set up a selective distribution network to distribute its products in France and Belgium. It had previously taken the same decision for other European countries, including the Netherlands.

Following this decision, it developed selection criteria for its distributors. On this basis, it had designated a limited and closed number of distributors with whom it had continued to work. At the same time, it decided to exclude the other distributors and to cease all collaboration with them (and this was the case with NEWPHARMA).

5. NEWPHARMA didn't agree with this decision. The company was of the opinion that the selective distribution network that had been established by ENERGETICA was contrary to competition law.

It therefore brought an injunction procedure ("action en cessation", in Belgian law) before the President of the Tribunal de l'Entreprise de Liège (Commercial Court).

The Claims and the Procedure

1. The procedure, in this case, is a particular one in Belgian Law: an injunction to cease the breach of the legal rules that are set up in the Commercial Law Code, here, in particular, in competition law.

2. For this specific procedure, the President of the Commercial Court has exclusive competence.

He takes the decision "dans les formes du référé". This means that it's an urgent procedure (with presumed emergency, since there is no need to prove it) which is dealt with following shorter timelines than those of the normal procedures that come before the Commercial Court.

3. NEWPHARMA had two different categories of claims:

i. First, it asked, as a preliminary measure, that ENERGETICA be ordered to continue with deliveries of products during the legal proceedings

ii. Second, it asked that ENERGICA be said to be breaching competition law and be ordered to cease the violation by integrating NEWPHARMA into its selective distribution network

The Presidential Decision of 8th February, 2022.

1. In the first part of the procedure, NEWPHARMA asked the President to order ENERGETICA to accept its orders for products until the adoption of the final decision on the case pending.

This demand was based on Art. 19, Para. 3, of the Belgian Judicial Code, which authorised the Judge to adopt provisional measures during the procedure to safeguard the party's rights.

2. The provisional measures granted are without prejudice to the final decision.

However, they can only be granted on the basis of a prima facie examination of the arguments in question between the parties. In the face of a clearly unfounded request, no legal advance measure could thus be granted that is to the benefit of the applicant

3. In his appreciation, the Judge balanced the interests of each of the parties.

The Judge must thus be particularly careful when the arrangement during the waiting situation imply the provisional triumph of one of the parties' claims in the main proceedings. He must not only compare the appropriateness of the measure sought with the seriousness of the consequences, but must also ensure that the right invoked is not seriously questionable, unless urgent needs require an immediate solution.

4. In this particular case, I refute the provisional measures.

5. Firstly, the prima facie analysis was not possible without a detailed analysis of the selective distribution system that had been put in place by ENERGETICA.

This examination shall include the definition of the relevant market, and the market shares that are held by the parties.

In the event that the market shares of the parties do not exceed the 30% threshold each, the application of the Block Exemption Regulation should be considered.

At this stage, a qualification of the selective distribution network – quantitative or purely qualitative – will have to be applied (the parties weren't agreed on the qualification to be given to the distribution network that had been put in place by ENERGETICA).

6. Secondly, the decision as to whether or not to grant provisional measures involves an analysis of their appropriateness, in particular, by balancing the interests of the parties to the case.

One of the criteria that must be taken into account is the harm that may be suffered by each party due to the duration of the procedure. However, in this case, we were involved in a specific procedure, which was to be dealt with quickly: the date for the hearing was already fixed for 5th April. 2022.

The Presidential Decision of 21st April, 2022.

1. Unfortunately, it was not possible to arrive at a final decision in this case.

For some unknown reason, NEWPHARMA completely changed its argumentation between the two hearings: this was no longer a claim based on unfair competition practice, but only on a breach of Art. 101 of the Treaty on the Functioning of the European Union (TFEU).

2. In its procedural act initiating proceedings, NEWPHAMA asked the President to:

- Declare that ENERGETICA had committed acts resulting in unfair competition by breaching competition law rules (based on Art. VI.104 of the Belgian Code of Economic Law and Art. 101 TFEU).
- Pronounce an order that ENERGETICA cease those unfair competition acts (based on Art. VI.104).

3. In its written acts before the second hearing, NEWPHARMA claimed:

- To declare that ENERGETICA had breached competition law by putting in place its selective distribution network (based on Art. 101 TFUE only), and, more precisely, to:
- Declare that ENERGETICA NATURA does not justify that its distribution network is made necessary by the nature of its products, and in that it constitutes a legitimate requirement with regard to the nature of the product, in order to preserve its quality and ensure its proper use.
- Decide that ENERGETICA NATURA does not demonstrate the existence of efficiency gains, within the meaning of Article 101 § 3 TFEU, that are generated by its distribution network.
- Decide that ENERGETICA NATURA had set up a distribution system, within the meaning of Regulation No. 330/2010, without justifying the existence of the defined criteria on which it bases its selectivity.
- Decide that ENERGETICA NATURA had set up a distribution system, within the meaning of Regulation 330/2010, with both a qualitative and quantitative objective, in which it does not communicate the selection criteria that limit the potential number of authorised resellers, nor the objective criteria of a qualitative nature that is fixed in a uniform manner for all, being brought to the attention of all potential resellers, applied in a non-discriminatory manner, which does not go beyond what is necessary.
- Declare that the selectivity invoked does not respect competition law and, therefore, that it is null and void.
- Decide that, in the absence of selectivity, NEWPHARMA can therefore freely supply itself with the products concerned.
    - NEWPHARMA also claimed that ENERGETICA be forced to pay damages
    - Subsidiarily, NEWPHARMA asked me to refer preliminary rulings to the ECJ

4. All these demands were outside the specific competence of the President of The Commercial Court ruling in a “comme en référés” procedure tht is based on Art. VI.104 of the Belgian Code of Economic Law.

So, I had to refer the case to the President of the Tribunal, who fixed for the case to be heard before three Judges in the Chamber of the Court.

Next Step:

The case will be examined by the Court next October.

A lot of interesting questions are under discussion:

- What is the relevant products' market? Is it only parapharmaceutical products? Only food supplements? Only products sold on the internet, or also those sold in a physical pharmacy shop?
- What is the relevant geographical market, the national or the European one? A more local one?
- What are the market shares of the parties? What about the cumulative effect of selective distribution agreements in this sector?
- Is ENERGETICA obliged to communicate its selection criteria for its agreed distributors?
- What is the meaning of "*Quantitative selective distribution* ***adds further criteria f****or selection*", in Para. 175 of the Guidelines on Vertical Restraints? Does this mean that a quantitative selective distribution network is always a qualitative one and, in addition, is also a quantitative one (reference is made to the ECJ Caselaw Auto 24 of the 14th June, 2012, C-158/11)
- What are the 'sufficient efficiency enhancing effects' of the selective agreements?

Emanuela Germano, Turin Court of Appeal

Decisions of the Milan First Instance Court of 19th October, 2020, and 12th January, 2021.

Case Note on:

1. Shiseido Group Italy s.p.a., Shiseido Europe S.A., Beautè Prestige International S.A. v. Amazon Europe Core S.A.R.L., Amazon EU S.A.R.L., Amazon Services Europe S.A.R.L. - Court of First Instance (Tribunale) of Milano, 19.10.2020, R.G.C. 10182/2020 – Precautionary Injunction.

2. Amazon Europe Core S.A.R.L., Amazon EU S.A.R.L., Amazon Services Europe S.A.R.L. v. Shiseido Group Italy s.p.a., Shiseido Europe S.A., Beautè Prestige International S.A. - Court of First Instance (Tribunale) of Milano, 12.01.2021, R.G.C. 39325/2020 – Confirmation of Precautionary Injunction.

Please note: the commentary concerns two judgments on the same case, the former rendered in the interim measure procedure, the latter in the appeal procedure.

Introduction - The Facts of the Dispute and the Arguments of the Parties

On 27.02.2020, Beauté Prestige International S.A. and Shiseido Europe S.A., who are the exclusive licensees of the trademarks “Narciso Rodriguez”, “Issey Miyake”, “Elie Saab”, “Dolce & Gabbana” and “Zadig & Voltaire”, for the manufacture and marketing of perfumery and cosmetic products - and SHISEIDO GROUP ITALY s.p.a. – the sub-licensee of those trademarks and the exclusive distributor for the Italian territory - brought urgent proceedings before the Court of First Instance of Milano against Amazon Europe Core S.A.R.L., Amazon EU S.A.R.L., Amazon Services Europe S.A.R.L. – respectively, the owner, manager and operator of the website www.amazon.it - for the undue promotion and offering for sale of products bearing the trademarks that are owned by the applicants through the e-commerce platform of the same name.

Amazon, as an outsider in Shiseido’s selective distribution network, would, in fact, not guarantee the necessary requirements for the protection of the prestige of its distinctive trademarks, thus damaging their reputation and interfering with them.

In respect of this conduct, which is also relevant from a competition point of view, the applicants have therefore invoked the injunction with a penalty to be extended to the entire Italian territory, as well as ancillary measures.

The defendants objected to the irresponsibility of Amazon, which would limit itself to offering a hosting service and would express excellence in relation to the sale of products online, with reference also to the assistance service being superior to that offered by the authorised distributors. Consequently, there is no damage to the image of the opposing trademarks.

Moreover, the third-party reseller would not be obliged to comply with the provisions included in the selective distribution contracts that were signed by third parties.

They then challenged the lack of proof in regard to both the prestige of the opposing products and the effectiveness of the relevant selective distribution system.

Part 1 - The First Ruling of the Court of Milano in the Interim Measure Procedure.

1. Selective distribution

1.1. Selective distribution and competition

The Decision recalls that selective distribution is expressly defined by EU Regulation 330/2010 as being a “distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised resellers in the territory

reserved by the supplier for that system"; it may be included among the agreements that produce efficiencies that outweigh the possible anti-competitive effects.

Although, in the abstract, this might be capable of restricting competition on the market and be sanctioned by Article 101(1) TFEU, which expressly prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition, it is nevertheless considered a legitimate selling method and is therefore permitted under Article 101(3) TFEU, in compliance with the following conditions:

- it is limited to particular types of products, identified as those of a high technical level for which the purchaser requires specific assistance from the moment of purchase, or in luxury and prestige products of a relevant brand, in order to protect the investments made by the owner;

- the limits imposed on free competition that are generated by this method of sale do not go beyond what is necessary, and they are established in an objective manner, which can be referred to parameters relating to the professional qualities of the reseller, consistent with the objective of ensuring specialised distribution of the product, and that can be applied in a non-discriminatory manner to all would-be resellers.

The Court of Milan mentions the ECJ Decision of the 12th December, 1996, in the case T- 88/92, G. v. Commission EC, Para. 16, EU Court of Justice, 13th October, 2011, case C 439/09, P.F.D. SAS v. Président de l'Autorité de la Concurrence, Ministre de l'Economie, del'Industrie et de l'Emploi, Para. 41; these principles have been reaffirmed by the European Commission and transposed into the Guidelines accompanying EU Regulation No 330 of 2010, Para. 175.

Under these conditions, selective distribution is therefore permissible.

1.2. Selective distribution via the Internet

In regard to agreements concerning the Internet sale of products by authorised distributors, the Court of Milano recalls EU Regulation No. 330/2010, which regulates such online sales, and Para. 52 of the Commission Guidelines of 19.5.2010, which accompany the aforementioned regulatory text and specifies how each distributor must be allowed to market online via its own website.

The Court also refers to what has been specified by the Court of Justice, for which "the objective of preserving the prestigious image of the brand cannot represent a legitimate objective for restricting competition and therefore cannot justify that a contractual clause aimed at such an objective does not fall under Art. 101. No. 1, TFEU (EUCJ, 13th October, 2011, Case C 439/09, P.F.D. SAS v. President de l'Autorité de la Concurrence, Ministre de l'Èconomie, del'Industrie et de l'Emploi, Para. 46, - in which the Court examined a clause that de facto prohibited all forms of internet sales of goods).

While an absolute impediment to online sales therefore constitutes a serious restriction of competition, it seems legitimate to require the distributor to comply with certain quality standards on their site.

The judicial enquiry then shifts to verification as to:

(a) whether the goods in dispute qualify as luxury goods;

(b) whether the trademark proprietor has adopted a valid and effective selective distribution system for marketing the product;

(c) whether the person marketing the product outside the authorised distribution network and, in particular, online, causes damage to the reputation of the trademark in the market.

1.3. Definition of a luxury product

The Court states that a product can be defined as a luxury one not only because of its material characteristics, but also because of the style and prestigious image that accompany it.

These elements confer on the product an aura of luxury that constitutes an element of distinction from other similar products (EUCJ, 6th December, 2017, C-230/16, Para. 25).

This is, moreover, consistent with the functions assigned – symmetrically - to the trademark, which is not only an indicator of entrepreneurial origin, but also an advertising vehicle and guarantor of the image and quality of the proprietor's products.

In the case we are discussing, perfumes bearing the trademarks 'Narciso Rodriguez' and 'Dolce & Gabbana' have been found to belong to the luxury category.

The high prestige associated with these products, states the Court, can be deduced from the following indicators:

- the search for high quality materials.
- the care in the packaging - in particular, D&G products also emphasise a high level of packaging care;
- presentation to the public, promoted at publicity level by show business personalities,
- the broad accreditation in the reference sector, which can be deduced from the numerous awards won (the Narciso Rodriguez fragrance received the 'Best of Beauty' award from the prestigious Perfume Academy in 2016, 2017, 2018 and 2020, in its 'For Her Pure Muse' section, in 2019, 'Dolce & Gabbana The Only One" received the best men's and women's fragrance of the year award, while, in 2008, "D&G Light Blue" was recognised as the best men's fragrance, "D&G Light Blue pour femme" won the Allure awards in the "Best of beauty' category, and in the "Sephora Awards' was judged best women's fragrance);
- the well-established recognition by the specialist press (which has repeatedly extolled the high quality and prestige associated with these brands, recognising the Narciso Rodriguez and Dolce & Gabbana perfumes' precision and attention to detail - both in terms of fragrance and in terms of the packaging and advertising of the products).

Such elements constitute serious, precise and concordant evidence, pursuant to Art. 2729 of the Italian Civil Code, as to whether such fragrances belong to the high-end category.

As regards the goods under the trademarks 'Issey Miyake', 'Elie Saab' and 'Zadig & Voltaire', however, the Courts considers that the burden of proof has not been fully reached here by the applicants and, in particular, that they have not sufficiently documented:

- -the allure of luxury and prestige, which can be deduced from the search for high-quality materials, the care taken in the packaging, the high price, and the attention to promotional activities with the public;
- the recognition in the relevant sector, through awards or mentions by institutions/associations in the sector;
- a particular appreciation by the specialist press - the articles and editorials in the specialist press and the blogs submitted by the applicants seem to be insufficient in this respect;

In addition, on the Doxa survey that was filed by Amazon there is therefore insufficient evidence to be able to place those fragrances in the high-end category, and any evidence in the appellant's favour is to be drawn from the advertising investments declared to have been made.

1.4. Shiseido's selective distribution contracts

The Court states that the selective distribution system set up by the owners appears adequate to create and maintain, in the minds of consumers, an image of luxury and prestige that is associated with the brands, as the relevant contracts in the file appear to be articulated, as many clauses are intended solely to safeguard the prestige of the trademark and appear to comply with the regulatory and case law principles cited, e.g., the provisions concerning the positioning of the brand and the trademark, the sales service and advice, the point of sale, the sales methods, the use of advertising material, the qualifications of sales personnel and the care of customers.

The Court of Milano asserts that these requirements appear to be consistent with those identified by European case law in relation to points of sale, the professional qualifications of personnel, the availability at the points of sale of an assortment of products from competing brands, and in conformity with the dictate of EU Regulation No. 330/2010. On the other hand, there do not appear to be any prohibited requirements of a restrictive nature that relate, for example, to sales prices, territory and end customers, or to cross-supplies between authorised distributors.

As for selective distribution via the Internet, Shiseido allows this sales channel only to authorised retailers who have at least three physical points of sale, thus establishing a series of quality criteria for the site in order to protect the prestige, image and reputation of the brand.

In this respect, prior written authorisation from the distributor is required, which triggers an admission procedure that takes into account certain criteria, for instance:

- the graphic quality of the site;
- the provision of a 'dedicated quality zone', as an exclusive virtual space, for brands and products, with the exclusion of all advertising references to different products and/or brands,
- the presence of quality spaces that are dedicated to competing luxury brands/products of equal prestige. In particular, the Website must include a number of at least four brands of competing luxury products of equal prestige; for Shiseido, the presence of at least one competing luxury product with one of the Brands indicated in Annexe 2 of the authorisation document is required;
- the absence of offers for sale of products other than perfumery or beauty products, or of services that are not related to these products, which are likely to debase the prestigious image of the brands and products.

These requirements, which are demanded by Shiseido, appear to be aimed exclusively at protecting the allure of its brands, taking into account the specific characteristics of online sales, with the application of objective, qualitative, non-discriminatory criteria that are proportionate to the luxury character of the products distributed.

The relative objections of the respondents do not preclude this conclusion: in the first place, the possible infringement of the contractual obligations undertaken by Shiseido's dealers does not elide with the wrongful act that is complained of here, against the respondents.

2. Subjective scope of the dispute

2.1. The plaintiffs' challenges

The plaintiffs challenged Amazon's activities in two respects: in addition to the direct sales and shipping of Shiseido products, the defendants would also 'actively' participate in sales advertisements that are run by third-party sellers, with warehousing, shipping and customer service services.

The defendants objected that Amazon Service Europe SARL was not liable, within the meaning of Legislative Decree No. 70 of 2003, since the latter merely facilitated the relationship between the purchasers and the sellers of the products but did not intervene in relation to the content transmitted and could not, therefore, be qualified as an active hosting provider.

In any event, Amazon Service Europe received neither a specific complaint about the allegedly unlawful content on the site, nor even a warning, prior to the initiation of the present proceedings.

2.2. The legal framework identified by the Court

The regulatory text set out in Legislative Decree No. 70 of 2003 on the regulation of e-commerce, implementing Directive 2000/31/EC on certain legal aspects of information society services in the internal market, is relevant here.

The national law regulates the activity of the service provider by describing three types of activity:

- activities as a 'mere conduit',
- temporary storage activities – acting as a cache;
- information storage activity - hosting - ('consisting of the storage of information provided by a recipient of the service', Art. 16).

Such subjects shall, in any case, be civilly liable for the content of the services if, when requested by the judicial or administrative authorities, they do not act promptly to prevent access to the content of such services, or if, having knowledge of the allegedly unlawful or prejudicial nature of the content of a service for which they guarantee access, they fail to inform the competent authority (as provided for in Art. 17 of Legislative Decree No. 70 of 2003, as well as Art. 15 of Directive 2000/31, not superseded on the relevant principles herein by the new Directive 2019/771, which had not yet been implemented in the Italian legal system at the time of the Judgment).

Arts. 14 and 16, above, on the other hand, indicate the conditions of exemption from liability for each of these subjects.

As to what is relevant, the hosting provider is not liable for information that is stored at the request of a recipient of the service, provided that:

a. "[it] is not actually aware that the activity or information is unlawful, and is not aware of facts or circumstances which make manifest the unlawfulness of the activity or information;

b. as soon as it becomes aware of such facts, upon notice from the competent authorities, act immediately to remove the information or to disable access to it" (Art. 16).

The privileged regime envisaged by the legislative decree in question does not apply, pursuant to Recital 42 of the e-commerce directive, when the information storage activity is carried out by an active hosting provider, whose figure must be traced back to the case of the active unlawful concurrence (as stated by the Court of Cassation, Sect. I, No. 7708/2019). And, on this point, the Italian Supreme Court has stated that the indices of interference to be ascertained concretely are, by way of example, "the activities of filtering, selection, indexing, organisation, cataloguing, aggregation, evaluation, use, modification, extraction or promotion of content, operated through an entrepreneurial management of the service, as well as the adoption of a technique of behavioural evaluation of users to increase their loyalty: conduct that has, in essence, the effect of supplementing and enriching content in a non-passive manner by indeterminate users'. In essence, the hosting provider is not exempted from liability if the activity carried out by the latter entails a "manipulation of data"' and a "change in the nature of the service" that is provided by individual users.

2.3. The concrete case

That being said, the Court of Milan stated that the respondents do not play a merely passive role, and it offered the following arguments:

Amazon, a player that claims to operate a marketplace service through its eponymous site as an intermediary provider of information society services:

- operates in some cases as a direct seller of the infringing products: in the latter case, Amazon is not liable for aiding and abetting the commission of the infringement but is the direct author thereof. With regard to intermediary services, it appears to engage in active conduct, having knowledge and control of the data entered by third-party retailers, thus not being exempt from liability under Art. 16 of Legislative Decree No 70 of 2003.

In fact, Amazon:

- manages the warehousing and shipping of products through the 'Amazon Logistics' service, which is also used by the platform operators in all cases in which the sales advertisements display the 'Amazon Prime' sticker, which is often present in the sales advertisements for Shiseido products. The result of such activity is to make the service more efficient, thus modulating itself into an active conduct of the hosting provider; this appreciation is not precluded by the ruling of the EUCJ (C-567/18 - Coty Germany GmbH vs Amazon), adopted in a case in which Amazon was limited to offering only storage services, while shipping was handled by third-party carriers;
- operates a customer service for third-party sales advertisements, which is the only service available to the customer in order to interface with the seller;
- is also responsible for promotional activity through advertisements on third party websites: Amazon, although itself not carrying out promotional activity, allows the display of advertisements relating to offers for sale by third parties;
- allows consumers to infer the existence of a link between Amazon and Shiseido; according to Para. 4 of the General Terms and Conditions of Use and Sale of the Amazon site, the trademarks - not owned by Amazon, but visible on its site - "are the property of their respective owners, who may or may not be connected to, related to, or sponsored by Amazon".

Even if taking into account the most recent decision of the Court of Justice, Amazon's liability seems to be discernible, even when it does not sell Shiseido's products directly, but nevertheless takes care of its logistics, customer service and promotional activities, elements that contribute to optimising the promotion of the offers on sale.

The Court says that this conduct by Amazon, as an intermediary, is therefore attributable to that of an active hosting provider, one that is exempt from the privileged liability exclusion regime.

3. Amazon's conduct

3.1. The object of investigation

The Court of Milano states that:

- the action is entirely consistent with and falls within the scope of the indications of EUCJ case law, according to which the supplier of luxury goods may bring non-contractual actions against third party platforms when the sale of those articles on the platforms can, and does, lead to the impairment of the qualitative characteristics of those articles (Paras. 49 and 50 of the Coty Judgment);

- the clauses of the selective distribution agreements examined above do not apply directly to Amazon, but constitute criteria of judgment (beyond whose standards, for example, more onerous conduct by third parties, not authorised resellers, cannot be required) for assessing whether or not the activities of the independent distributor are brand-infringing.;
- it must therefore be investigated whether the actual manner of sale on the Amazon site damages the image of the luxury and prestige of products bearing the marks 'Narciso Rodriguez' or 'Dolce & Gabbana', pointing out that "the online sale of luxury products through platforms that do not belong to any selective distribution system for those products, within the framework of which the supplier does not have the possibility of controlling the conditions of sale of its products, gives rise to the risk of a degradation of the presentation of those products on the internet, capable of harming their luxury image and, therefore, their very nature" (ECJ Coty Germany GmbH v Parfümerie Akzente GmbH, C-230/16, Paras. 49-50);and, therefore, according to Para. 52 of the Guidelines accompanying EU Regulation 330/2010, "while an absolute impediment to online sales constitutes a serious restriction of competition, it appears lawful to require the distributor to comply with certain quality standards of the site".

3.2. The actual manner of sale on the Amazon site damages the image of luxury and prestige of products

(a) the absence of physical shops, Amazon being a 'pure player'. In this regard, the Court considers that, since those in dispute are fragrances and cosmetics, the consumer may need direct evidence of the effect of the product on the body and particularly on the skin (e.g., allergy problems, etc.). This limitation - to require an albeit very limited number of physical points of sale throughout the national territory - does not seem to go beyond what is necessary, which is, moreover, admitted by the European Commission (see Point 54 of the Guidelines of Regulation No. 330/2020);

(b) the consequent lack of appropriate customer service similar to that ensured at the actual point of sale with the presence of a person capable - in the case of specific consumer needs - of informing the public adequately about the outcome. Authorised distributors, on the other hand, must guarantee such a service, a requirement generally regarded as being legitimate by the Court of Justice;

(c) the juxtaposition with litigious perfumes of other heterogeneous products, belonging to categories completely unrelated to luxury and of low quality (e.g., cat food, toilet paper, insecticides, etc.); this matching, moreover, occurs automatically and not as a result of a user-guided search. In fact, the selling method censured here does not therefore guarantee an appropriate perception of the products by the purchaser, thus debasing their value and, at the same time, violating the requirements that are imposed by the applicants on their authorised distributors;

(d) the presence of advertising material for the products of other brands - even those from a lower market segment - on the same internet page on which the perfumes "Narciso Rodriguez" and "Dolce & Gabbana" are presented; in this regard, the considerations of the Court of Justice are decisive in favour of the applicants, who have had occasion to emphasise that, even though other goods may be present in the same space (physical or virtual and, in that case, in hypermarkets), the manner in which the luxury perfume is presented, through the department or space reserved for the sale of that product, must highlight elements that enhance its value (see ECJ, 12/12/1996 in Case T-88/92).

Eventually, the Court considers that the specific manner of offer and sale that is examined above seriously damages the prestige of the trademarks "Narciso Rodriguez" and "Dolce & Gabbana" (Dior, Para. 56, Copad, Para. 59), which is a requirement under Community case law, in order for the proprietor to prevent an unauthorised reseller from further resale (C. Justice, C-337/95 case Dior v Evora, 4.11.1997).

3.3. The Court dismisses the respondent's complaints

- the lack of damage to the image, in the light of the high reputation enjoyed by the Amazon site among consumers and professionals, in the light of the effective graphic interface, the offer of a support service, and the provision of detailed information, on the basis of the fact that, even if the Amazon site is amongst the best in the online context, for consumers of luxury and prestige products too, that does not exclude the risk of harm to the image where, in practice, the sales methods censured above are found;
- the irrelevance in the assessment of the lawfulness and of the marketing, by the third-party reseller, of non-luxury or prestige products also: on the contrary, the Court observes, it is not the sale of other products that is censured, but the concrete manner in which the litigious perfumes are combined;
- the irrelevance of the comparison between the sales methods of the third reseller and those implemented by its authorised distributors, since only they are not bound by the contracts signed with the proprietor. On the contrary, the Court points out that if certain sales standards are laid down in selective distribution contracts, they are not inapplicable to the third-party reseller.

4. The Judgment

The Court prohibits AMAZON EUROPE CORE S.A.R.L., AMAZON EU S.A.R.L., AMAZON SERVICES EUROPE S.A.R.L., from marketing and/or offering for sale, and/or promoting and/or advertising through its website, www.Amazon.it, products bearing the trademarks "Narciso Rodriguez" and "Dolce & Gabbana" in the manner indicated and within the limits set out in the narrative. The Court orders the Respondent to pay a penalty in the amount of €1,000.00 for each day of delay in the performance of the obligation, after the thirtieth day from the communication of the order.

Part 2 - The Second Ruling of the Court of Milano in the Appeal Procedure

The Tribunal of Milano, sitting as a full court, confirmed the precautionary injunction.

The Court, in the quoted Judgment, states:

1. that Article 101(1) TFEU must be interpreted as meaning that a system of selective distribution of luxury products aimed, primarily, at safeguarding the luxury image of such products, is in accordance with that provision, provided that the choice of retailers is made in accordance with objective criteria of a qualitative nature, established indiscriminately for all potential retailers and applied in a non-discriminatory manner, and that the criteria defined do not go beyond what is necessary (EUCJ 6.12.2017 C - 230/16, Coty Germany GmbH);

2. that the existence of a selective distribution network can be included among the "legitimate grounds" preventing exhaustion, provided that the marketed product is an article of a luxury or prestigious nature that legitimises the decision to adopt a selective distribution system and that there is actual harm to the luxury or prestige image of the brand as a result of the marketing carried out by third parties that are outside the selective distribution network;

3. that the appreciation of the two perfumes in question places them in at least a similar position, in terms of quality, to perfumes belonging to brands that are known to be prestigious;

4. that, in terms of the relationship between the supplier and the franchisee, and with respect to the restrictions applicable to online sales, the circumstance that luxury products are not sold through such platforms, and that their online sale is carried out only in the online stores of authorized distributors, contributes to this image of luxury among consumers and, therefore, to the preservation of one of the main characteristics of such products sought by consumers;

5. that Art. 54 of the Guidelines on Vertical Restraints, which was adopted by the European Commission in 2010, provides that, within the framework of the block exemption and with specific reference to selective distribution, the supplier may require compliance with quality standards in connection with the use of Internet sites for the resale of its goods, just as it may do so in connection with a point of sale, or sale via catalogue, or advertising and promotional activity in general. In this context, the supplier may, for example, require its distributors to have multiple "non-virtual" points of sale, or showrooms, as a condition of becoming a member of its distribution system, or require that its distributors use third-party platforms to distribute the contracted products only in accordance with the rules and conditions that are agreed upon between the supplier and its distributors for the latter's use of the internet; for example: where the distributor's Internet site is hosted by a third-party platform, the supplier may require that customers do not enter the distributor's site through a site bearing the name or logo of the third-party platform;

6. that the consideration of such profiles may therefore also be relevant in relation to the marketing activities of third parties, where they are aimed at guaranteeing the prerequisites for the preservation of the image of prestige and the quality of trademarks, and may therefore identify those qualitative conditions within the limits of compliance with which consent to marketing by the trademark owner may be deemed present or, instead, prerequisites for deeming the principle of the exhaustion of trademark rights are inoperative;

7. that the ruling of the Court of Justice of the EU, in Case C-567/18, is not relevant in the present case, insofar as the activities carried out by the complainants through the "Amazon Logistics" and "Amazon Prime" services cannot be deemed to be limited only to the service of warehousing products from third-party sellers.

Part 3 - Comment.

1. Selective distribution, competitive law and luxury products

Increasingly, products under selective distribution contracts are offered for sale and marketed online by parties that are outside the selective distribution network and, in particular, by so-called selective distribution.

This situation has given rise to a series of legal disputes in which trademark owners act against unauthorised distributors, claiming an infringement of their trademarks, and injury to their prestige and notoriety.

The existence of a selective distribution network can be included among the 'legitimate grounds' for refusal of exhaustion (see Art. 5 C.P.I. – Italian Industrial Property law), provided that the marketed product is an article that is considered to of a luxury or a prestige type. Selective distribution is a distribution system that entrepreneurs are increasingly resorting to in order to protect the resale of its products.

This is defined by EU Regulation No. 330/2010 as being a "system of distribution in which the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and in which these distributors will undertake not to sell such goods or services to unauthorised resellers in the territory that the supplier has reserved for such a system'.

In the abstract, such a distribution system might be suitable for restricting competition on the market, and could thus be deemed to be contrary to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which expressly prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition.

2. Court of Justice Case Law

However, CJEU case law has stated that, under certain conditions, selective distribution may be regarded as a legitimate selling method, within the meaning of Article 101(3) TFEU, if it is limited to particular types of products, such as those of a highly technical level, for which the purchaser needs specific assistance, or for luxury and prestige products, provided that the limits imposed on free competition that are generated by this method of sale do not go beyond what is necessary, are established by objective criteria of a qualitative nature, and that they are applied in a non-discriminatory manner to all would-be resellers (EU Court of Justice, 6th December, 2017, C-230/16, Coty Germany GmbH).

On the other hand, clauses such as those that are aimed at imposing sales prices and defining territories are prohibited.

With specific reference to agreements concerning Internet sales by authorised distributors, the EU Reg. No. 330/2010 and, in particular, Para. 52 of the Commission Guidelines of 19th May, 2010 (which is aimed at interpreting this regulation), specify that distributors may not be prohibited from selling online via their own websites.

This principle was reaffirmed by the Court of Justice in the Pierre Fabre Dermo Cosmétique - case, which expressly stated that 'the objective of preserving the brand's image of prestige cannot be an objective that is legitimate in order to restrict competition' and cannot therefore justify a clause that absolutely prohibits the sale of products via the internet". (EU Court of Justice, 13th October, 2011, C-439/09).

In any case, while an absolute impediment to online sales constitutes a serious restriction of the competition, it is accepted as lawful to require distributors to meet certain standards in relation the quality of the site, based on objective and non-discriminatory criteria, which are aimed at ensuring its brand allure, such as, for example, the adoption of quality website graphics; the provision of a virtual space that is exclusively dedicated to its own brands and products, without advertising references to different products; the request that the site advertises the sale of other luxury products of competitors of equal prestige.

The reference is to C 230/16 - Coty Germany:

> "… the prohibition imposed by a supplier of luxury goods on its authorized distributors to use, in a discernible manner, third party platforms for the internet sale of those goods is appropriate to preserve the luxury image of those goods"
>
> "[As to] whether the prohibition goes beyond what is necessary for the attainment of the objective pursued, the clause here does not contain an absolute prohibition imposed on authorized distributors to sell the contract goods online Indeed, under that clause, the prohibition applies solely to the internet sale of the contract goods via third party platforms which operate in a discernible manner towards consumers. Consequently, authorized distributors are permitted to sell the contract goods online both via their own websites, as long as they have an electronic shop window for the authorized store and the luxury character of the goods is preserved, and via unauthorized third-party platforms, when the use of such platforms is not discernible to the consumer".
>
> "In those circumstances, even if it restricts a specific kind of internet sale, a prohibition such as that at issue in the main proceedings does not amount to a restriction on the customers of distributors, […], or a restriction on authorized distributors' passive sales to end users, within the meaning of Article 4 of the VBER".

3. Online restrictions in vertical agreements – the revised Vertical Block Exemption Rules.

Hereunder is reported VBER Art. 4:

([VBER] shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(e) the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services, as it restricts the territory into which, or the customers to whom, the contract goods or services may be sold within the meaning of points (b), (c) or (d), (without prejudice to the possibility of imposing on the buyer:

(i) other restrictions of online sales; or

(ii) restrictions of online advertising that do not have the object of preventing the use of an entire online advertising channel

"VBER - Recital 15" contains guidance for applying Art. 4 (e.g., hardcore if object is to significantly diminish the aggregate volume of online sales of the contract goods/services or the possibility for consumers to buy the contract goods/services online) and specifies that there is no need for an effect's analysis.

4. The revised VBER/VGL, entering into force on 1st June, 2022, provides an assessment of online restrictions

The block exemptions include: quality requirements, marketplace bans, restrictions of online advertising, including the use of particular providers (except the most widely used providers, if it, de facto, bans the use of that advertising channel),the requirement to operate an offline store, a requirement to make a minimum absolute volume of sales offline.

The hardcore restrictions include: the de facto prohibition of the use of the internet, requiring sales to be made only in a physical store, banning the use of a supplier's brand on a website, requiring the buyer to block website access to customers who are located outside a , or to reroute them, requiring a buyer to reject payments using foreign credit cards, requiring a buyer to make a certain share of total sales offline, banning the use of entire online advertising channels (e.g., price comparison websites, search engine advertising).

In addition:

- an agreement must be assessed as a whole (use of several online sales restrictions may prevent the effective use of the internet);
- the rules apply irrespective of the type of distribution system;

Birgit Burm-Herregodts, Brussels Commercial Court

Decision of the Market Court of 1st December, 2021.

1. Relevant facts of the case.

The parties involved in the case. Newpharma, is a Belgian limited liability company. Pharmasimple is a public limited company. They both sell parapharmaceutical products. Pharmasimple is an online parapharmacist.

Both companies were former distributors of Caudalie Belgium, the Belgian branch of the French Caudalie company. The distribution contract with Newpharma was not renewed by Caudalie because Newpharma was said not to have met the contractual obligations. The contract with Pharmasimple was ended because of the lack of compliance with a number of conditions by Pharmasimple.

Both Caudalies are daughters of Caudalie Holding, the parent company,which is based in London. The three Caudalies are hereafter referred to as the Caudalie-roup. Caudalie produces and sells cosmetic products that are derived from grape seeds and that supposedly contain powerful antioxidants. The group wants to uphold an image of luxury and is supposedly very selective in choosing its distributors. The products are considered to be parapharmaceutical products that can be sold only in pharmacies, parapharmacies, or through specialised resellers. Sales take place in physical shops or online.

The Belgian Competition Authority is the authority that is competent in the implementation of competition policy in Belgium[23]. The Belgian Competition Authority will hereafter be referred to as the BCA. It consists of an Investigation and Prosecution Service, IPS hereafter, and a College that is presided over by the President of the BCA.

The investigation. Newpharma and Pharmasimple had filed complaints with the BCA against Caudalie for breach of competition law. The BCA received the complaints[24] and decided, in 2017, that there were enough indications to investigate whether indeed there were breaches. Those alleged breaches would have been committed by Caudalie imposing minimum resale prices on the selective distributors, and through the restriction of active and passive sales online. The imposing of the minimum resale prices consisted of limiting the distributors in relation to the discount that they could give to their customers. The restrictions for transactions online consisted of limitations on the Caudalie-distributors, who would sell to customers in another Member State. Caudalie was supposed to have committed these infringements between 2014 and 2018.

The Belgian BCA requested mutual legal assistance from the French Competition Authority[25], since Caudalie France would have to be implicated in the investigation. In both countries, dawn raids were held in February, 2018. The premises of both Caudalie Belgium and Caudalie France were visited, and over 500,000 documents were seized.

The investigation and dawn raids proved to be very effective. The BCA's IPS submitted a motivated proposal to the College of the BCA in November, 2020. Upon this motivated proposal the President and the College could base their Decision. The IPS proposed a fine for Caudalie and suggested that the distributors should not be punished because of the pressure that was put upon them by Caudalie. Caudalie had either warned the distributors that would not comply with the pricing-policy it had set out that it would treat them severely or would just terminate the distribution agreements with the non-compliant distributors.

23 https://www.belgiancompetition.be

24 The complaints were filed on 27th November, 2017, and 12th December, 2017

25 The French Competition Authority had already released a press communication in 2007 concerning sales through the internet by Caudalie, and by other companies selling parapharmaceutical products on the internet. Le Conseil de la concurrence facilite la vente de produits parapharmaceutiques sur Internet | Autorité de la concurrence (autoritedelaconcurrence.fr)

Caudalie's intention was to have the investigation closed without any sanction(s) being imposed. Caudalie therefore proposed to the IPS of the BCA that it would communicate to its distributors those conditions that would be imposed in order to protect Caudalie's distribution network, brand image and product quality, and that it would have its distributors determine the resale prices and discounts without any interference from Caudalie.

The decision of the BCA. The College of the BCA decided, on 6th May, 2021[26], thatCaudalie was to pay a fine of €859,310 for a breach of the Articles 101 TFEU and IV.1 Code of Economic Law[27], CEL hereafter. The College decided, in application of Art. IV.52 § 1, 2° CEL, that it accepted and imposed the proposed commitments, the communications from Caudalie[28]. The amount of the fine had been determined by taking this proposal into account as a mitigating circumstance. The three entities of the Caudalie-group were held liable. The distributors were not sued.

2. Summary of the judicial proceedings.

Caudalie goes to Court. In June, 2021, Caudalie introduced a motion to suspend the decision of the BCA and filed for the annulment of the decision.

The Market Court, by way of an interlocutory decision, suspended the decision of the College of the BCA. The suspension only concerned the decision of the College in which it had accepted and imposed the proposals of Caudalie. The merits of the case were to be dealt with after the the parties; submissions of their depositions[29].

Caudalie requested the annulment of the decision of the College of the BCA.

The BCA asked the Court to reject the request of Caudalie.

Newpharma intervened in the procedure, and also requested the rejection of the sought annulment. Pharmasimple did not ask for anything. It was represented before the Market Court and stated that it referred itself to justice.

The Market Court annulled the Decision of the BCA in its Decision of 1st December. 2021.

3.The Decision of 1st December. 2021.

Caudalie argued that the decision of the BCA was void and illegal because it had been taken in disrespect of Art. IV.52 §1, 2° CEL. Caudalie said the BCA should not have, on the one hand, accepted and imposed the binding proposals of Caudalie while, on the other, establishing the breaches of competition law and imposing a fine.

The Market Court sets out very clearly the scope of the request for annulment that Caudalie submitted. The Court has very clearly stated and confirmed that Caudalie sought the annulment of the Decision of the BCA, based on the reasons that it did not respect the provisions of the Belgian CEL. The breach of the Articles 101 TFEU and Article IV.1 CEL were not challenged. The Court therefore explicitly states and confirms that Caudalie is considered to have admitted that it infringed these Articles by imposing minimum resale prices on the selective distributors of her network, and by restricting online sales. The question as to whether there were infringements is therefore considered to be unnecessary.

26 The public version of this Decision was published on theBCA's above mentioned website.

27 Art. IV.1 Code of Economic Law, or CEL, is the transposition in national law of Art. 101 TFEU.

28 Decision of the Market Court, 1st December 2021, §2 : " *Le Collège de l'ABC a rendu la Décision attaquée le 6 mai 2021, au terme de laquelle, il: "…**accepte et rend obligatoire en application de l'article IV.52, §1, 2° CDE** les engagements suivants: …"* (theunderlining and putting in bold is the work of the author of this paper).

29 Decision of the Market Court, 30th June, 2021, 2021MR1_Caudalie_AI | Belgische Mededingingsautoriteit (bma-abc.be).

The question of law that had to be answered by the Court, in this case, was whether the BCA had taken a decision that was valid and in accordance with the applicable provisions of Belgian law. Those Articles that had been applied were Arts/ IV.52 § 1, 2 and 7 CEL[30]. These provisions are the transposition into national law of Arts. 7 and 9 of the Council Regulation (EC) No 1/2003 of 16th December, 2002, on the implementation of the rules on competition that are laid down in Arts. 81 and 82 of the Treaty.

The Court decided that the BCA had not made a valid decision for the following reasons:

- Caudalie had proposed to the College that she would live up to certain commitments in order to escape any sanctions after the investigation was closed. She sent suggestions for communication to the College which were to be sent to her distributors. The project enhanced the conditions that Caudalie would impose on her distributors, mainly to protect the luxurious character of her brand, together with the information with which these distributors would be able to determine the resale prices and discounts. Caudalie hoped to negotiate the further practical implementation of this proposal with the IPS.
- The Market Court confirmed that the College did not think of this proposal as being sufficient to disregard the existence of the breaches of competition law, as proven by the investigation. Caudalie had relied on the possibility that was provided for in Art. IV.52 § 1, 7 CEL. The BCA did not apply this Article correctly. The BCA decided that there was a breach of the abovementioned Articles: 101 TFEU andIV.1 CEL, that the infringements were proven and that there was a need to impose a further sanction in the form of a fine. On top of these findings, she obliged Caudalie to fulfil the commitments it had proposed.
- The Market Court found, in its Decision, that there is no prohibition for the College to simultaneously apply Article IV.52 § 1, 7 CEL and Article IV.52 § 1.2 CEL. It seems that the Market Court had implicitly decided that the College should therefore not have disregarded Article IV.52 § 1.7 CEL.

The College had made an application of Article IV.52 § 1.2 CEL but had not respected the intent that Caudalie had shown when it was proposing certain conditions in order to escape a sanction. The Market Court decided that Caudalie's intention could not become the BCA's intention which had, in taking its Decision, accepted and imposed the commitments of Caudalie. Article IV.52 § 1, 2° CEL, in contradiction to Art. IV.52, § 1.7° CEL, does not provide for the possibility that the BCA can accept commitments such as those proposed by Caudalie.

The Market Court further states that there can be no question of a writing error by the BCA, since conditions and commitments cannot be considered to have the same meaning. The conclusion of the Market Court is that the BCA, by accepting and imposing the commitments that Caudalie proposed, in order to close the investigation without any sanction, did not live up to the conditions that are imposed by Art. IV.52,1.2° CEL. It was unfair of the BCA to have referred to the possibility that only Art. IV.52,1.7° CEL provides, and which implies that the BCA will no longer intervene when applying the other paragraph of the same article.

The fact that the BCA had turned away Caudalie's proposed commitments from their goal, which was to escape any further action from the BCA, and accepted them as supplementary conditions that were to be imposed in combination with the imposition of a fine, could not meet with the approval of the Market Court. The Court decided that the BCA had committed an error in law. Caudalie should have been informed about whether the BCA would have liked to take the proposed commitments into consideration as conditions that were imposed by the BCA under Art. IV.52.2° CEL. Reference was

30 In free translation this provision states: "The Competition College may by reasoned decision, (…) 2°find that there has been an infringement of competition law and, as the case may be, an infringement of Art. IV.1, § 4, and order that it be terminated, if necessary, in accordance with the conditions prescribed by the Competition College and, if appropriate, can impose a fine; (…)7° declare the commitments that are offered are binding and declare that there are no longer grounds for action by the intervention of the Belgian Competition Authority. Such a decision does not affect the competence of the courts to determine the existence of infringements of competition law for past infringements. The commitments shall not constitute recognition by the party concerned;"

made by the Court to the Alrosa Company Decision of the EU Court of Justice[31], and the different objectives of Arts. 7 and 9 of the above cited Council Regulation. Furthermore, the BCA could not have taken the proposed commitments and applied them as mere conditions within the scope of a different article.

The decision of the BCA was annulled. The BCA will have to render a new decision.

4.Comments

This decision of the Market Court is interesting for several reasons.

In Belgium, the BCA seldom takes the proposed commitments of a company that is under investigation into account. The decision of the BCA was therefore a more or less unique decision. The Market Court has elaborated on these commitments and has referred to the jurisprudence of the Court of Justice in The Commission versus Alrosa Company Ltd. The Court of Justice decided that the principle of proportionality that must be applied by the Commission demands a different application and depends on whether the Commission applies Arts. 7 or 9 of the Council Regulation 1/2003. In the decision of the Market Court, it was made clear that a company that is under investigation and that is demanding the application of Art. IV.52§1.7° CEL cannot be expected to suppose that the commitments this company is proposing will be taken into account as conditions by the BCA whenever the BCA decides to disregard Art. IV.52§1.7° and wants to apply Art. IV.52,1.2°. The BCA, like the Commission, will have to carefully indicate to the infringing company the grounds on which its decision is taken.

What the new decision of the BCA will be remains to be seen. The BCA will have to render a new decision because of the annulment. Caudalie seems to have acknowledged that it has committed infringements of Art. 101 TFEU and Art. IV.2 CEL, and therefore seems to have accepted that the investigation and the dawn raids have supplied sufficient proof to establish the infringements. The fact that Caudalie did not request that the Market Court annul BCA's Decision due to a lack of proof of the retained infringements seems to indicate that Caudalie cannot defend before the BCA that it denies the alleged infringements. It is therefore unlikely that the BCA will, at this time, not reach a conclusion with regard to the established infringements and will not be imposing a fine.

It also remains to be seen whether the BCA will impose the same fine, or if she will impose a higher fine. The question is whether Caudalie will present its proposed commitments as mitigating circumstances. These mitigating circumstances, which Caudalie may present before the BCA, may be taken into account as conditions under which the BCA would like to put the infringements to an end, and as circumstances that might cause the BCA to lower the fine that she had originally foreseen. It is, therefore, not excluded that the BCA might take a new decision that brings with it the same outcome for Caudalie. However, it cannot be excluded that the BCA will, in its new decision, disregard the former decision and impose an even higher fine.

The case is also relevant because it proves that investigations and mutual legal assistance between Competition Authorities of different Member States can easily take place. Apparently, there were no great difficulties presented by having simultaneous dawn raids in two different Member States, organised by the local competition authorities. The problems that did arise were problems in the IPS selecting the evidence, and the arguments that Caudalie made about the respect for her rights to a defence. An impossible number of documents were seized during the dawn raids. The IPS did make a selection, and Caudalie did not agree on the selection that was made. If the IPS can build its case on the selection it made, it seems to be up to Caudalie to prove that other evidence might overthrow the IPS's findings.

31 Court of Justice of the European Union, 29th June, 2010, European Commission vs. Alrosa Company Ltd., C-441/07, www.curia.eu, ECLI:EU:C:2010:377.

The Decision of the Market Court proves that the legal remedies against a decision of the BAC can be handled in a very quick and efficient manner. The decision of the BCA was taken on 6th May, 2021. The interlocutory decision of the Market Court was pronounced on 30th June, 2021, and the final Decision on the merits of the case came on 1st December, 2021. The Market Court has contributed to legal certainty in cases of competition law while following a very tight timetable and by rendering a very clear and concise decision.

The Commission has, in the meantime, adopted a new Vertical Block Exemption Regulation and Guidelines, which entered into force 1st June, 2022. This Regulation holds new rules and more flexibility for exclusive or, as was here the case, selective distribution networks. It remains to be seen whether the BCA will take the provisions of this new regulation into account when it takes its new decision.

Ana Paula Lobo, Portugal Supreme Administrative Court

Case 71/18.3YUSTR-M - Court of Competition, Regulation and Supervision - Santarém, October 10th, 2021

A brief summary of the facts of the dispute.

Following two complaints from two of the former distributors of Super Bock, in June, 2016, the Portuguese Competition Authority opened an investigation – PRC/2016/4 – on the possible restrictive practices on competition carried out by Super Bock Bebidas, S.A. (Super Bock). At issue were behaviours that had been adopted by Super Bock in the distribution markets for beer, water, soft drinks, iced tea, still wines, sangrias and ciders in hotels, restaurants and cafes (HORECA channel) in Portugal.

The PCA concluded, as a result of the investigation carried out, that Super Bock had, for approximately 11 years (between May, 2006, and January, 2017), set the minimum prices to be charged by its distributors, and interfered with other transaction conditions that were applicable to its products in the HORECA channel, which resulted in the limitation of the independent distributors' ability to compete with each other, distorting the free functioning of the market, to the detriment of consumers, which constitutes a "serious restriction of competition".

By a decision of 24.07.2019, the Portuguese Competition Authority condemned SUPER BOCK BEBIDAS, S.A., for the practice of a serious infringement of Art. 9, n. 1, a) of Law No. 19/2012, and a) of Para. 1 of Art. 101 the TFEU, to a fine of €24,000,000.00.

1. Super Bock is a company, which currently has a social capital of €38-38,500,000, which has as its object the "production and sale of beverages in general and other related activities";

2. The Super Bock business group describes itself as "the largest Portuguese company for refreshing drinks, with a multi-brand and multi-market strategy, whose core activity is based in the beer and bottled water business. It is also present in the segments of soft drinks, wines, the production and marketing of malt, and in the tourism business";

3. Super Bock sells the beverage brands Super Bock, Carlsberg, Cristal, Cheers, Somersby, Água das Pedras, Vitalis, Melgaço, Caramulo, Vidago, Frutea, Frisumo, Frutis, Guarana Brazil, Snappy, Vinha de Mazouco, Campo da Vinha, Vinhas das Garças, Porta Nova, Tulipa, Planura, Monte Sacro, Quinta do Minho and Sangria Vini;

4. Most of these brands are brands that are recognized by an average consumer in Portugal, and they are the preferred brands of many Portuguese consumers and also have international visibility;

5. The turnover achieved by Super Bock was €401,381,826 in 2016, €461,170,892 in 2017 and 397,751,788.00 in 2018;

6. The company, Super Bock, is dedicated to the production and commercialisation of beverages, namely, beers, bottled water (flat and sparkling), soft drinks, iced tea, wines, sangrias and ciders, which it distributes in Portugal through two channels, the (also called the "off-trade" channel) and the Horeca channel (which is also called the "on-trade" channel);

7. As for the food channel (off-trade), corresponding to purchases in hypermarkets, supermarkets, Cash & Carry, Traditional Stores and discount stores, for consumption in the home, Super Bock implements its commercial policy directly, that is, Super Bock directly supplies a restricted set of customers, who are called "direct customers" or "large retail customers", which tend to require direct negotiation with Super Bock due to the volume of their purchases;

8. Regarding the Horeca (on-trade) channel, corresponding to purchases in “hotels, restaurants and cafes” for out-of-home consumption, Super Bock mostly uses independent distributors, who purchase the products for resale in the territory, with the exception of some areas, which are directly supplied by Super Bock.

9. From the product point of view, beer, water (flat and sparkling), carbonated soft drinks, iced tea, still (or table) wines, sangrias and ciders constitute distinct markets, insofar as they are not substitutable from the perspective of demand.

10. Due to consumer preferences, loyalty to national brands means there is a need to have a distribution and logistics network that ensures the supply to points of sale, taxation and applicable legislation, the markets for the products identified above have a national dimension, with some exceptions.

11. From the analysis of the substitutability among the alimentary channels and Horeca, it is understood that they are not substitutes for each other, given the differentiation in terms of their respective structures of demand, the price levels practiced in retail – which are higher in the Horeca channel – and variations in margins, as well as the distribution network used and the existence of the different dimensions and types of some of the packages, depending on the channel for which they are intended.

12. Between Super Bock and its network of independent distributors, there is a commercial relationship, within which these distributors buy a wide range of drinks from that company, including beers, bottled waters, juices/soft drinks, ciders and wines for, inter alia, resale to retail through the Horeca channel.

13. Commercial relations between Super Bock and its distributors are developed based on exclusive distribution agreements for a given geographic area of sales.

14. The distributors do not have any group relationship with Super Bock and, under the terms, and for the purposes of, the said contracts, they are the commercial and financial risk-takers which are associated with the resale of the products in question and the distribution business itself.

15. These contracts have a duration of one year, with equal and successive extensions, and may, at any time, be terminated by either part; Under these contracts, Super Bock and the distributors negotiate the objectives for sales, for each year and for each group of products, and if they are not met, Super Bock may terminate the distribution agreement;

16. Super Bock grants the distributors an exclusive sales territory (typically corresponding to a county or set of parishes). It establishes and imposes, in a regular, generalized way (to the entire network of distributors), and without any changes during the period from at least 15th May, 2006, to January 23rd, 2017, the commercial conditions with which they must comply for the resale of the products that they purchase from Super Bock, namely, the prices they charge their retail customers, whether concretely, either in minimum terms or in average minimum terms and expressly claims the right to set such resale prices for the products it sells, without, in practice, being recognized by distributors capacity for self-determination in this matter;

17. The resale prices imposed on distributors are determined by Super Bock in order to guarantee the maintenance of a minimum price level, one that is stable and aligned, throughout the national market.

18. The usual procedure for fixing and imposing resale prices on distributors consists of the following: it has a monthly frequency (as a general rule), the Super Bock’s Sales Department approves a minimum price list, which is then forwarded by the Network Managers or the Target Super Bock Market to the respective distributors, often with the indication that the implementation of prices is mandatory and cannot have prices that are lower than the minimum fixed, under penalty

of non-compliance being signalled by the Visada Super Bock employees who are responsible for Coordination and Control to the Sales Department, which will take measures accordingly.

19. Super Bock maintains forms of control and the monitoring of the prices for resale practiced by the distributors, and intimidates distributors through various forms of retaliation, such as cutting financial incentives (e.g., commercial discounts applicable to the purchase of the products by the distributors to Super Bock, and the reimbursement of the discounts that are practiced by the distributors on resale), supply and replenishment of stocks, as a way of obliging them to practice the resale prices that they set.

20. Super Bock effectively cuts off the supply of products to distributors and the reimbursement (replacement) of resale prices in the event of non-compliance with the established transaction conditions that are applicable to the resale.

21. Super Bock, during the same period, also imposed and fixed on the distributors the maximum discounts that they had to apply to their respective customers, so that distributors were obliged, in practice, to respect a certain minimum level of resale prices, under penalty of having a negative margin for distribution.

22. The maximum discounts, and the other commercial conditions, are often previously and directly negotiated by Super Bock with its distributor customers (retail operators), with whom it contracts certain commercial conditions for the purchase of the products, conditions which it subsequently imposes on distributors for implementation in the resale of the products to the customers in question.

23. The Appellant, Super Bock, acted freely, voluntarily, knowingly and intentionally, having never acted, during the time the practice in question lasted, in the sense of putting an end to it, or distancing itself from it, but rather by pursuing it, wanting it, deliberately creating a barrier to competition in the market and benefitting from the benefits of their removal; Super Bock acted with the awareness that its behaviour consisted of fixing, both directly and indirectly, the resale prices charged by distributors who were independent and that these behaviours created a barrier to competition in the affected markets, this being its objective;

24. There are also occasions when Super Bock, reacting to the repositioning of prices by its competitors, directly, generally and immediately imposed on its distributors new minimum prices or fixed resale prices.

Summary of the judicial proceedings

The defendant challenged the conviction, which was confirmed by the Competition, Regulation and Supervision Court

The Appeal filed by the defendant against the decision of the Court of First Instance awaits the decision of the TJUE in a preliminary ruling process that is to be formulated by the Court of Appeal of Lisbon.

3. The ruling of the court.

The defendants challenged that decision on multiple grounds.

They presented dozens of objections about the administrative procedure, the collection of evidence and the non-compliance of competition law with the Portuguese Constitution. They claim that they did not fix resale prices nor did they adopt any restrictive competition practices.

The Competition, Regulation and Supervision Court confirmed the Decision of the Portuguese Competition Authority on the following main grounds:

- There was an agreement between the Applicant, Super Bock, and its distributors with the aim of establishing the minimum price limit to be charged, which objectively attacks competition.
- The harm to consumers is particularly serious in this case, given the markets in question and the preponderance that Super Bock occupies in them, as well as the fact that the practice has been implemented by a network of distributors with almost complete coverage of the national territory.
- The agreement between the companies under analysis itself includes a significant restriction of competition, irrespective of their effects, which the legislator presumes have resulted.
- The agreement to fix minimum resale prices under these conditions is liable to affect the trade between the Member States, which includes an increase in imports from other States and a decrease in our country's exports.

Personal comment

The judicial decision presented is very extensive and difficult to summarize. It deals with a situation that seems to me to be very common in the goods distribution sector. It makes it possible to highlight the weight of the distribution chains in the selling price of beverages to the public, which is largely the result of factors that are in themselves disconnected from either production costs or raw material prices.

CJEU Preliminary Rulings

Andreea Marchidan, Romania High Court of Cassation and Justice

A brief summary of the facts of the dispute

1. The Decision no. 49 /3.12.2014 issued by the National Competition Council stated that during 26.03.2012-17.10.2012, many undertakings committed a unique and continuous breach of Art. 5 Para. 1 of the National Competition Law, No. 21/1996 and of Art. 101 Para. 1 of the Treaty, through an understanding relating to the removal from the market of the media services of the competing media agencies belonging, or related, to The Group. As a consequence, the plaintiff, Zenith, was sanctioned with a penalty of 2,146,199 lei (approximately, €485,000 at that time), representing 2.52% of the turnover achieved in 2013 that was found in the financial records of the undertaking.

Summary of the judicial proceedings

2. By Decision No. 1979 of 8th June, 2016, ruled by the Bucharest Court of Appeal, the petition filed by the plaintiff, Zenith, was rejected. The Court of First Instance decided that the grounds relating to the non-existence of the anti-competitive behaviour, are unfounded.

3. Regarding the amount of the penalty, the Court decided that there are no national or union law principles that were broken when the turnover was set, since the national law provides that the penalty is set at a certain percentage of the turnover from the year preceding the sanction. This phrase excludes the plaintiff's claim that the defendant should have taken into consideration the turnover that was established only on the basis of commission.

4. On the other hand, the decision of the National Competition Authority does not refer to an economic concentration, in order to be incident the Regulation CEE no. 4064 /89.

5. The plaintiff filed an Appeal against the Decision of the Court of First Instance, claiming that the decision appealed disregarded the legal principle of the proportionality of the sanctions and the case-law that is related to it, by errantly establishing the base level of the penalty without taking into consideration the economic reality, since the real income of the undertaking is made up of the perceived commissions and not of the accounted turnover.

6. Although the defendant admits that media agencies operate as intermediaries that pay forward to the publicity service providers (similarly to televisions) the amounts of money received from publicity clients, and they retain only the commissions,they refused to apply the law and to follow the case law regarding Point 152 of the Competition Council Instructions on the concept of economic concentration, and Art. 253, Para. 2 from the Accounting Regulation of the 29th October, 2009. By doing this, the Competition Authority practically punished the undertaking for the manner in which they kept the register, but not for the alleged breach of competition law.

7. During the Court session of 1st September, 2020, before the Supreme Court, the Appellant submitted, based on Art. 267 of the Treaty, a request for a preliminary ruling.

Ruling of the Court

8. At the Court Session of the 1st March, 2021, the Supreme Court decided to ask the ECJ the following preliminary questions:

9. Are Article 4(3) TEU and Article 101 TFEU to be interpreted as:

> imposing an obligation upon a Member State's competition authority to interpret national law governing the fixing of fines in accordance with the principle of proportionality, in the sense that it is necessary to verify whether total turnover, as stated in the profit and loss account of the balance sheet for the previous financial year, faithfully reflects the economic and financial

operations in accordance with the economic reality.

Precluding, in the light of the principle of proportionality, the practice of a Member State's competition authority from imposing a fine in relation to the turnover stated in the profit and loss account of the balance sheet for the previous financial year, which includes the sums re-invoiced to final customers in connection with services for the purchase of media space by an intermediary, rather than just the commissions on the work of the intermediary;

Precluding the interpretation of a rule of national law as meaning that the responsibility for the correct recording in the accounts and the faithful presentation of the economic and financial , in accordance with the economic reality lies with the undertaking that is fined and that a Member State's competition authority is bound by the manner in which the undertaking that is fined fulfils that obligation?

Ruling of the Court

10. The Supreme Court held that the courts unanimously invested the actions of the other participants to the agreement and rejected the plaintiff's defences, which claimed that the instructions regarding the economic concentrations are applicable.

11. In the preliminary phase of the administrative investigation, all the plaintiffs claimed that the Competition Authority should have taken into consideration only the income that was effectively achieved, and not all the income.

12. The Competition Authority stated that the national law refers to the total turnover, without distinctions between the components of this figure and without any other form of calculation, according to the nature of the activity of the undertaking. The undertakings cannot invoke the lack of conformity in the total turnover declared in the accounting registry with the real income (commissions), as long as they had decided to register their accounting books in that manner.

13. It is uncontested that the plaintiff registered, in their profit and loss account, all of the income, including the sums that were re-invoiced to the clients, butin front of the CA the plaintiff sustained that the real incomes are represented only by the commissions that are cashed in.

14. According to the national law, the sums collected by an entity on the account of third party do not represent income from the current activity; in this situation, the income is considered to be made up only of the commissions received.

15. The Court has to establish if the base level of the penalty must be set out according to the total turnover, as seen in the accounting registry or according to the commissions from intermediary activity.

16. In order to solve this dilemma, the Court must balance the European principles regarding competition law sanctions: the principle of predictability; the principle of proportionality and the mandatory dissuasive character of the penalty.

17. Finally, the essential question is: if the national CA has the obligation, in a situation like the one above, to re-evaluate the turnover according to the real income.

18. Para. 47 form the Conclusions of the General Advocate, Giovanni Pitruzzella, presented on 3rd September, 2020, in Case No. C-308/19 (Whiteland Import Export SRL) is extremely important,

19. "It is true that 'in accordance with the principle of national procedural autonomy, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from

European Union law' (12) and that 'in so far as Community law, including its general principles, does not include common rules to this effect, the national authorities when implementing Community regulations act in accordance with the procedural and substantive rules of their own national law". (13)

20. Although, based on the procedural autonomy principle, the membership states have freedom of ruling, it is essential that, in respect of the loyal cooperation principle, the manner of applying the competition rules should be unique.

21. In the opinion of this Court, the interpretation that holds the impossibility for the national CA to impose a penalty according to the real income of the undertaking may lead to case law that is not uniform.

22. The Court bears in mind the following paragraphs from the Case C-227/14 LG Display Co. Ltd şi LG Display Taiwan Co. Ltd vs European Commission andT-82 /13 Panasonic Corp., MT Picture Display Co. Ltd vs European Commission:

23. "It must be borne in mind, in that regard, that, as set out in point 15 of the 2006 Guidelines, in determining the value of sales by an undertaking, the Commission is required to take that undertaking's best available figures. However, since the Commission had data more accurately reflecting the value of direct EEA sales through transformed products — a fact which it also acknowledged at the hearing — it is sufficient to note that it departed from those guidelines in so far as it concerns the calculation of the basic amount of the fines imposed on the applicants, without providing any justification.

24. The Court of Justice has already held that the guidelines set out rules of practice from which the Commission may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02, P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, Paras. 209 and 211). However, although the Commission must observe the principle of the protection of legitimate expectations when it applies its self-imposed guidelines, that principle cannot bind the Courts of the European Union in the same way, in so far as they do not propose to apply a specific method of setting the amount of fines in the exercise of their unlimited jurisdiction, but consider case by case the situations before them, taking account of all the matters of fact and of law relating to those situations (see, to that effect, *Quinn Barlo and Others* v *Commission*, cited in Para. 156 above, Para. 53).

25. For the purposes of setting the amount of the fines imposed on the applicants, the Court should therefore take account, in the exercise of its unlimited jurisdiction, of the figures provided by the applicants during the administrative procedure, the correctness of which has not been disputed by the Commission."

26. On the other hand, if a presumed recording in the accounts with failure to respect the national accounting law is able to draw the consequence of a different sanction from a totally different area of law, and if such a consequence does not lead to an over-sanctioning of the undertaking, then this must be analysed..

The case has been registered as a request for a preliminary ruling from the Înalta Curte de Casație și Justiție (Romania), and this request was lodged on 22nd June, 2021, – Zenith Media Communications SRL v Consiliul Concurenței (Case C-385/21).

Jenni Poropudas, Finnish Market Court

Decision of the Market Court of Finland, 30.3.2016 MAO:183/16, Finnish Competition and Consumer Authority v Eltel Networks Oy and Eltel Group Oy[32]

Judgment of the Court (Second Chamber), 14.1.2021, Case C-450/19 (EU:C:2021:10), request for a preliminary ruling from the Supreme Administrative Court of Finland

Decision of the Supreme Administrative Court of Finland, 20.8.2021, KHO:2021:112

This case concerns an alleged cartel in the market for power transmission line supply in Finland. The main issue in the case is the limitation period for a competition infringement in an alleged cartel case which, as in this case, is based on prohibited tender collusion. The issue to be resolved was whether the Finnish Competition and Consumer Authority (FCCA) had submitted an application for a fine to the Finnish Market Court within the statutory time-limit of five years.

Pursuant to Para. 22 of the Law Prohibiting Restraints of Competition, as amended by Amending Law No 318/2004, a fine cannot be imposed for, inter alia, an infringement of Para. 4 of the law, or Article 101 TFEU, if the application is not submitted to the Market Court within five years from the point at which the restraint of competition ended or the authority became aware of the restraint on competition.

The decisive question in this case was to discern at what point in time the continuance of a single infringement of the competition rules by the competitors can be assumed, in a situation in which one of the two participants in a cartel has entered into a construction contract, as agreed in the cartel, with a player outside the cartel, if the works are completed, for instance, two and a half years after the construction contract is entered into and payments arising from that contract are still being made even after the works have been completed. The contract in question relates to a high-voltage power line that was constructed between Keminmaa and Petäjäskoski.

Fingrid Oyj, the company that is the main customer for electricity transmission works in Finland and owns, and is responsible for developing, the high-voltage network that is used for mains electricity transmission, published on 16th April, 2007, an invitation to tender for the construction works for a high-voltage transmission line between Keminmaa and Petäjäskoski. Tenders had to be submitted no later than 5th June, 2007. According to the invitation to tender, the deadline for the completion of the works was 12th November, 2009.

On 4th June, 2007, the Finnish undertaking, Eltel Networks Oy, submitted the tender for which the contract was subsequently awarded. Eltel Networks Oy and Fingrid concluded the contract on 19th June, 2007. The works were completed on 12th November, 2009. The last instalment of the payment for those works was paid on 7th January, 2010.

On 31st January, 2013, the other undertaking, Empower Oy, submitted a leniency application to the FCCA, which led to the FCCA launching an investigation into the existence of a cartel that had been created between Eltel and Empower. On 31st October, 2014, the FCCA granted Empower lenient treatment, and it was exempted from all sanctions.

On 31st October, 2014, the FCCA submitted an application to the Finnish Market Court to impose a fine of €35,000,000, jointly and severally, on Eltel Networks Oy and the Eltel Group Oy (hereinafter referred to jointly as Eltel) for their alleged participation in a prohibited cartel. According to the application, Eltel and Empower had reached an agreement on prices, profit margins and market sharing for the design and construction works relating to electricity transmission lines in Finland. According to the FCCA, the infringement was a single and continuous infringement which came into being in October, 2004, at the latest, and continued uninterruptedly until at least March, 2011.

32 See also European Networking and Training for National Competition Enforcers ENTraNCE for Judges 2019, Selected Case Notes pp. 39–46.

On 30th March, 2016, the Market Court rejected the FCCA's application to impose a fine because the matter was time-barred. The Market Court found that Eltel and Empower had agreed on the Keminmaa-Petäjäskoski planning contract, which Empower had won, and which was completed in January, 2007, but the evidence presented by the FCCA was insufficient to show that the cartel had covered the Keminmaa-Petäjäskoski construction contract. According to the Market Court, Eltel had ceased to participate in the restriction of competition by 31st October, 2009, and therefore the application by the FCCA was not submitted within the statutory time-limit of five years from the date at which the restraint of competition ceased.

The FCCA appealed against the decision of the Market Court to the Supreme Administrative Court (SAC).

In view of the limitation period for penalty payment, the FCCA argued that its application to impose a fine was received by the Market Court within the five-year period, either because the restriction on competition lasted until 7th January, 2010, which was the date of the last payment for the construction works on the high-voltage line in question, since the contract binding Eltel and Fingrid was still in force and the illegal pricing resulting from the cartel was applied, or because the restriction on competition ended, at the earliest, on 1st November, 2009, when the construction works were completed. According to the FCCA, once the contract has been awarded to an undertaking participating in a cartel, it has adverse effects throughout the whole period in which contractual obligations arising from the contract are discharged, or payments for the works are made to the contracting parties, such as the increased costs caused by the price paid and its impact on undertakings´ competitiveness.

Eltel argued that the duration of the infringement should be assessed with reference to the period in which the undertakings that committed the infringement while engaged in the prohibited conduct. According to Eltel, the limitation period begins to run from the date on which the tender was submitted or, in a situation in which the price is negotiable after the tender has been submitted, the limitation period begins to run from the date on which the contract is signed. In the case in question, Eltel submitted its tender on 4th June, 2007, and entered into a contract on 19th June, 2007. According to Eltel, subsequent factors, such as the progress of the contract or payments, no longer have any effect on competition on the market, as these would have no effect on the agreed price.

The SAC decided to stay the proceedings and requested a preliminary ruling, a request which was lodged on 13th June, 2019, to the Court of Justice, concerning the duration of a competition infringement.

The SAC reasoned, in regard to the need for the preliminary ruling, that it considered that a legal interpretation is required as to whether a competition infringement continues up until the point at which the payment obligations arising from the contract for the works that falls within the sphere of the cartel have been discharged in their entirety, or when the project has been completed, as would be in line with the view taken by the FCCA, or whether it has to be assumed that the infringement ceases and the limitation period begins when the tender for the works is submitted or the contract for the works is signed, as would be in line with the view taken by Eltel.

Questions referred were:

> "Can the system of competition established by Article 101 of the Treaty on the Functioning of the European Union (TFEU) be interpreted to mean that, in a situation in which a cartel participant has entered into a construction contract, as agreed in the cartel, with a player outside the cartel, the competition infringement continues, due to the economic effects caused thereby, throughout the whole period in which contractual obligations arising from the contract are discharged, or payments for the works are made to the contracting parties, that is to say, up until the point at which the last instalment is paid for the works, or at least until the point at which the works in question are completed; or is it to be assumed that the competition infringement continues only until the point at which the company that committed the infringement has

submitted a tender for the works concerned or entered into a contract for the execution of the works?"

The Court (Second Chamber) ruled:

"Article 101(1) TFEU must be interpreted as meaning that, where an undertaking which has allegedly participated in a single and continuous infringement of that provision, the most recent constituent element of which consists in the concerted submission with its competitors of a tender for the award of a public works contract, has won the contract and concluded with the contracting authority a works contract determining the essential characteristics of that contract and, in particular, the overall price to be paid for those works, the performance and payment of the price for which are staggered over time, the infringement period corresponds to the period up to the date of signature of the contract concluded between the undertaking and the contracting authority on the basis of the concerted bid submitted by that undertaking. It is for the national court to ascertain the date on which the essential characteristics of the relevant contract and, in particular, the total price to be paid for the work, have been definitively determined."

The Court of Justice held that a distinction must be drawn between the restrictive effects of the cartel on competition, which consist in the exclusion of competing tenderers and/or the potential artificial restriction of the customer's choice, which deprives the contracting authority of the opportunity to obtain the agreed goods, works or services under competitive conditions, and the resulting wider adverse economic effects on other market players, on the basis of which such players, as the European Commission pointed out in its written observations, may seek redress before the national courts. Moreover, the questions regarding the limitation period for such an action for damages, as well as of any action by the contracting authority to challenge the legality of the tender, or to have the contract terminated, are legal questions that are distinct from those that are related to the date on which an infringement of the competition rules ended, and the period during which a penalty for that infringement may be imposed before the limitation period expires.

On 20th August, 2021, the Supreme Administrative Court of Finland upheld the Market Court's decision, but it reduced the court fees. As the Market Court, the SAC also held that the FCCA had not shown evidence that was legally sufficient to demonstrate that the cartel had existed until 31st October, 2009, and the Market Court had to reject the penalty proposal that was made after the limitation period.

Comment

The case is interesting from several points of view. It is a follow-up on a preliminary ruling request to the CJEU. The case-law of the CJEU did not contain any previous judgments in which the legal evaluation of the duration and economic effects of the restraint of competition is based on prohibited tender collusion in construction contracts. It highlights the specific circumstances of bid rigging in tendering procedures for public works contracts. The case also highlights that it is essential to distinguish the restrictive effects on competition and other possible effects. It emphasizes also that the undertaking must have a choice to bring their infringing conduct to an end at any time.

Katalin Surányi, Budapest High Court

Case note on Kfv. II. 37.385/2020/17, Judgment of the Kúria (Hungarian Supreme Court)

Six financial institutions, namely, Budapest Bank Nyrt., the Hungarian subsidiary of ING Bank NV, OTP Bank Nyrt., Kereskedelmi és Hitelbank Zrt., Magyar Külkereskedelmi Bank Zrt. and ERSTE Bank Hungary Zrt., and two companies providing card payment services, namely, Visa Europe Ltd ('Visa') and MasterCard Europe SA ('MasterCard") v Gazdasági Versenyhivatal (the National Competition Authority)

C-228/18, request for a preliminary ruling from the Curia [Hungary]

Summary

1. In the mid-1990s, Visa and MasterCard permitted financial institutions issuing their cards ('the issuing banks'), on the one hand, and financial institutions providing merchants with services enabling them to accept those cards as a method of payment ('the acquiring banks'), on the other, to determine jointly the amount of national 'interchange' fees charged among the issuing and acquiring banks, that is to say, the amount paid by the latter to the former when a card payment transaction takes place.

2. In 1995 and 1996, the banks operating in the card payment services sector introduced a multilateral cooperation procedure ('the Forum'), in which they discussed, on a case-by-case basis, various issues on which it was considered that cooperation was needed.

3. Within the Forum, seven banks — most of which had joined the card payment systems set up by Visa and MasterCard, and which represented a large part of the national market for issuing and acquiring banks — reached agreement on 24th April, 1996, following several rounds of negotiations, on the text of an agreement relating to the determination, for each category of merchant, of the minimum level of uniform merchant service charge ('MSC') payable by each category ('the MSC Agreement'). On 28th August, 1996, they concluded an agreement, which entered into force on 1st October, 1996, through which they introduced a uniform amount for interchange fees relating to payments made by means of the cards issued by banks belonging to the card payment system offered by Visa or MasterCard ('the MIF Agreement'). Kereskedelmi és Hitelbank negotiated the MIF Agreement on behalf of Visa and MasterCard, and the latter both applied that agreement.

4. The MSC Agreement was not signed by the seven banks, but the interchange fees covered by the MIF Agreement, as a cost factor, had an indirect effect on the determination of the amount of the MSC. In particular, the fees covered by the MIF Agreement operated as a lower limit in the reduction of the MSCs. Furthermore, the pursuit of the objectives that were set up in the draft MSC Agreement played a part in the conclusion of the MIF Agreement and in the calculation of the uniform scales for Visa and MasterCard, even if those objectives were not subsequently achieved.

5. Later, other banks interested in the card payment services sector signed the MIF Agreement and joined the activities of the Forum, so that the number of banks that were party to that agreement — and that are concerned by the main proceedings — rose to 22 in 2006.

6. The MIF Agreement was still in force on 31st January, 2008, when the Competition Authority initiated a procedure relating to that agreement.

7. The MIF Agreement was terminated with effect from 30th July, 2008.

8. In a decision of 24th September, 2009 ('the Competition Authority's decision'), the Competition Authority found that, by: (1) determining the level and structure of the interchange fees, which were uniformly applicable to Visa and MasterCard as well as to all the banks, (2) establishing a framework for such an agreement in their internal rules, and (3) facilitating it, the 22 banks that

were party to the MIF Agreement, and Visa and MasterCard, entered into an anti-competitive agreement that did not fall within any exemption. It stated that, by that conduct, from the time when they signed the MIF Agreement — the starting date of the anti-competitive conduct being that of the entry into force of the tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvény (Law No LVII of 1996 on the prohibition of unfair and restrictive market practices; 'the Law on Unfair Market Practices') on 1st January, 1997, in respect of the banks that concluded the MIF Agreement, while that date varied in respect of the banks that signed up to that agreement subsequently — until 30th July, 2008, they infringed Para. 11(1) of that law and, after 1st May, 2004, they infringed Article 101 TFEU. That conduct constituted not only a restriction of competition 'by object', in that the purpose of the MIF Agreement was anti-competitive conduct, but also a restriction 'by effect', in that that agreement had a restrictive effect on competition. The Competition Authority imposed fines in varying amounts on the seven banks that had initially concluded the MIF Agreement, and on Visa and MasterCard.

Summary of the judicial proceeding

9. Visa, MasterCard and six of the banks that were ordered to pay fines, brought proceedings against the Competition Authority's decision before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary), which dismissed their application.

10. Ruling on the Appeal brought by those parties (except MasterCard), the Fővárosi Törvényszék (Budapest High Court, Hungary) amended the Competition Authority's decision and, on procedural grounds, closed the procedure in so far as it concerns the Hungarian subsidiary of ING Bank. As regards the other parties, it annulled that Decision and referred the case back to the Competition Authority to give a new Decision.

11. The Competition Authority brought a special Appeal to the Kúria (Supreme Court, Hungary), against the Judgment of the Fővárosi Törvényszék (Budapest High Court, Hungary).

12. The Hungarian Supreme Court decided to stay proceedings and to refer a question to the ECJ for a preliminary ruling.

13. The ECJ (Fifth Chamber) ruled that Article 101(1) TFEU must be interpreted as not precluding the same anti-competitive conduct from being regarded as having, as both its object and its effect, the restriction of competition, within the meaning of that provision.

14. The ECJ also ruled that Article 101(1) TFEU must be interpreted as meaning that an interbank agreement which fixes, at the same amount, the interchange fee that is payable, when a payment transaction by card takes place, to the banks issuing such cards, offered by card payment services' companies operating on the national market concerned, cannot be classified as being an agreement which has 'as [its] object' the prevention, restriction or distortion of competition, within the meaning of that provision, unless that agreement, in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which is for the referring court to determine.

Ruling of the Court

15. The Hungarian Supreme Court upheld the Judgment of the of the Budapest High Court, except with regard to the Hungarian subsidiary of ING Bank, in which part it annulled the decision of the Competition Authority and ordered the Competition Authority to reopen the proceedings concerning the Hungarian subsidiary of ING Bank.

16. It ruled that the Competition Authority's Decision was not unlawful because it was based on purpose and effect, but the nature of the infringement should be unequivocally determined in the Competition Authority's Decision. It found that the reasoning and assessment of the Decision was inadequate and did not contain an independent statement of reasons for the legal consequences.

Comment

17. The Hungarian Supreme Court decided that the Competition Authority might base its decision on a dual legal basis: both on the basis of it having an anti-competitive object and on the basis of effect, although, in this case, the findings and their evidence should also be separated, and the ratings should have an independent justification.

Exploitative Abuses

Elita Gavriel, Cyprus Administrative Court

Cyprus Telecommunications Authority (CYTA) v. National Committee for the Protection of Competition (NCA), Recourse No. 741/13, Judgment delivered on 10.6.2019.

Court: Administrative Court of Cyprus (First Instance Court)

The facts of the dispute

In this case, which was filed before the First Instance Administrative Court of Cyprus, the Applicant, the Cyprus Telecommunications Authority (hereinafter "CYTA"), requested from the Court the annulment of the Decision of the National Competition Authority (hereinafter "NCA"), dated 25.1.2013 and numbered 6/2013, through which it had an administrative fine of €295,277.00 regarding the infringement of Art. 6(1)(a) of the National Law (Art. 102(a) of the TFEU) imposed upon it.

On 26.1.2007, Primetel PLC (hereinafter "the Complainant") filed a complaint to the NCA against CYTA, alleging unfair pricing in relation to a contract concerning CYTA's allocation to the Complainant of capacity on the SMW-3 submarine cable system that terminated in Cyprus, through which the telecommunication traffic is routed from Cyprus to London.

CYTA is a legal entity under public law that was created with the establishment of the Republic of Cyprus in 1960, and that provides, inter alia, telephony, internet, and broadband services. CYTA exercised a legal monopoly for a number of years. During the exercise of the state monopoly, CYTA made major investments by developing international partnerships. It became the co-owner of five of the six submarine cable systems and acquired an irrevocable right to use with respect to the sixth. In 2004, the market was liberalised and the first alternative providers were given licenses. However, no other provider had the capacity to operate a submarine cable system.

CYTA was able to: (a) lease capacity, or (b) allocate capacity for a long period of time to third-party providers, such as the Complainant.

Such an allocation of capacity in submarine cable system, was granted by CYTA to the Complainant, under an Agreement which was dated 1.07.2006, for 12 years.

In order to examine the complaint, the NCA defined the relevant market and the relevant geographic market, and it found that CYTA held a dominant position in relation to the available international capacity in submarine cable systems terminating in Cyprus, through which it provides broadband services. Then, the NCA proceeded to examine and accept the Complainant's allegation that CYTA had abused its dominant position in the market by imposing unfair selling prices. This finding by the NCA was the main subject of the discussion before the Court.

In its Decision, dated 25.1.2013, the NCA found an infringement of Art. 6(1)(a) of the National Law (Art. 102(a) TFEU) by CYTA and it imposed an administrative fine.

The judicial proceedings

The Applicant (CYTA) claimed that the relevant market definition was incorrect.

CYTA's second claim concerned the fact that the NCA concluded incorrectly that it had a dominant position in the submarine cable systems on the Cyprus-London route, since capacity allocation was offered, also, by sources other than CYTA.

The third claim concerned the NCA's erroneous conclusion that there was unfair pricing, which lead to an abuse of a dominant position, as it did not investigate the comparative charges of other competing companies and it also failed to take into account the costs incurred by CYTA, resulting from unallocated capacity.

Ruling of the Court

First, the NCA argued before the Court that the definition of the relevant market, the existence of a dominant position, and the excessive pricing are technical matters, and they do not fall under the control of the Administrative Court. These claims were rejected by the Court, taking into account that the duty of the Court is to provide effective judicial protection, thus ensuring the guarantee of a fair trial.

Relevant market

The Court agreed with the NCA's conclusion as to the definition of the relevant market, taking into account that a relevant market for goods or services, includes all the goods or services that are sufficiently interchangeable or substitutable with each other, and not taking into account their objective characteristics alone.

The Court also agreed with the NCA's definition of the relevant market:

(a) submarine cable systems (on which the Complainant claimed capacity through the Agreement) were distinguished from satellite systems, which cannot be considered substitutable, since the former provide a superior quality of service if compared to the latter; and:

(b) that the six submarine cable systems available in Cyprus are not fully substitutable with each other, but those which bear the newer SDH technology are distinguished (the transmission of data with this technology is done using fibre optics and lasers).

The Court therefore agreed with the NCA's definition of relevant market for:

- the allocation of capacity on submarine cable systems terminating in the Republic,
- utilising SDH technology.

Dominant position

The Applicant's claim that it did not have a dominant position in the market, since capacity could have been offered to the Complainant by other co-owners of submarine cable systems to the Applicant, was rejected.

In accordance with the NCA's findings, it was taken into account that CYTA, being a financially powerful public entity and a co-owner of submarine cable systems with other international operators, had—on the basis of the co-ownership agreement between them—priority over capacity allocation. This, therefore, gave CYTA a control advantage in providing these services itself, rather than allocating capacity for the provision of broadband services to other providers that are located in the same country as CYTA (Cyprus). This was a condition of the contract (between them).

Abuse of a dominant position by imposing unfair prices

In accordance with the NCA's findings, the Court held that, in order to determine whether or not the price imposed was excessive, it had to rely on the assessment criteria that are set out in the case law of the Court of Justice of the European Union (CJEU) (United Brands v. Commission). The NCA examined the excessive difference in cost and price in order to conclude that the price imposed was excessive.

The Court held that the NCA did not explain why it chose to adopt only one methodology/test, the "price per se", as a measure with which to assess the unfair price, without carrying out a comparative market analysis.

According to the Court's Judgment, the NCA should have chosen a methodology that would have led it to a reliable conclusion. Since there were concerns about the uncertainties of the choice of the "price per se" methodology, it should have combined the methodology of a comparative market analysis as a measure of assessment.

Comment

In Cyprus, the NCA's decisions are enforceable administrative decisions and are examined by the Administrative Court, which has the power to exercise control over the legality of the Decision, and over the strict outer characteristics. The Court has no power to substitute the Decision of the NCA, under Art. 146 of the Constitution. However, it has the authority to annul the decision on a number of grounds, including misconception of fact or law, insufficient enquiry, lack of due reasoning, or on procedural grounds.

In the above Decision, the Court intervenes for the first time in order to examine the definition of the relevant market, the existence, or not, of a dominant position, and the determination of whether or not excessive pricing has been imposed, within the framework of a review of procedure, in order to provide effective judicial protection. However, it should be stressed that the Court's authority cannot replace the NCA's decision, nor can it amend it, but it can only annul or uphold it.

The interesting issue held by the Court is the concept of "excessive pricing" and the methodology/tests which the NCA must follow in order to reach a firm conclusion, a choice which is kept for the NCA itself. However, the choice of the tests to be considered should be made with a view to arriving at safer results and should not be an abusive choice that leads to arbitrary decisions.

It is for this reason that the Court held that the choice of methodology/test to be followed by the NCA in reaching its conclusion on the existence and imposition of unfair prices, should be justified.

The case law of the CJEU has indicated that an unreasonable price "per se" does not always lead to a finding of excessive pricing, and that economic value should be determined in relation to the specific circumstances of each case, taking other factors into account also (United Brands Company and United Brands Continentaal BV v. Commission of the European Communities - Chiquita Bananas - Case 27/76, 14.2.78, Scandlines Sverige AB v. Port of Helsingborg, Case COMP/A.36.568/D3, C-177/16, Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v. Konkurences padome, 14.9.2017).

Andrea Postiglione, Rome First Instance Court

Case Law Medov Civitavecchia S.R.L. Vs, Port Mobility S.P.A.

Decision of the Antitrust Chamber of the Court of Rome of September 29TH, 2019 (RG 51237-2016).

MEDOV CIVITAVECCHIA s.r.l. is a maritime agency that is active in the cruise sector and that operates in the Port of Civitavecchia, the first port of the Mediterranean, by number, for cruise passengers. As part of its activity, the plaintiff company also takes care of the transport of cruise passengers from the ships to a railway station in the port of Civitavecchia (Seatrain Service) whose destination is the city of Rome.

The plaintiff carries out this service by paying a fee to the company Port Mobility, a company owned by the Port Authority of Civitavecchia, and the exclusive concessionaire for mobility services within the port of Civitavecchia. Services are provided through a tariff plan that has been adopted in agreement with the Port Authority.

The tariff plan, prepared by Port Mobility, for the management of the port area under concession, was implemented by the Port Authority following a Resolution by the Port Committee, No. 31 of 7th July, 2015.

Pursuant to Art. 14 of the concession, the defendant company is then required to ensure equal treatment for the users of the services, in accordance with the tariff provisions that are laid down in accordance with the statutory and regulatory tariff provisions as per the economic plan presented.

MEDOV claims that the defendant requests a higher rate than it does from the other companies operating in the port and, in particular, from the company RCT; MEDOV submitted two requests for access to the documents in order to ascertain the criteria for pricing mobility services.

MEDOV files:

- abuse of Port Mobility's dominant position as the exclusive concessionaire for mobility services (Art. 31 lit. A of the Law 287 of 1990), as well as the conflict of interest between Port Mobility and the Port Authority (the holder of 19% of the share capital of P.M.) and, at the same time, the authority in charge of modelling tariffs.
- excessive burden of the tariff regime of the Sea Train Service for the years from 2010 to 2012 (€176) and for the years from 2013 to 2015 (€200)

The claim is therefore finalised:

- to the ascertaining of the defendant's dominant position in the market,
- to the finding of an abuse of position in the determination and/or application of the tariff,
- to the repayment of the amount already paid through the application of an unfair tariff and particularly the difference between the fair price for the service and that which the defendant has so far claimed.
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PORT MOBILITY

Port Mobility is the licensee of mobility services and related maintenance in the port area through a governmental license.

Port Mobility provides the following services:

- the creation and management of parking lots and equipped parking areas, as well as control and management systems for functional access to the service;
- the provision of the shuttle service inside the port and similar services in favour of users'
- any further activity agreed with the Port Authority, functional to the performance of the Mobility Service (see Art. 2 of the Convention).

The Seatrain Service has been active since 2005 and the rate applied to it was equivalent to €176.00 until 2013, and then went up to €200.00.

SEA TRAIN SERVICE DEFINITION

The Sea Train Service is a private transport service for cruise passengers, who are transported, by a dedicated train, from the Port of Civitavecchia to Rome. Port Mobility organizes the transfer from the various docks of the cruise ships to the starting point of the train, which has a fixed position in the railway platform. The service is carried out only at the request of the various Tour Operators who make use of this train transport for their cruise passengers. The service takes place in 2 transfers, of which the first is usually carried out in the morning around 08.00 from the platform to the train, and the second in the afternoon around 17.45 from the train to the ship.

DEFENCE STRATEGY OF PORT MOBILITY

PORT MOBILITY outlines the burden of proof to which the plaintiff was bound in the hypothesis that there was a "stand alone" anti-competitive action. It does not really dispute the tariff difference that it has always applied to MEDOV and the competing company RCT, but it does connect the different economic treatment to the different activities that the two companies carry out: MEDOV, as a shipping agent that schedules a shuttle service with a minimum start ranging from one week to about 12 hours before the completion of the service, and RCT, as a "terminalist" and therefore as a manager of the docks of the port in a situation of continuity.

The TRIAL

The Antitrust Court of Rome considered the claim a standalone action, since no official statement of the National Competition Authority was introduced.

The Court pointed out that it is the plaintiff's responsibility, as correctly noted by the defendant, to prove:

1. Port Mobility's dominant position in the relevant market;
2. Abusive conduct;
3. Unjust damage, as a direct consequence of the alleged abuse;

The Courts then appointed an Antitrust expert to investigate the DOMINANT POSITION

The expert defined the relevant market following the EU Indications through "the analysis of the substitutability of demand (and possibly of supply), with reference to goods and services interchangeable by the consumer by reason of their characteristics, their prices, consumer habits and trends and with reference to a defined geographical area in which the conditions of competition are sufficiently homogeneous". Starting from the parameters of the substitutability of supply and demand, a picture emerges of the substantive narrowness of the reference market, given that supply

and demand are exhausted in the geographical area of the port of Civitavecchia and in relation to the specific sector of transport from ship to railway station.

The technical expert then stated, without having been contradicted by any of the parties involved, that PORT MOBILITY acts on the specific market in a monopoly position (expert notes of 8th November, 2017), a circumstance that was never denied by the defendant.

The dominant position on the specific market could therefore be considered as an acquired fact.

ABUSIVE CONDUCT

The technical expert highlighted multiple elements that were consistently addressed in affirming that the conduct of the defendant was abusive, in particular, in relation to the fact that they "directly or indirectly impose[d] purchase prices, sales or other unjustifiably free contractual conditions".

Incontrovertible data is that for which, in the tariff plan approved by the port authority, Port Mobility, indicates a mileage rate of €4.25 per km., but where, at the same time, an effective mileage rate ranging between €26 and €30 per km, (Section 3.2.of expert script) was incontrovertibly applied to the plaintiff.

The service performed is. in fact, largely similar, and it is not subject to significant unforeseen events (these are statistically limited to 15%).

Another symptomatic element of Port Mobility's abusive conduct is the fact that no contract governs the relationship between Port Mobility and the competitor company, Royal Bus, an element that is particularly emblematic of the contiguous nature of the relationship between the two companies. The investigation has therefore revealed how PORT MOBILITY is both part-owned by Royal Bus, and, by subcontracting the shuttle service that operates under a monopoly regime to Royal Bus.

In the case of Royal Bus, therefore, mobility services are carried out exclusively by an undertaking that does not have the necessary means to provide them directly on the market, moreover, without a contract, and under uneconomic conditions that do not correspond to either the industrial or the approved tariff plan, with the result that there is unjustified enrichment of a company which is partially owned by Port Mobility.

STATUTE OF LIMITATION

The Court rejected any application of the statute of limitation and moved on to the

ESTABLISHMENT OF AN ADEQUATE FEE

The technical expert places the reasonable rate – net of margin – between a minimum rate (Tmin) and a maximum rate (Tmax) when determining a tariff range.

The minimum rate - net of the margin - is determined as €4.25 per Km. The maximum rate – net of margin – is determined by the average between the cost per kilometre in house of €16.72, and the higher service costs of €16.68, equal to €16.70.

DAMAGES CALCULATION

On the basis of the "average cost" of €10.48 per km., the mileage rate (Point 7.3) of €10.83 per km. and the price for each trip €71.48 (instead of the €200 that has been applied by PM) was determined, tracing all the invoices issued by the defendant company, and a surcharge was therefore reached for a total of €376,453.00, which therefore constitutes the profit deriving from the abuse of the dominant position that is due.

The damage is calculated by applying the reasonable rate to the services performed and documented.

The tariff for the years 2011 and 2012 is €176, and, for the years 2013, 2014 and 2015, it is €200.

The mileage rate applied is given by the ratio of the Tariff for the 6.6 kilometres of the Sea Train Service (€26.66 and €30.30). The reasonable rate is €10.83, as determined above.

The damage is calculated by multiplying the difference between the cost per kilometre applied (€26.66 and €30.30) and the reasonable rate (€10.83) by the number of kilometres served.

PASSING ON

The CTU believes that the determination of the damage must include, according to antitrust legislation, the so-called passing on, and points out - for exclusive and dutiful completeness of information - that the practice estimates the translation of the damage - "passing on" - in the monopolistic market, up to a maximum of 50%.

In actions for damages, the defendant pleading that the plaintiff has transferred all or part of the surcharge resulting from the infringement of competition law has the burden of proving it also by requesting the performance of evidence from the plaintiff or from third parties.

The Court excluded, then, any passing on evidence, and ordered Port Mobility topay damage compensation to Medov.

APPEAL

Port Mobility lodged an Appeal against the Decision. The Appeal, RG 7716-2019, is still pending and will be decided on 04.04.2023.

PERSONAL COMMENT

The Court extensively refers to the previous case law of the CJEU

The definition of the relevant market in the present case law follows the COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372 /03) point 8): 'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'..

In regard to the statute of limitation, the Court specifically refers to C 295-04 (Manfredi/Assitalia) "A national rule under which the limitation period for bringing an action for damages runs from the day on which the cartel or concerted practice was put in place could make it practically impossible to exercise the right to claim compensation for damage caused by that unlawful or prohibited practice, in particular where that national rule also provides for a short limitation period and that period cannot be suspended".

The Court specifically quotes Manfredi/Assitalia also in the damage compensation calculation (Section 94). "However, it is settled case-law that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, Para. 14, Joined Cases C-441/98 and C-442/98, Michaïlidis [2000] ECR I-7145, Para. 31, and Courage and Crehan, cited above, Para. 30)".

The national Curt introduces a new interpretation in the statute on the burden of proof, striking a parallel between overcompensation and passing on.

The Panel noted, however, that the institution of overcompensation, as well as the passing-on, must be the subject of specific exception by the defendant, it is, in fact, the one who has caused damage, who has to allege and prove the circumstance in which the injured party has passed on damages to third parties, or receives overcompensation.

In fact, the burden of the defendant to promptly and specifically attach the extinguishing and/or modifying facts of the plaintiff responds to the principles of our legal system, as well as to the principles of Community acquis.

Compensation for damage that is caused by the infringement of Competition Law may be claimed by any person who has suffered it, (irrespective of whether s/he is the direct or indirect purchaser of the infringer") and compensation can be awarded by the Court in an equitable way, bearing in mind the general principle of disfavour for punitive damages. Nevertheless, overcompensation, as such, can be considered to exist only if there is sufficient evidence to underpin this statement.

Enerjeta Shehaj, Tirana Administrative Court

Procedure followed by the CA and the emergence of the dispute.

- Competition Authority, with Decision No.684, dated 18.03.2020, decided: "Opening of the preliminary investigation in the market of wholesale and retail sale of paramedical supplies".
- Subsequently, the Competition Commission took the DCC (the Decision of the Competition Commission) with No.685, dated 18.03.2020, "On taking the temporary measure for establishing competition in the market for the wholesale and retail sale of paramedical supplies". With this decision the CA ruled that:
- There should be prohibition of the behaviour of enterprises operating in the wholesale and retail trade network (importers, pharmaceutical warehouses and pharmacies) for paramedical supplies, which, directly or indirectly, impose unfair prices or trading conditions.
- In order to avoid abuse in the trade chain, there was an obligation for all companies operating in the market for the import and wholesale of paramedical supplies to be transparent in setting the selling prices for disinfectants, alcohol and masks;
- There should be the application of cost-oriented prices, and their publication on the official websites of enterprises or other communication channels; This interim measure will be taken for a period of time, until the end of the investigative procedure; In the case of the non-implementation of the decision for temporary measures, cited in point (I) of this decision, the enterprises that are found to be in violation are to be punished with fines of up to 10% of their annual turnover for serious competition violations, pursuant to Art. 74. Point 1, Letter b) of Law No. 9121/2003.
- As above, and within the framework of the verification of the above, with Decision No.716 dated 15.10.2020, the Competition Commission decided to open the in-depth investigation procedure against some subjects, amongst which is the plaintiff, FLORFARMA SHPK (ltd).
- The respondent, the Competition Authority, after being acquainted with the documentation submitted by the plaintiff, FLORFARMA SHPK, has concluded that: -The plaintiff FLORFARMA SHPK has realized that the production and sale of the:
- Product: Alcohol 70% *(ALCOHOL 0.1 LIT 70% and ALCOHOL 1 LIT 70%)* and;
- Product: Bactiflor.
- In the framework of the verification of these sales, the respondent CA has concluded that the plaintiff, FLORFARMA SHPK, has not implemented the temporary measure previously determined with DCC No. 685, dated 18.03.2020, in time.
- As above, the CA took Decision No. 765, dated 22.01.2021, wherein it decided:
- To fine the enterprise FLORFARMA SHPK for not implementing the temporary measure, according to DCC No. 685, dated 18.03.2020, "On taking the temporary measure so as to establish competition in the market for the wholesale and retail sale of paramedical supplies", respectively, in the amount of ALL 1,000,000 (one million);
- That there was an obligation for the enterprise FLORIFARMA SHPK to implement Art. 4 of Law No.9121, "On the protection of competition", as amended.
- That, following this procedural moment, the plaintiff has administratively appealed the decision above, an Appeal which has been rejected. As a result, the appellant filed a lawsuit in Court.
- That the object of the lawsuit is the abrogation of the decision taken by the CA, No.765, dated 22.01.2021.

Plaintiff's allegations

- The decision was taken in violation of legal procedure and without being based on facts and evidence;
- That the CA had not, accurately and in detail, analysed the entire chain through which the sale and price of these products has passed;
- That the price increase is a consequence of the increase in the price of raw materials and the cost of production in its entirety, e.g..: -Purchasing suitable clothing, protective masks and thermometers for staff has increased the cost of producing these products. Due to the pandemic and the specific conditions in which we had to work and still continue to work, the overall costs have also increased. During this period, compared to the period before the pandemic, there were mandatory expenses that were based on the anti-COVID protocols of hygienic-sanitary measures and social distancing, and these were added as general expenses. the purchase of thermometers. the purchase of Valve Masks; the purchase of thermometers for indoor use. In addition to thermometers, masks, sterile single-use aprons and sterile gloves for staff have been added as an expense;
- **It was** proven at the trial that, with the measures taken by the Albanian government to close down transport, we were forced to transport all of the personnel from FLORFARMA, thus adding a voice to general costs.
- The employees' salaries have been increased, which is an extra cost, due to the additional hours of work performed by them.
- The DDD Service (Disinfection, Deratization, Disinsection) and diagnostic tests have been added as a cost.

Legal Framework, Court reasoning and resolution of the case

The respondent, the Competition Authority, conducted this administrative procedure and, after being acquainted with the documentation submitted by the plaintiff, FLORFARMA shpk, concluded that: - The plaintiff, FLORFARMA, has produced and sold the product, alcohol 70%, and the product, Bactiflor 1 L ML. The respondent concluded that the plaintiff had sold these products at a price that was higher than their cost of production. According to the CA, this behaviour by the plaintiff contradicts what DCC No. 685, dated 18.03.2020, provides for and prohibits.

In relation to this moment, the Court quotes that the litigants do not dispute the documentation that was assessed at the stage of the administrative investigation, as well as in this trial. At the same time, both litigants admit that, in this period, subject to verification by the CA, 01.11.2019 - 31.12.2020, there was an increase in the costs of production of Alcohol 70% and Bactiflor 1 L.

However, what divides the litigants in this trial is the plaintiff's claim that the cost of production is the only reason that this price has risen. At a time when the respondent party rejectsthe notion that, although the production costs increased during this period, the selling price was, in any case, not in proportion to the cost of production of these products.

The Court emphasized to the litigants that it upholds the Court Decision only on the evidence taken at the trial. The Court evaluated the evidence obtained, based on its internal conviction, which was created by the examination, in their entirety, of the circumstances of the case.

In a court process, and throughout the trial, the plaintiff has the basic obligation to prove by means of the evidence before the Court that it is the holder of a legal right which is born of the law, and that it alleges that this right has been violated by the respondent by their illegal conduct during its concrete administration. In parallel, the respondent party must prove before the Court that it has committed, in all its forms, concrete administrative conduct that is in accordance with the law and with what the

law provides for as both a procedure and a decision.

One of the basic moments in this trial is the legal verification, as to whether the fact ascertained by the respondent: that the plaintiff, FLORFARMA SHPK, during the period 01.11.2019 - 31.12.2020 had, in the marketing of the products Alcohol 70% and Bactiflor 1 L, violated Law No. 9121/2003 and Decision No.685, dated 18.03.2020, was true, or not. This moment leads to the verification of the main facts, considering the division of the litigants, as to whether during the period 01.11.2019 - 31.12.2020, the increases in the selling price of the products Alcohol 70% and Bactiflor 1 L, demonstrates an increase that is conditioned by the increase in the cost of production of these products, or that it is not a proportional increase (as the increase in the cost of production is accepted as fact by both litigants).

This moment required the verification of some of the facts and the review of the accounting documentation, as well as the accounting tracking of the production costs and the verification of the sale prices. The Court was therefore assisted in this judgment by an accounting expert, who submitted his opinion in writing.

In the context of evaluating both the written and the expert evidence at the trial, it became evident that, according to the Accounting Inventory submitted for 31.12.2019 to the plaintiff, there was a stock of: 847 units of Alcohol 70, 1 Litre; 8,887 units of Alcohol 70, 100 ml; 89 Litress of BactiFlor 1 Litre; 49 Units of BactiFlor, 100 ml.; converted to 4.9 Litres.

Following the stock identification at the end of 2019, as well as its ratio to imports, and the respective costs that were being tried, the further progress of the sales process of this product which was found to be in stock from 2019, was verified. At the same time, the Court verified the 2020 costs for the production of these two types of products. During the trial, the sales that occurred during 2020 were verified in terms of their quantity and price.

Regarding this moment, it was noted that, from the verification of the documentation of the Court file, it had not been ascertained that the products under trial were purchased as finished products. These products are produced by FLORFARMA.

During the trial, evidence was given that, in addition to the product found in 2020, the plaintiff produced these products, even during 2020, from the end of 2019, and this was subject to verification by the CA. In the Court file, even the Database of the Production of the items that are the object of the trial, were available as evidence.

These data present, in detail, the Date of Production, the Quantities Produced, and the Manufacturing Series, as well as the Registration/Matriculation of the Raw Material used for production.

It was noted by the expert that there was an increase in the costs for the production of these products - for both the products of alcohol 70% and BactiFlor, during 2020.

The expert offered the opinion that the item with the greatest fluctuation and Impact on the costs of production for these two products was the Raw Material, Alcohol 96. From the Customs Declarations, proof was taken for evidence at the trial, and the cost per litre, purchased by the company was used as evidence and was compared to the technology card that was presented as evidence in the Court file. The expert gace his opinion that there wa an increase of 23.97% in Wage Expenditures from 2019 to 2020. There was also an increase in Consumption and Other Utilisation Expenditures of 12.52% from 2019 to 2020.

Despite these fluctuations in Other Cost Items, the expert gave his opinion that the determinant factor in the changes in the production costs for the different periods was the imported raw item, which experienced very large fluctuations during 2020, and this had a direct impact on the cost of production.

Regarding the comparison of the costs of production with the costs of sales, it became apparent that the progress of the price increases showed an unjustified increase in both time and the respective costs. In no case was there a progressive increase between the costs of production and the costs of sales.

If what was achieved by the expert can be identified as the cost price, and what was identified by the expert as the selling price is evaluated, the selling price does not correspond to the costs. In these cases, the Court noted that either the cost had increased and the sales had increased, but with a higher ratio than the cost increases, or the continuity of the high price had increased, which did not reflect either the real cost, or the reduction it suffered from one period to another.

In relation to these products, costs were recorded in times of both increase and decrease, as the case may be, at a time when there was a reflection on the selling price that was inconsistent with what was happening to the costs.

If what was achieved by the expert was identified as being the cost prices, and what was identified by the expert as the sales price was evaluated, the prices do not correspond to the costs. In these cases, the Court noted that either the cost has increased, and the sales have increased, but in a higher ratio than the cost increases, or the continuity of the higher prices have increased, which means that this did not reflect the real cost, nor the reduction it suffered from one period to another.

So, it is true that there was an increase in costs, and that there was an increase in prices, but, in no case, is this increase justified by the cost of production. Moreover, this inconsistency comes simultaneously with the outbreak and development of the pandemic. This time, which coincided with an immediate increase in the flow of demand, and consequently with the relationship between the flow of demand and the quantity of products that came onto the market, then this has led to incoherence in the behaviour of the plaintiff or in the establishment of practices that were discriminatory to the consumer.

This situation indisputably contradicts what the CA had previously had available, with its Decision No. 685, dated 18.03.2020, and. respectively the disposition of the CA with this Decision, for instance, the prohibition of the behaviour of enterprises operating in the wholesale and retail trade network (importers, pharmaceutical warehouses and pharmacies) for paramedical supplies which, directly or indirectly, set unfair prices or trade conditions.

As above, the Court decided to dismiss the lawsuit, since the plaintiff had disproportionately increased the selling price in relation to the costs of production of these products. Taking into account the plaintiff's profits in relation to this unfair behaviour, the Court concluded that the amount of the fine was proportional in the case, subject to verification.

Altin Shkurti, Tirana District Court

Decision of Tirana, District Court, No. 172, of 19.01.2009.

The Competition Commission, with its Decision No. 18, dated 13.09.2005, decided to open the investigation procedure in the economic sector relating to mobile phones, and invited the plaintiff to attend the hearing.

After the completion of the preliminary investigation in the mobile phone sector, in which only two operators operated, 'Albania Mobile Communication' Sh.A. (hereafter AMC) and 'Vodafone Albania' Sh.A., the Competition Commission, with its Decision No. 21, dated 11.10.2005, decided to initiate the in-depth investigation procedure in the economic sector for mobile phones. This decision was communicated to the plaintiff, AMC, with Letter No. 331, dated 12.10.2005.

The Decision of the Competition Commission, No. 21, dated 11.10.2005, was challenged in Court by the plaintiff, AMC. The District Court, with Decision No. 550, dated 20.10.2006, decided to reject the lawsuit. An Appeal was lodged against this Decision in the Court of Appeals which, with Decision No. 206, dated 31.01.208, decided to terminate the trial of the case in the Tirana Court of Appeals.

Following the opening of the in-depth investigation procedure, the relevant investigation was conducted, and the plaintiff, AMC, was asked to provide the Secretary-General with the necessary documentation. After conducting an in-depth investigation, the plaintiff, AMC, by Letter No. 230 Prot., dated 12.04.2007, was invited to a hearing session at the Competition Commission on 02.05.2007.

On concluding the hearing session, the Competition Commission, after reviewing all the documentation compiled, with Decision No. 59, dated 09.11.2007, 'On the abuse of a dominant position in the mobile phone market of companies Albanian Mobile Communication Sh.A. and Vodafone Albania Sh.A' decided that: 'AMC Sh.A. and Vodafone Sh.A. have abused their dominant position by setting unfair prices in the mobile phone market during the period under investigation (2004-2005). For the violations ascertained in Point 1, the company, Albania Mobile Communication Sh.A. (AMC), is fined in the amount of 2% of the annual turnover in relation to the respective product for 2005, which amounts in value to 211 552 000 ALL.

This Decision was appealed in Court through a lawsuit, with which the plaintiff sought the acknowledgment of the invalidity and the abrogation, and/or the complete annulment, of Decision No. 59, dated 09.11.2007, of the Competition Commission 'For abuse of a dominant position in the mobile phone market of Albania Mobile Communication Sh.A. and Vodafone Albania Sh.A. in the part that was related to the company, AMC.

The claims of the parties

The Plaintiff's claims

With the lawsuit, the plaintiff, AMC, claims that the Decision of the Competition Commission, No. 59, dated 09.11.2007, is the result of an incorrect application of the law, in relation to: a) the definition of the market, b) the concept of a dominant position, and c) the concept of the abuse of a dominant position.

The plaintiff, AMC, claims that the definitions given by the Competition Commission for the relevant market are vague, unsubstantiated, and contradictory, and that the final conclusion on the abuse is not related to a defined market.

The objections of the Commission

The defendant, the Competition Commission, objected that the definitions given in the decision of the Competition Commission, No. 57, dated 9.11.2007, are clear, and the market definition is correct. The 'Relevant market' is the mobile phone public service, offered by each of the two mobile companies, AMC and Vodafone, or the transmission of the telephone calls they make to their end user (generated either by this user, or to this user).

The Court's assessment

A) Definition of the common market

The Court evaluates that the market definition given in the decision of the Competition Commission, No. 57, dated 09.11.2007, is clear, and the product market is defined correctly. This definition is given pursuant to Art. 3 (7) of Law 9121, dated 28.07.2003, 'On Competition Protection', which reads: [that the] 'Relevant market' are products that are considered to be replaceable by consumers or other customers, in terms of their characteristics, price and their function, and which are offered or required by enterprises in a geographical area with the same conditions of competition, an area which can be clearly distinguished from neighbouring areas.

In the sense of this provision, the Competition Commission has defined the relevant market in Points 16-24 of the Decision of the Competition Commission, No. 59, dated 9.11.2007, which considers the mobile public service in total, as a product that is based on Art. 3 (5) of Law 9121, dated 28.07.2003, 'On Competition Protection'. The definition of the relevant market is found by dividing the product market from the geographical market, noting at the same time that, in the period under investigation, the companies AMC Sh.A. and Vodafone Albania Sh.A. between them own 100% of the mobile phone market.

B) DOMINANT POSITION

In the Decision of the Competition Commission, No. 59, dated 9.11.2007, it was determined that the plaintiff, AMC, had a dominant position in the market. The definition of a dominant position is provided in Art. 3 (5) of Law 9121, dated 28.07.2003. 'Dominant position' means the position of one or more undertakings which allows them to be able to operate in terms of supply and demand, independently of other market participants, such as competitors, customers, or consumers'.

The assessment of the dominant position of the plaintiff, AMC, was conducted in accordance with the criteria provided in Art. 8 of Law 9121, dated 28.07.2003, 'On Competition Protection', which are: i) the relevant market shares, ii) the administrative, technical, and economic barriers to market entry, iii) the potential competition, iv) the economic and financial strength of enterprises, v) the countervailing power of buyers, and, vi) other market characteristics.

Dominant market position is determined by the market shares held by enterprises in the product market. Based on the assessment of the market shares of AMC and Vodafone, according to the criteria of the average number of subscribers and revenues, the result is that, based on the average number of subscribers in 2004, AMC Sh.A. owns 52% and Vodafone 48%, respectively, and for 2005, 51% and 49%, respectively. In terms of market division, based on the criteria of the revenues from service calls for 2004, AMC owns 49% and Vodafone 51%, respectively, and, in 2005, 47% and 52% of the market, respectively. During the investigation period, the market has thus been split almost in half between AMC and Vodafone.

In the doctrine of consumer law, it is estimated that when enterprises own 25% or more for some time, it is very likely that this is an indicator of a dominant position in the market, but this indicator cannot prove this position. The only case in which this indicator is considered to be sufficient is when the company owns 50% or more of the product market (According to the AKZO case, Decision of the European Court of Justice). The fact that AMC owns 50% or more of the market share proves that AMC possesses significant economic power, due to its dominant position in the market, thus hindering effective competition.

All these factors were assessed in the light of the doctrine of the European Court of Justice and, specifically, in the case of United Brands Vs. Commission, in which it was stated that: '... a position of economic power that enables an enterprise to prevent the maintenance of effective competition in the relevant market, by allowing it to behave quite independently towards its competitors and customers and finally towards consumers', proves that AMC and Vodafone are companies that hold a dominant position in the mobile phone market. They have almost equal parts of this duopolistic market (the extreme case of the oligopoly and the threshold that separated it from the monopoly) from 2003 onwards. It is worth mentioning here that AMC was declared a Powerful Market Operator, with Decision No. 286, dated 26.04.2006, of ERT. Being a Powerful Marked Operator as an enterprise, is equivalent to its dominant position in the market. Consequently, the Court considers that the conclusion of the Competition Commission, in its Decision No. 59, dated 9.11.2007, that the plaintiff AMC company has a dominant position, is correct.

Mobile phone markets have high entry barriers. The mobile phone market in Albania has an administrative barrier because, in order that a new operator can enter the market, it is necessary to obtain a license, as defined in the legal acts that are in force.

The lack of potential competition has led to a high and stable profit rate for the company, a fact that is assessed in the relevant tables in the EBITDA profit rate. High and stable profits have, over time, been evaluated by the Court as being indicators of low competition in the market, due to the lack of effective competition.

The Court considers that a factor that affects the dominant position is also the economic and financial strength of these enterprises. This fact is proven by the annual income of the plaintiff, AMC, which, in 2004, was 1,689,067 ALL, and in 2005 was 18,319,973 ALL. Meanwhile, the number of subscribers has reached 1,530,867 subscribers. Both mobile phone companies for 2004 had a total turnover of 33,835,819 ALL, or 4.45% of the Gross Domestic Product (GDP). The abovementioned figures prove that AMC is an enterprise with significant economic power.

In a mobile market that is owned by two major companies, buyers have no option to react. Transferring from one company to the other proves the inability of customers to react otherwise, since they have no opportunity to replace this service.

Both mobile phone companies have offered an identical product, the mobile phone service. Consequently, the Court considers that the product offered by the mobile phone companies is homogeneous.

C) ABUSE OF A DOMINANT POSITION

The Competition Commission, in Point 1 of Decision No. 59, dated 9.11.2007, reached the conclusion that AMC had abused its dominant position in the market by applying unfair tariffs during the years 2004 – 2005, and that it had therefore violated Art. 9 (1, 2) Letter 'a', of Law No. 9121, dated 28.07.2003.

Abuse of a dominant position is proven by tests and analyses that were performed on the economic activity of the plaintiff, AMC, and these are: i) the setting of high prices, without reasonable connection to the economic value of the product/use of the benchmark method, ii) providing trade benefits, which would not be provided in a presumed competitive market, iii) comparing tariffs with other geographic markets.

National call termination offers the same service as international call termination, but since this price is 2.5 to 4 times higher than the cost for the international one, it has nothing to do with the economic value of this service. The price of international termination was 11 ALL/min, while the price of national termination was 20 ALL/min, a price that, it transpires, is about 17 ALL above the cost of the termination service. The average termination price of the countries in the region, at the end

of 2004, was about 13 ALL/min, while the international termination price was 28 ALL/min, a price that was about 15 ALL above the cost of the termination service. It is worth noting that AMC and Vodafone have applied higher tariffs than in the countries in the region that have a level of Gross Domestic Product (GDP) and per capita income comparable to that of Albania (e.g., Macedonia). The comparative data are taken from the Cullen International Report (a comparative report by South East European countries on telecommunications services and other related aspects), which is funded by the European Commission.

The other test that proves the abuse of a dominant position is the obtaining of commercial benefits, which would not be obtained in a market that it is presumed is competitive. For this test, the high and increasing level of EBITDA rates and the profit of both companies are evaluated. In normal competitive markets profit rates are declining. The comparison of revenues between AMC and Vodafone shows that the respective revenue levels of the two operators are equally balanced..

The Competition Commission, in the absence of a detailed cost for services that should have been submitted by the AMC and Vodafone, which is used as one of the main methods for investigation (the Benchmark), the service fee for those services, or those that are similar in the region. From this analysis, it became apparent that both of the companies under investigation have applied higher tariffs than the countries in the region with a level of domestic product (GDP), and a per capita income that is comparable to that of Albania. The conclusion reached by the Competition Commission in regard to the application of high prices is the same as the conclusion reached in the Cullen Report, dated 26.06.2006, which states that: 'Albania represents an exception in terms of prices that place the country among the most high EU countries'. From this comparison, it can be seen that the tariffs for the mobile phone service in Albania, if compared to other geographical markets, are very high.

Comments

This decision was one of the first decisions in Albania, and served as a pioneering decision, not only in the other similar case: Vodafone vs Competition Commission, which also involved the abuse of a dominant position in the market, which was investigated by the Competition Commission in the same case, but also in other court cases of this nature that have since been reviewed. The Court and the litigant parties, in reasoning their positions, have referred to Articles 101 (the former Art. 81 of the EC Treaty) and 102 (the former Art. 82 of the EC Treaty) of the Treaty on the Functioning of the European Union, and the case law of the European Court of Justice.

This Decision was upheld by the Decision of the Administrative Court of Appeals of Tirana, No. 2076, dated 22.05.2018, and is pending for review in the High Court.

This Decision is also relevant, because, after the licensing of the other two mobile operators and the start of their operation in the market, they have already been bought by the two initial operators, and soon only these two operators will operate in the market: operators that, by this decision, have been found to have abused their dominant position in the market.

Trucks Cartel Follow-On Actions

Martin Vaessen, Amsterdam District Court

Truck cartel – follow-on proceedings for damages

By a Settlement Decision of 19th July, 2016, the European Commission ruled that various EU truck producers had infringed Article 101 TFEU and Article 53 EEA Agreement from 17th January, 1997, until 18th January, 2011, through collusive arrangements on: (1) pricing and gross price increases in the EEA for medium and heavy trucks, and (2) the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks, which is required by EURO 3 to 6 standards. The Commission imposed administrative fines of more than €2.5 billion in total.

In addition, the truck producers are liable for civil damages. In that context, several of these producers claim that vehicles have collected claims for damages, mainly from the buyers and lessees of trucks throughout the EU. have had claims enacted on the basis of a mandate.

It is not just one of the producers, DAF, that is based in the Netherlands, but also the holding company of the Fiat Chrysler concern. The proceedings in relation to these vehicles began in the Netherlands, not only against DAF and Fiat Chrysler, but also against the other producers, on the basis of Art. 8 (Para. 1) Regulation Brussels I Recast, claiming that all of them had participated in the same cartel and were therefore jointly and severally liable for the same unlawful act. Since Fiat Chrysler is located in Amsterdam, some of the proceedings were initiated before the Amsterdam District Court in 2017. In the same year, proceedings against DAF were initiated before the Den Bosch District Court. As a result of a proposal from the Amsterdam District Court, all the Dutch proceedings were joined in Amsterdam. The idea was that three specialist judges (one delegated by the Den Bosch Court, the other two being Amsterdam judges) would deal with all the follow-on claims with regard to the truck cartel that came before the Dutch courts. However, the initial idea to join the cases proved to be unworkable, due to the number of cases. As new cases kept coming in (they came from several major companies, such as Carlsberg and transport firms, also), the Court decided to create different batches of joined cases.

The first batch of cases dealt with the acquisition of about 200.000 trucks in proceedings between 24 claimants and 18 defendants (representing 6 producers). The trucks were acquired in various EU countries, both during and after the infringement period, which was between 17th January, 1997, and 18th January, 2011. During this period, several states joined the EU. One of the discussions between the parties relates to whether the trucks were acquired at a time that the various states had already joined the EU.

The claimants requested a Declaratory Judgment, in which the Court rules that the truck producers are liable for damages, not only because the cartel caused there to be higher prices for trucks, but also because the cartel arranged delays in the introduction of technical improvements that made the introduction of those technical improvements take much longer than would normally have been the case, and also meant that the trucks were less energy efficient. The claimants assert, in this regard, that they are also entitled to compensation for extra fuel costs.

Under Dutch procedural law it is possible to extend the discussion about the exact amount of damages to subsequent separate proceedings. In the present case, only the legal basis for the liability for damages of the truck producers is therefore disputed. Moreover, it should be noted that subsequent proceedings for damages are quite rare in the Netherlands. In most of the cases the parties come to an agreement with regard to the amount of the damages after the extent of the liability was decided upon in Court.

The proceedings until now

The first decision: 15 May 2019 (ECLI:NL:RBAMS:2019:3574)

The first defence of the truck producers was that the claimants had not sufficiently corroborated their assertion that they themselves had acquired claims from the various buyers, lessees, etc., throughout the EU, with regard to the trucks that were at stake. The producers also claimed that their defence was hindered because the submissions were too general. They wanted to know which exact acquisitions by former customers had been conveyed to the vehicles that were drawing the claims, in order to be able to assess whether this might have led to damages.

In that respect, the assertions in almost all the statements of claims in the different proceedings were, indeed, quite summary, mainly relying on very general notions and arguments. After a first hearing, the Court, in its first Decision of 15th May, 2019, decided that the claimants had to corroborate their claims within four months, and that they had to produce all the underlying documents with regard to the 200.000 separate claims. Although the claimants had argued that this would be a major piece of work, they all succeeded in producing the required documents, as digital files on USB-sticks, in time.

After this, the truck producers submitted their statements of defence. Following a proposal from the Court (one might also say a 'request'), the producers' advocates jointly produced one single document. This was quite remarkable, since about 30 lawyers from at least six major law firms were representing the various truck producers. Apparently, the lawyers had split up the work, and each of the law firms had prepared one section of the statement for the defence.

The second Decision: 12th May, 2021 (ECLI:NL:RBAMS:2021:2391)

In consultation with both parties, it was decided that the next step would be, inter alia, the discussion and a Decision on the defence that the cartel had not caused any damage. The truck producers asserted that the cartel had not had a price increasing effect, nor had it hampered technological innovations.

The truck producers claimed that the members of the cartel, mainly Chief Executive Officers, had only exchanged harmless general information at social meetings, and that it was impossible that this could have had any effect on prices, let alone that prices were fixed. According to the truck producers, the wording of the Settlement Decision of the Commission, in this respect, was too general to assume that the reproaches had caused damage. Moreover, the producers claimed that, because they had settled the case, the Commission's investigations had been limited. The scope of the Settlement Decision was thus in dispute.

Thereupon, the Court had to explain how it would take the Settlement Decision into account. It ruled - in short - that it had to respect the Decision of the Commission, as defined in the Settlement Decision. With reference to the Otis-Decision of the ECJ, the Court also assumed that the Settlement Decision, in its totality, was binding, and that in defining the scope of the dispositive, the observations of the Commission had to be taken into account.

Furthermore, the Court dealt, in this second Decision, with the question in regard to which kind of trucks the Settlement Decision applies to (e.g., not for used trucks or military vehicles), as well as the question about the geographical and temporal scope that the Settlement Decision had.

Still, the question was whether the cartel had caused no harm. After all, if the producers were correct, and that was the case, there would be no basis for a Declaratory Judgment that the truck producers were liable for damages. Hence, this would stop the case. The discussion was about whether the infringements as established by the Commission – mainly in relation to the existence of the regular exchange of gross list prices at the level of the Chief Executive Officers of the various producers – could have had any effect on the 'consumer' prices for trucks, or on technical innovations. The truck producers contested this. However, the claimants, produced an expert opinion from two

professors of price theory, which explained that information exchange at the top level of a company about gross list prices, can also lead to higher prices, even when nobody else in the company knows that there has been this exchange of information, and all the company employees think that they are acting in a fully competitive market. After all, when gross list prices are coordinated in such a way that every participant can apply higher prices at their own company, this - as a starting point - has consequences for the final pricing of the products of that company.

The truck producers did not contest this report with a counter report. They merely claimed that the Court could not use this report, because it had been drafted upon the request of a party. However, under Dutch procedural law, the judge is allowed to rely on such a report when it is not substantially contested, and when the judge considers the report to be convincing and conclusive. On this basis, the Court, with reference to the expert report as submitted by the claimants, rejected, in its decision of 12th May, 2021, the defence that it was not likely that the cartel had caused any damage. Hence, the proceedings continued.

The third Decision

After the second Decision, the Court asked the parties to submit written statements on the subject of the applicable law and in regard to the defence of the truck producers that the claims in relation to those vehicles in regard to which claims were being made, were inadmissible, because they had effectively lodged a collective action, but were acting in their own right on the basis of a mandate. The truck producers asserted that the case relating to the claims should have been lodged as a collective action. Furthermore, the truck producers claimed that, on the basis of the national law of several countries, the mandate contracts were invalid. Again, in a joint effort by the advocates, both (!) parties now each submitted one document. A hearing was held on 29th March, 2022, in which the advocates of both parties had divided between them the various subjects that the wanted to elaborate upon to the Court.

The Decision is pending, and it was expected at the end of this month (July, 2022). After this third Decision, the Court expects to be able to come to a final (fourth) Decision in 2024.

Personal observations

In these extended proceedings, strict case management has been necessary. Most of the advocates in these proceedings are experienced. They understand that, for all the parties involved, including the Court, the proceedings must be both manageable and feasible. However, the parties' interests conflict. Whereas the claimant, in general, wants a speedy decision, the defendant's tactic is often to delay. This requires lot of tactical skills from the judge. What helps, in my opinion, is 'give and take'.

For instance, normally, the Clerk of the Court (who is a fully trained lawyer) writes a Court Report of the hearing in a summary and objective style. The advocates appreciate a more extensive report, in which all their submissions and statements during the hearing are fully incorporated. They therefore wanted to engage a court reporter at their cost. The Court allowed this, and now the advocates have submitted a draft version of the Court Report, which, following the approval of the Court, becomes the official Court Report.

The Court also made it possible for the written statements, as well as the exhibits, to be submitted by electronic means, which not only saves a lot of paper, but also gives the advocates a little bit more space in the quite rigid Dutch procedural system, which is based on a role system with fixed days on which parties can submit documents.

Nevertheless, we, as a Court, were very happy that the advocates of both parties agreed to submit joint statements.

Moreover, this is quite cost efficient for both parties, who all have their own company lawyers, who know exactly how expensive these proceedings can become.

However, this leniency, in my opinion, does not apply to the Decision on the case. The problems caused by the fact that this cartel had possibly affected a lot of consumers/buyers/companies, etc., may be a problem for the lawyers due to the sheer volume of information, but this should not be a reason for a Court to be more lenient with the applicable rules. There was some reluctance to decide that the claimants had to submit all the documents with regard to thousands of cession and mandate contracts, but this has worked out well. Since the Court and both parties have received these documents, it is at least clear that at least a majority of the claims in relation to the vehicles for which claims are being made pretend to represent seem to be real claims. This makes it easier for the Court to decide upon the continuing requests from the defendants for more information. Often, the Court can refer to the documentation that was submitted by the claimants.

Nonetheless, these cases are time consuming. An extra problem for the judiciary is that judges on these cases, for a variety of different reasons, make career movements and leave the Court. It takes ages for a new judge to get a grasp on a case like this. In September, 2022, a first hearing in the second batch of cases was scheduled. In total, the Court has to deal with four batches of cases. The hope is that each batch will be easier to decide upon.

Finally, ow is the judiciary supposed to deal with the millions of claims for damages that, in the end, will have to be assessed on an individual basis? Especially since the passing-on defense generates a lot of questions that have not yet been answered. After all, the claimants in this case – who are the buyers of trucks – are, in general, commercial enterprises that, under normal economic circumstances, pass on all their costs, including the increased prices of the trucks they use.

Axel Walz, Regional Court Munich I

The Status Quo of Truck Cartel Damages Actions in Germany

Follow-on litigation regarding the European Commission's truck cartel Decision of 19th July, 2019 (case AT.39824– trucks), continues to keep competition divisions of German Courts busy. The variety of cases still pending with the Courts is broad. While there are cases of individual companies that have allegedly suffered financial harm by purchasing trucks from any of the truck cartel's member companies at anti-competitive prices, many of the complaints were submitted by claims vehicles in order to enforce claims assigned to them by various of the cartel's victims. The German Federal Court of Justice (FCJ) has, so far, rendered two landmark Decisions relating to the truck cartel. It is foreseeable, though, that more decisions will be forthcoming.

The FCJ's truck cartel Decisions

1. The Decision Truck Cartel I of 23rd September, 2020.

a. Binding effect of settlement decisions

In its first and fundamental Decision of 23rd September, 2020 (case no. KZR 35/19 = NJW 2021, 848), the FCJ confirmed the binding effect of European Commission Decisions in the field of EU competition law, irrespective of whether the decision was taken within standard proceedings, under Regulation 772/2004, or on the basis of settlement procedures pursuant to Art. 10a Regulation 772/2004, as amended by Regulation 622/2008.

b. Scope of the binding effect of European Commission Decisions

As regards its scope of these Decisions, the binding effect, as such, extends to all factual and legal findings on the basis of which the European Commission assumes a violation of competition law. Courts are, however, not bound by any of the further considerations that may be included in such Decisions. Questions relating to the causality of damages, as well as to the amount of damages, are not binding either.

c. Allocation of the burden of demonstration and proof

The FCJ has set out clear guidelines as to the burden of demonstration and proof that is to be complied with by cartel victims in follow-on damages actions. Generally, Courts can only rely upon facts in a case in which those facts are disputed by the respective other party in dispute – of which they are fully convinced (Sec. 286 of the German Code of Civil Procedure). However, the question as to whether, and to what extent, damages were caused by truck purchases from any of the truck cartel members, is subject to the Courts' free assessment of evidence, under Sec. 287 of the German Code of Civil Procedure, according to which a Court shall rule on the causation and quantification of damages at its discretion and conviction, based on its evaluation of all of the circumstances of the relevant case.

Consequently, different legal standards apply with respect to the evidence required to demonstrate the liability, on the one hand, and the question as to whether, and to what extent, damages were caused by the cartel, on the other:

Regarding the question of liability ("Haftungsgrund"), evidence must be provided that fully convinces the Court of the facts submitted by the parties to the dispute. Firstly, facts relating to the cause of damages claims in truck cartel damages actions include the infringement of Art. 101 TFEU. The cartel victim can, in this regard, however, and as already explained, rely on the binding Commission Decision. In addition, the anti-competitive behaviour – caused by the sale of cartelized products – in which the defendant has engaged - must be able to, directly or indirectly, cause damage to the cartel's victim. This precondition is fulfilled if the cartel victim can demonstrate and prove the

purchase of products that were subject to the cartel agreement, as established in the Commission's Decision.

Regarding the question as to whether, and to what extent, damages were caused by a cartel, it is sufficient that a claimant provides evidence convincing the Court that there is a clearly predominant probability according to which damage has occurred that is to the detriment of the cartel victim. A corresponding predominant probability can, according to the FCJ, only be assumed if the Court can rely on sufficiently assured facts. In relation to the truck cartel, the FCJ, in this regard, notably stated that the relevant anti-competitive behaviour of the truck manufacturers concerned is not limited to a mere exchange of information, but that, rather, the cartel participants discussed future list prices and their increases with one another and coordinated their future pricing, both through agreements and through coordinated behaviour, even to the extent that the relevant price-setting behaviour did not amount to express agreements, the cartel members involved faced price competition to a much lesser extent and, accordingly, this creates less leeway to reduce prices. For this reason, the FCJ accepted that, based on economic experience, the formation and implementation of a cartel regularly leads to additional revenue for the companies involved. However, at the same time, the FCJ points out that cartel participants shall not be obliged to provide evidence that, in actuality, there was no damage caused by the cartel. The factual presumption that cartel members usually generate additional revenue, if compared to the counterfactual scenario shall, therefore, not amount to a reversal of the burden of proof. The Courts shall rather be obliged to consider all of the relevant circumstances of the case at hand, for which any of the parties in dispute have offered evidence, including eventual economic expert opinions.

2. The Decision Truck Cartel II of 13th April, 2021.

In its second Decision of 13th April, 2021 (Case no. KZR 19/20 = EuZW 2021, 988), the FCJ further specified its aforementioned approach in relation to truck cartel damages cases.

a. Inclusion of indirect truck purchases

As to the occurrence of cartel damages claims, the FCJ held that the causality of anti-competitive cartel activities is not interrupted in cases where trucks were sold by independent truck dealers. According to the FCJ, independent truck dealers do not form a uniform separate market level. Rather, they are integrated into the sales and distribution structure of the truck manufacturers, some of whom sell their products, directly or indirectly, via dependent dealers. This decision is remarkable, insofar as truck manufacturers are also liable for any damages caused by indirect purchases via independent truck dealers.

b. Overall assessment of all indications relied upon by the parties

Regarding the extent of damages claims, the FCJ confirmed that Courts must take into consideration every circumstance of indicative importance both for or against the possible price effects of the cartel, provided that such circumstance has been established or proven by the party invoking it. This may, inter alia, include expert opinions that are submitted by any of the parties.

c. Restrictive application of the passing-on defence

Further, the FCJ points out that the passing-on defence shall be applied rather restrictively, and it can even be completely excluded for normative considerations. In particular, a relevant passing-on of cartel damages to the customers of direct cartel victims shall not come into consideration, simply because the primary victim, like any company, typically has an interest in aligning its price with the production costs and of selling its goods or providing its services at a profit. A detailed analysis of the circumstances of each case, therefore, is required. The primary burden of demonstration and proof lies with the cartel members in this regard. The cartel participant must, therefore, plausibly argue that passing on the overcharge caused by the cartel is at least very likely, considering the general market

conditions on each of the relevant sales markets of the relevant cartel victims concerned, including the elasticity of demand, price developments and product characteristics.

d. Statute of limitation

Finally, the FCJ confirmed that the limitation period in the case at hand had not yet expired. An important general finding in this regard relates to the legal principle under Sec. 33, Para. 5 of the German Act against Restraints of Competition, as in force in the year 2005. According to this, limitation periods are suspended if a competition authority takes action for the purpose of conducting an investigation or proceedings concerning an infringement, in particular of Art. 101 TFEU. The FCJ applied a rather broad interpretation and held that taking action in this regard does not require the initiation of formal proceedings, but only requires official measures to be taken against a company that are clearly aimed at investigating the company on suspicion of anti-competitive behaviour.

II. Current approaches by German Courts of First Instance

Most of the damage claims relating to the European Commission's truck cartel decision are still pending. Two decisions will be briefly explained in the following:

1. Decision of the Regional Court of Stuttgart of 7th February, 2022.

In a recent decision of 7th February, 2022, the Regional Court of Stuttgart ruled that a cartel overcharge is not sufficiently likely regarding these truck cartel activities (Case no. 53 O 275/21 = NZKart 2022, 160).

However, it appears to be doubtful whether that decision will be upheld on Appeal, as the Judgment is, in particular, based on the consideration that a cartel overcharge caused by the information exchanges between the participating truck manufacturers requires a sufficient transparency of the relevant market, and that further deterrent mechanisms must be in place to ensure that cartel members are sanctioned in the case of non-compliance with the concerted behaviour. This consideration is unlikely to be upheld by the competent Appellate Court, as the Commission expressly stated in Rec. 29 of its decision of 19th July, 2016, that "the truck sector is characterised by a high degree of transparency". In addition, by exchanging information on truck configurators, the cartel members intended to further increase the level of transparency to thereby eliminate the remaining uncertainties as to the market behaviour of competing truck manufacturers.

Moreover, it appears that the Regional Court of Stuttgart's reading of the FCJ's truck cartel decision of 23rd September, 2020, is hardly in line with what the FCJ intended to express in its decision. According to the Regional Court of Stuttgart, the FCJ, in Rec. 49 of its decision of 23rd September, 2020, inferred from the findings of the European Commission that this was no more than an at least possible, fluctuating and barely quantifiable influence of price lists and list price increases on the achievable market prices. Looking at Rec. 41 et seqq., however, the FCJ concluded that it can be assumed that the coordination of list prices was relevant from the competition point of view and that the truck cartel yielded a price effect. In Rec. 49, the FCJ stated, rather, that price lists and list price increases may influence achievable market prices, even if they are fluctuating and difficult to quantify. The factual assumption of a price effect arising from the agreements in the case at dispute was, according to the FCJ, not ruled out by the economic studies referred to by the cartel members.

2. Decision of the Regional Court of Munich I of 19th February, 2021.

In its decision of 19th February, 2021 (Case no. 37 O 10526/17 = NZKart 2021, 245), the Regional Court of Munich I accepted international jurisdiction for damages claims brought against manufacturers based in Germany, and also in cases where Spanish companies acquired cartelized trucks from Spanish dealers during the cartel period. The Court stated, though, that German substantive law is applicable in this regard.

On the merits of the case, the Regional Court of Munich I took the view that, in contrast to a decision of the Regional Court of Dortmund of 30th September, 2020 (Case no. 8 O 115/14 = NZKart 2020, 612) relating to the German Federal Cartel Office's Decision of 18th July, 2013, against a cartel of rail suppliers, damages – at least in the case at issue – cannot be freely estimated by the Court but shall only be quantified on the basis of an independent expert opinion. According to the Court, in view of the complex economic circumstances and developments involved, an expert report is essential in order that it can be referred to as an adequately reliable basis for the judicial assessment of damages, in order to determine the counterfactual price level that would have applied in a non-cartelized market. As the required application to appoint an economic expert was not submitted by the claimant in that case, the Court ultimately had to dismiss the claim. In more than 50 other cases that are pending with the Regional Court of Munich I, the Court has, however, appointed experts and is currently awaiting the receipt of the respective expert reports.

3. Outlook

A crucial next step in the German truck cartel litigation cases will eventually be reached when the expert reports commissioned by the Regional Court of Munich I become available. Irrespectively, and in view of the variety of complex and controversial issues to be decided, it can be assumed that further decisions of the FCJ will become necessary in order to provide for the legal certainty required by the parties that are in dispute. The truck cartel saga will, therefore, probably not come to an end too quickly. It can be expected, however, that many of the legal questions discussed herein will be significantly less problematic in future follow-on damages actions. The reason, in this regard, is that, with effect from 1st July, 2005, cartel victims can rely upon Sec. 33 Para. 4 (now: Sec. 33a, Para. 2) of the German Act Against Restraints of Competition, according to which there is a rebuttable presumption that a cartel results in harm. The quantification of damages will, however, continue to be a controversial issue that will ultimately need to be decided upon by the competent Courts.

Anne-Marie Witters, Belgium Market Court

A brief summary of the facts of the dispute.

On April 22nd, 2022. the Ghent Court of Enterprises (previously the Commercial Court) rendered a Judgment in a cartel follow-on damages case concerning trucks, providing various substantive decisions about a claim for damages that was brought against DAF (Decision available in Dutch, with the following number: A/18/02226).

This case follows a settlement decision adopted by the European Commission in 2016, describing, in short, collusion by truck manufactures on truck pricing and on passing on the costs of compliance with stricter emission rules. According to the settlement decision, those practices constituted an infringement of EU Competition Law (Article 101 TFEU).

On 19th July, 2016, the European Commission had indeed published details of a fine of €2.93 billion that it had imposed on the cartel of truck manufacturers (MAN, Volvo/Renault, Daimler, Iveco and DAF). The cartel lasted from 1997 to 2011. The manufacturers fined at that time had settled the case with the Commission. Scania, however, denied the charge and refused to settle, but was later found guilty of the infringement and fined €880 million on 27th September, 2017. This decision was confirmed by the General Court on 2nd February, 2022.

The claimant in the case leading to the Ghent Court's Judgment of April 22nd, 2022, alleges that it had suffered harm as a result of that infringement.

The claimant is AJ Veurinck BV, a Belgian transportation company that has bought and leased DAF trucks since 1990. Veurinck does not acquire the trucks directly from DAF, but from a third company, i.e., an independent dealer, NV Turbotrucks, in Courtrai. This third company was not implicated in the proceedings.

Besides the manufacturer, DAF Trucks NV (a Dutch company), the claimant also sued Paccar Financial Holdings Europe BV (PFHE), a Dutch company from the DAF group dealing mainly with intra-group financing. PFHE was not named in the settlement decision, its parent company, Pacar Inc., was mentioned by name.

The claimant states that it purchased - within the time frame of the 17th January, 1997, tol 18th January, 2011, 54 trucks for a total amount of €4,095,334.81, and asks for compensation of €1,030,000.54, with interest and costs. The claimant claims to have calculated the compensation in the same manner as the Court in Toledo, Spain, in another case pertaining to the same cartel. It estimated its damages at 25.17% of the net-acquisition value of the trucks.

DAF contested the entire claim and states that there is no evidence of actual harm.

2) Summary of the judicial proceedings.

Veurinck sent a formal notice to DAF and PFHE on 16th October, 2017. It did not receive any reply.

It started the court case on 21st August, 2018. In an intermediary decision, the Court decided that it had the required jurisdiction to deal with this case, since it was a tort case and thus the applicable law was Belgian law. Oral pleadings took place on 18th February, 2022.

3) The ruling of the Court.

In the present case, the judge ruled:

- No liability can be derived solely from the fact that DAF never reacted to the written notice from the claimant;

- That the decision from the EU Commission of 19th July, 2016, is binding and determines that, for DAF, the infringements took place between 17th January, 1997, until 18th January, 2011.
- That the parent company could be held liable for the actions of the subsidiary company. The judge refers to the Sumal decision from the Court of Justice C-882/19, and holds that the following paragraphs are relevant in the light of Considerations 45 and 47 :

  51 Consequently, in circumstances where the existence of an infringement of Article 101(1) TFEU has been established as regards the parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company, rather than that of the parent company, in accordance with the case-law cited in Paragraph 42 of this judgment. The liability of that subsidiary cannot however be invoked unless the victim proves – whether by relying on a decision adopted earlier by the Commission under Article 101 TFEU or by any other means, in particular where the Commission has remained silent on the point in that decision or has not yet been called upon to adopt a decision – that, having regard, first, to the economic, organisational and legal links referred to in Paragraphs 43 and 47 of the present judgment and, second, to the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible, that subsidiary, together with its parent company, constituted an economic unit.

  52 It follows from the foregoing considerations that such an action for damages brought against a subsidiary presupposes that the claimant must prove, in order for it to be found that the parent company and the subsidiary form an economic unit within the meaning of Paras. 41 and 46 of this judgment, the links uniting those companies referred to in the preceding paragraph, as well as the specific link, referred to in the same paragraph, between the economic activity of that subsidiary company and the subject matter of the infringement for which the parent company has been held responsible. Thus, in circumstances such as those at issue in the main proceedings, the victim should in principle establish that the anticompetitive agreement concluded by the parent company, for which it has been punished, concerns the same products as those marketed by the subsidiary. In so doing, the victim shows that it is precisely the economic unit of which the subsidiary, together with its parent company, forms part that constitutes the undertaking which actually committed the infringement found earlier by the Commission pursuant to Article 101(1) TFEU, in accordance with the functional interpretation of the concept of ‘undertaking’ identified in paragraph 46 of this judgment.

The judge decided that the claimant can validly claim against DAF Trucks NV and against PFHE, two Dutch companies from the DAF group who form an economic unit.

- **As to the existence of the damage** The defendants argue that the Decision of the Commission does not prove the existence of any damage. They produce a unilateral expert report from Compass Lexecon which establishes that the infringing information exchange between cartelists on gross list prices did not have any effect on the actual retail sales prices. The claimant relies on the presumption of harm stemming from the Damages Directive and the national law implementing it in Belgium. The judge ruled that the presumption cannot be applied in this case, because the infringement ended in 2011 (i.e., before the adoption of the Damages Directive in Belgium, which occurred on 26th December. 2014). Referring to the principle of effectiveness and to the case law of the ECJ, the judge requires proof (according to Article 1382 of the former Belgian civil code of fault, damage and causal link).

- **As to the value of the Commission Decision of 19th July, 2016, it establishes the existence of the infringement (fault)**, according to the judge: Veurinck also correctly refers to the following considerations made by the Commission in its Decision C(2016)4673: 51-71-75-47-49-53-54-55-56-81-27-28-29-30, and the judge states that it is highly unlikely that these facts did not cause harm to the claimant. The judge refers to: i) the long duration of the infringement, and ii) to a decision from the Court in Amsterdam, referring to an expert report from Harrington & Schinkel stating that there is a link between the exchanges between cartelists of gross (recommended) list prices and the increase in the actual retail sales prices that are paid by buyers, such as the claimant. The Court is not convinced by the expert report submitted by the defendants because it deviates from the clear considerations made by the Commission.

- **The existence of harm/the damage** is demonstrated, according to the judge, by a) the Commission decision, and b) by other indications, such as the report from Harrington & Schinkel, c) the Oxera Report, from 2009 (stating that there is an overcharge in 93% of the cartel cases).

- **Estimation of the damages**: the Court decides that no precise damage can be proven. The Court rejected the appointment of an expert, and proceeded with an ex aequo et bono estimation of the damages, referring to Spanish case law obtained from the site www.poderjudicial.es. While estimating the damages, the judge took account for a **7.5% overcharge**. In this concrete case, the judge ruled that account must be taken of trucks that are acquired and of trucks that are leased. Vleurinck produced a list of 54 trucks, and the defendants – according to the judge - did not produce any relevant documents at all. The prices proven by the claimant are therefore accepted as being relevant by the judge. The total acquisition price proven by the claimant amounts to €4,095,334.81. Taking into account a percentage of 7.5%, the damage suffered by the claimant is estimated to amount to €307,150.11 to be increased with interest fixed at €30,000 until 11th January, 2011, and thereafter with legal interest. The defendants were ordered to pay the costs of the proceedings.

- **No Appeal was lodged against this Decision.**

4) My personal comment.

(a) There is only limited success in relation to collective actions and follow-on damage claims in the Belgian Courts: Belgium is, for a number of reasons, not a preferred venue for follow-on damage claims in the Courts, as opposed to the situation in the Netherlands and Germany.

(b) This Decision raises the following issues:

- The burden and the standard of proof and the effect of the presumption of harm;

- The use of the underlying Decision of the European Commission, and the effect of its binding nature (since it was a Settlement Decision): is the petitum binding, or are all the considerations binding?

- The evidence of the purchase or rental (date of the transaction, price, leasing or rental conditions?);

- The management of the evidence by the judge and the interaction of the Damages Directive, its transposition and national procedural rules.

(c) CDC and others are active in the area of claims acquisition and data collection CDC (Cartel Damage Claims operate throughout Europe, with offices in Belgium, France, Luxembourg and Germany), purchased and bundled the claims of a large number of companies that claimed to have been damaged by the trucks cartel. This collective approach has enabled a significantly more robust damage analysis, if compared to an analysis that is based on data from a single company, such as Veurinck. The bundling of claims into a single action also creates considerable synergies in the recovery process. CDC is attempting several out-of-court settlements in this

area. However, these cases are far more complex to manage when they move to litigation, as experience in the Netherlands and Germany shows.

(d) Economic analysis of cartel damages is still a difficult exercise The selected Judgment establishes how parties and courts still struggle with damages in this area. Whether the appointment of an expert would have simplified matters remains to be seen: credible experts in this area are rare and expensive, various experts in a case require strict control by the judge (thus avoiding the so-called ‘battle of the experts’).

(d) This Judgment is relevant because it refers extensively to the Case Law of the ECJ, to the Decision taken by the European Commission in relation to the cartel, and to several Decisions from national jurisdictions (mainly in Spain and the Netherlands).

Abuse of Dominance between Public and Private Enforcement

Iannis Symplis, Greek Council of State

Council of State Judgment 1410/2022 (Procter & Gamble Hellas Ltd v. Competition Commission)

A mixed bundling case – a rarity in itself – was the Council of State's first opportunity to pronounce on Article 102, the 'as efficient competitor' test, and the effects based approach, after Intel. Significantly, Intel is not even cited in the Judgment; neither, for that matter, was Servizio Elettrico Nazionale, despite being CJEU's most recent Judgment. By contrast, as we will see, the Court took the entirely extraordinary (and out-of-character) step of citing doctrine.

The facts of the case are simple. P&G is a conglomerate, active mainly in the markets for laundry, cleaning, cosmetics, and personal care products; most of its range are "must stock brands". In the market for baby napkins it enjoys a dominant position, with a market share in the range of 55-65%. P&G offered retailers a retroactive rebate for their total purchases, conditional upon meeting a performance target set by reference to their turnover during the same semester of the previous year – a typical retroactive target bundle discount..During the first years of the operation of the scheme, the targets were set individually for each retailer, but later a uniform sliding scale was established.[33] A divided Competition Commission concluded (by majority) that those two conditions constituted an abuse of P&G's dominance in the market for baby napkins. A minority of two Commissioners were of the opinion that the likelihood of an exclusionary effect must be demonstrated in concreto. With respect to the quantitative targets, it must, in particular be shown "to the requisite standard" that there is either a likelihood of exclusion at the level of the bundle, or that there is an increase in the sales of the dominant product which is attributable to the competitors' inability to meet the portion of the rebate which corresponds to these sales – a rather strict (particularly in terms of the causal nexus requirements) version of the as efficient competitor test. These are the issues that eventually reached the Council of State en cassation, after P&G's recours de pleine jurisdiction was dismissed by the Court of Appeal.

The main argument put forward before the Council of State was that Article 102 TFEU, and its national equivalent provision, should be interpreted in the sense that an abuse of dominance exists only when it can be demonstrated that a particular rebate scheme shall "in all likelihood"[34] cause, under the particular circumstances of the case, the exclusion of an equally efficient competitor; and that the Court of Appeal had failed to take proper account of several arguments that such an effect was unlikely. The first argument was that a suction effect was unlikely, since the target increase in turnover could be achieved without increasing purchases of the dominant product, which represented only 20% of the bundle. The second argument was that the Court had failed to take properly into account an expert report, presented by the defendant to the NCA, according to which the accused scheme operated, in practice, as a linear rebate. The third argument was that the appellant's competitors could, and did, offer higher discount rates, and therefore it was unlikely that an equally efficient competitor would be excluded from the market; the absolute size of the rebate was therefore irrelevant from that point of view.

Conceivably, the case could have been decided on narrow grounds; all the appellant's pleas could have been interpreted as taking issue exclusively with the sufficiency and adequacy of the reasoning of the Court of Appeal, which, after the reforms introduced by Act 3900/2010 is no longer a ground for cassation. Instead, the Council of State took the opportunity to spell out the constitutional and

33 An additional condition for the rebate was that the retailer should reserve shelf space for the products ofP&G that was at least equal to the market share of each product. In the case of baby napkins, the formal target was 60%, but the informal one was in the area of 65-75%. The Court of Appeals agreed with the Competition Commission that, on the facts, because of the essential characteristics of the products (bulk, variety of non-substitutable sizes) the space left to the competitors was insufficient to carry a full range, and therefore *Van den Bergh Foods Ltd (T-65/98)* applied. This part of the Decision is of marginal interest.

34 [English in the original]

methodological foundations of competition law, in particular, with respect to the abuse of dominance.

The Council of State began its analysis with a reminder of the origins and implications of the established definition of dominance, which has not been challenged even by proponents of the so-called "effects based" or "more economic" approach: Dominance is the ability to form business plans without taking into account the reactions of others. This definition is derived directly from the writings of Walter Eucken and Franz Boehm and, to underscore the point, the Court complemented the citations of the relevant case law with a direct reference to F. Böhm's, Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung (1933), and W. Eucken's Die Grundlagen der Nationalökonomie (1950). If dominance is so defined, then the Court must focus on the dynamics of the relationship between economic actors and not merely on their observable effects on quantity and price. Economic analysis, to be meaningful, may therefore not be limited to neoclassical (or rather the "new classical") microeconomic price theory.

This reminder is followed by an exposition of the constitutional foundations of Competition Law. Under Art. 5 Para. 1 of the Constitution (a provision directly derived from Art. 2 Para. 1 of the German Grundgesetz), economic freedom is protected as an aspect of every person's general right to the free development of his personality "and participation in the social, economic, and political life of the Country", free insofar as he does not violate the rights of others or offend against the constitutional order or "χρηστά ήθη (guten Sitten, bonnes moeurs)"[35], a term which, in this constitutional context, does not refer so much to a general notion of "accepted principles of morality", or "public decency", nor to "good faith and fair dealing practices" but, rather, to a general notion of fairness. This provision has a number of implications for competition law. First, if the Constitution guarantees an individual right to free and equal access and participation in economic life, then the goal of competition law must be to protect that right, and not to promote economic efficiency. Second, the use by an undertaking of its economic power as a springboard to further its economic interests infringes that fundamental right and, therefore, constitutes anti-competitive harm by and in itself, without a need to demonstrate a reduction in total or consumer welfare. In that respect, the Court quotes, with approval, Douglas J.'s dictum in United States v. Borden Company, (370 U.S. 460 (1962), at 476) "Free enterprise is not free when monopoly power is used to breed more monopoly". Third, from that point of view, a dominant firm's so-called "special position of responsibility" consists in an absolute prohibition, not only to adopt practices that would not be open, meaningfully profitable, efficient, or rational, for a small firm to adopt (particularly in view of the concomitant risks), but also in an absolute prohibition from adopting any practice that would be permitted to non-dominant firms, if the impact of that practice is negligible when adopted by a small firm, but appreciable, when adopted by a dominant firm. And, fourth, that it is sufficient to demonstrate the existence of endangerment in abstracto, in accordance with the precautionary principle. Last, but not least, the implication of the absolute prohibition of negative externalities is that efficiency gains are not to be taken into account, unless the undertakings concerned (and this applies equally to agreements and abuse of dominance) demonstrate that all the requirements of Article 101 Para. 3 are met. This last point, again, comes with several caveats: First, the "consumer" of Para. 3 is the final consumer, i.e., society at large, not the "consumer" in the microeconomic sense.Second, it is only at this stage that there is a limited scope to examine the impact of the practice on efficient competitors. However, the dominant firm must fully demonstrate that competitors do exist and that there is no risk of the foreclosure of a competitor who is either as efficient as itself, or less efficient but still reasonably efficient (after taking due account of growth and learning curves and other barriers). Potential competitors may be taken into account only if there is a credible threat of the emergence of efficient competitors. A danger of foreclosure always exists if such competitors do not have reasonable prospects of growth or sufficient profitability. The Competition Authority is free to reject the dominant firm's arguments either as being economically unsound, or because, as a matter of competition policy, it considers

35 Emphasis on the (minor) differences between the Greek and German text. The term χρηστά ήθη was introduced due to objections to the term "moral law", which was adopted by the *Grundgesetz*., because of itsnatural law and traditionalist overtones.

any existing or additional competition on the margin necessary in order to discipline the dominant firm. And its economic assessments on these issues are subject only to marginal review, because they mainly raise questions of policy, and not questions of fact. Moreover, the so called “as efficient competitor” test is not relevant in that respect. Specifically, in the case of rebates, anti-competitive foreclosure exists if the competitor has to sacrifice an appreciably higher part of his profits, compared to the sacrifice the dominant firm must make. The Competition Authority needs only to consider the difference between the average effective discount offered by the dominant firm and the marginal discount rate that its competitors have to offer.

Turning to the issue of anti-competitive rebates, the Court adds several glosses and nuances to the Post Danmark II test. In a wording that deliberately echoes Locke’s Second Treatise on Government (V. 33-34, 36), it begins with the reminder that, in the case of exclusivity rebates, the anti-competitive harm consists precisely in making private to the dominant firm something that, as a matter of constitutional principle, should be open to all, namely, access to the relevant part of the market, which may not be treated by firms as their private property; Swedish Match AB C-210/03, p.73 is cited to that effect. Next, the Court goes on to remind, that, as established in C-234/89, Delimitis, p.14, the only relevant consideration in that respect is the cumulative impact of exclusivity agreements; there is no need to demonstrate that they form a single plan (the Court’s disagreement on this point with AG Wahl’s opinion in Intel, which was followed by the General Court in renvoi, is obliquely indicated by not citing either). The third point made by the Court is that both target and retroactive fidelity rebates are functionally equivalent to exclusivity rebates; the former because of their long-run dynamic, the latter because, by design, they raise rivals’ costs. The last point made by the Court, is that the analysis of “all relevant circumstances” mentioned in Post Danmark is nothing other than an analysis of the implications of the qualitative aspects of the market power of the dominant firm, in view of the structure of the relevant market. As for bundle rebates, the only difference between them and single product rebates is that conglomerate and portfolio effects operate as power multipliers, the market share threshold for dominance may be lower, and the likelihood of effective competition must be examined at the level of the bunch.

It should be mentioned that, reading between the lines of the Judgment, its most significant aspect is that the term “effects” is used only once, to confirm that abuses can be either by object or by effect. Otherwise, the Judgment makes use only of the terms “impact”, “function”, “operation”, “dynamic” and suchlike. The Court could, in fact, have expanded the criteria it had developed in an earlier case[36] on the distinction between object and effect in the context of Article 101, to also cover the abuse of dominance. In that case, it had taken the view that the distinction between object and effect is essentially a distinction between structure and circumstance (conjoncture). What it did instead, was to eschew altogether the object/effect terminology and to replace it with a distinction between endangerment in abstracto and endangerment in concreto. The former is established on the basis of purely structural analysis (of both the relevant practice and the relevant market). Admittedly, the somewhat paradoxical outcome of this approach is that predation and margin squeeze would qualify as infringements in concreto, insofar as the cost structure of the dominant firm depends on the circumstances of the case.

36 (Council of State, 166/2018,”ΔΗΜΟΣΙΑ ΕΠΙΧΕΙΡΗΣΗ ΗΛΕΚΤΡΙΣΜΟΥ” (Δ.Ε.Η. Α.Ε.) v.”ELPEDISON ΠΑΡΑΓΩΓΗ ΗΛΕΚΤΡΙΚΗΣ ΕΝΕΡΓΕΙΑΣ Α.Ε.”, πρώην “ΕΝΕΡΓΕΙΑΚΗ ΘΕΣΣΑΛΟΝΙΚΗΣ ΑΝΩΝΥΜΗ ΕΤΑΙΡΕΙΑ”, with the Competition Commission participating as amicus curiae)

Jelena Čuveljak, Croatian High Commercial Court

Case No.: High Commercial Court Republic of Croatia Pž-5541/2016-2, December 9h. 2019.

Case: The Claimant ZOLA d.o.o. Zagreb vs. the Defendant Croatian Composer's Society – Collecting Society)

Appeal against the Judgment, Commercial Court Zagreb P-2883/2010-45, June 3rd, 2016.

Facts of the Case

The Croatian Competition Agency (hereinafter: CCA) decided that HDS-ZAMP (Croatian Composer's Society – Collecting Society) have been abusing their dominant position in collecting in the private copying levy market covering the territory of the Republic of Croatia. According to the provisions of the Copyright and Related Rights Act HDS – ZAMP has a monopoly in the collecting of the private copying levy in the Republic of Croatia. The CCA, by its decision of 3rd November, 2009 (UP/I 030-02/2008-01/41), established that the undertaking HDS-ZAMP had abused its dominant position in the relevant market forcollecting in the private copying levy market covering the territory of the Republic of Croatia, in the following manner. On 12th January, 2007, HDS-ZAMP and HGK (Croatian Chamber of Commerce) concluded an Agreement on the principles and conditions for the collection of the private copying levy, which set the framework for the rebates approved by HDS-ZAMP. The rebate is based on two grounds: for timely payment of the levy and for pooling into associations in order to simplify the implementation of the collection of the private copying levy and ensuring the transparency of that process.

Based on the abovementioned Agreement, HDS-ZAMP set the model for rebates based on 2 grounds. The amount of rebate for timely payment was 15%, and the rebate for pooling into associations was set in the amounts of 15%, 25% and 35%, based on the total amount of the levy that undertakings – members of associations were obliged to pay on a yearly basis. CCA established beyond any doubt that the rebates based on pooling into associations were set so high that only the members of one association were able to fulfil the criteria for the association rebate, and to accumulate both rebates into a 50% discount, while members of other associations, as well as other levy payers – non-members of any association -- were eligible only for a 15% rebate, based on timely payment. In addition to that, the CCA determined that rebates for pooling into associations were not objectively justified and did not simplify the implementation of the collection of the private copying levy, because the levy payers are undertakings - importers of the computers, CDs, DVDs and other IT equipment that is subject to the payment of the levy. According to the Law, they are obliged to provide all the necessary information to HDS-ZAMP, and they are held responsible for the data provided, and they are obliged to pay the levy. Associations do not have any role in that process. Therefore, in its Decision, the CCA established that HDS-ZAMP, from 1st January, 2006, onwards, had abused its dominant position by charging different rebates to levy payers through the application of dissimilar conditions for equivalent transactions, which are not objectively justified, then ordered the cessation of such abusive practice by the HDS-ZAMP, and prohibited any further activities by the undertaking in question, which may prevent, restrict or distort competition through the abuse of a dominant position, and ordered HDS-ZAMP to collect the private copying levy under equal conditions for all levy payers from receipt of CCA's decision, then ordered HDS-ZAMP to submit the proof to CCA (invoices for the next payment period) that will show compliance with the request and ordered the HDS-ZAMP to publish the Pricelist and Rebates Policy on its website within 30 days, starting from the receipt of the CCA's decision.

After the decision, HDS-ZAMP retroactively granted the maximum discount to all users and refunded the copying levy to those users who were not members of any association.

Court of the First Instance

In 2010, the plaintiff, Zola d.o.o., filed a lawsuit with the competent Commercial Court in Zagreb, in which it states that it is a company that is engaged in the import and sale of electronic and IT products, and that the defendant had abused its dominant position in the market as a result of which it suffered damage and so claims for loss of profit in the period from 2007 to 2009, in the amount of HRK 195,041.43 and HRK 80,000.00, for violation of the personality right.

During the proceedings before the Court of First Instance, an expert opinion was conducted by a Court expert for finance and bookkeeping. From the findings and the opinion, it follows that the plaintiff, in the period from 2006 to 2009, achieved a difference in price on products that were subject to the ZAMP copying levy, which was, on average between 42% - 49%, and, at the same time, the invoiced fee from the defendant was 0.33% to 6.83% of the realized turnover on items that are subject to the ZAMP copying levy. The expert opinion is therefore that the amount of the fees paid by the plaintiff for the turnover on products that are subject to the ZAMP copying levy is not the only and exclusive reason for the decrease in the plaintiff's turnover on products that are subject to the ZAMP copying levy, because the plaintiff realized an average price difference of 42% to 49%, and, at the same time, paid a levy of 0.33% - 6.83%. To survive in the market and keep turnover at the level of previous years, s/he could, among other things, reduce its price difference in order to be competitive in the market. Furthermore, the total turnover of the plaintiffs on items that were subject to the ZAMP copying levy in 2007 amounted to HRK321,442.49, and they were invoiced by the defendant based on fees is HRK1,062.93, which represents 0.33% of the total turnover of plaintiff's which is subject to the ZAMP copying levy. In 2008, the total turnover of the plaintiffs on items that were subject to ZAMP amounted to HRK184,925.56, and they were invoiced by the defendant based on the levy, which amounted to HRK12,639.63, which represents 6.83% of the total turnover of the plaintiffs on products that are subject to the ZAMP levy, while the total turnover of the plaintiff on items that were subject to the ZAMP levy in 2009 amounted to HRK20,151.29, invoiced by the defendant based on the levy it was HRK163.17, which represents 0.81% of the total turnover of the plaintiff on products that are subject to the ZAMP levy. Therefore, the Court of the First Instance found that the fact that the increase in compensation that the company had to pay to the defendant ranged from 0.33% to 6.83%, while the average realized the difference in price was from 43% to 49%, and therefore increased payment of compensation to the defendant cannot be the sole and exclusive reason for the decline in the plaintiff's turnover. Accordingly, the Court found that there was no causal link between the harmful action or illegal conduct of the defendant that is caused by introducing a copying levy that was unequal for all market participants in 2007, and which was determined by a final Decision of the CCA and damages.

However, the Court adopted the part of the claim that was related to the claim for compensation for non-material damage due to the violation of the personality rights. Art. 19. of the Civil Obligations Act (hereinafter: COA), prescribes: every natural or legal entity is entitled to protection of its personality rights under the conditions provided by law. Within the meaning of this law, personality rights are understood to be the right to life, to physical and mental health, reputation, honour, dignity, name, privacy of personal and family life, freedom, and other. A legal entity has all the stated personality rights, other than the rights related to the biological character of a natural person, in particular the right to reputation and a good name, honour, name or firm name, business secrecy, freedom to conduct business, and other. Based on Art. 1046. COA: 'damage' shall imply a loss of a person's assets (pure economic loss), the halting of assets' increase (loss of profit) and the violation of privacy rights (non-material damage). The provision of Art. 1100 COA stipulates that, in the event of the violation of personality rights, the Court shall, where if finds that this is justified by the seriousness of the violation and circumstances, award a just pecuniary compensation, irrespective of the compensation for material damage and in the absence of the latter. In deciding on the amount of just pecuniary compensation, the Court shall take into account the degree and duration of the physical and mental pain and the fear caused by the violation, the objective of this compensation, and the fact that it

should not favour the aspirations that are not compatible with its nature and social purpose. In the event of the compromised reputation and other personality rights of a legal person, the court shall, if it assesses that this is justified by the seriousness of the violation and the circumstances, award to that legal person a just pecuniary compensation, irrespective of the compensation for material damage and in the absence of the latter. Taking into account all the circumstances, the Court of the First Instance considered that, in this specific case, the legal compensation of HRK40,000.00 was justified.

Court of Appeal

The plaintiff and the defendant filed an Appeal against the Judgment of the Commercial Court in Zagreb, and the case was submitted to the High Commercial Court of the Republic of Croatia.

The plaintiff's Appeal was rejected, and the decision stated that liability for damage arises under the presumption that the person responsible for the damage committed an unlawful harmful act which caused damage to the person seeking repair of that damage, and if there is a causal link between the harmful act and the damage. All the above assumptions must be met cumulatively, and the plaintiff was burdened with evidence of a causal link between the defendant's harmful conduct or its distortion of free competition in the period from 1st January, 2006, to 3rd November, 2009, as well as the resultant damage to the plaintiff. The First Instance Court concluded that the plaintiff did not prove that the increase in the amount of the copying levy by the defendant was the reason for the decrease in the plaintiff's turnover. So, there was no causal link between the determined by a final decision of the CCA, and damage in the form of a decrease in the plaintiff 's turnover or earnings in the disputed period, i.e., between the amount of copying levy paid by the plaintiff and the final price of the product. The plaintiff did not propose, or provide, evidence that he was forced to include the increased amount in the final price of the product, so that ultimately its product is more expensive, by comparing its prices before and after the introduction of the copying levy, as well as by comparing it with the prices of other fee payers. The documentation submitted by the plaintiff does not in itself prove that there was a decrease in the plaintiff's profit due to the defendant's actions, no information was provided on the plaintiff's prices, on the basis of which it could be concluded that there is a causal link between the plaintiff's conduct and the plaintiff's competitive position in the market, because it lost a significant number of customers, nor did not suggest any evidence of this circumstance.

The defendant's Appeal was upheld, and the Judgment of the Court of First Instance was reversed, and the plaintiff's request for compensation for non-material damage, which caused damage to its business reputation in the amount of HRK40,000.00, was rejected. It was pointed out that the decision was made only on the basis of the statement of the plaintiff's legal representative and the fact that the defendant abused his dominant position. The fact that the defendant, by applying unequal conditions to the same kind of work, amongst others, put the plaintiff in an unfavourable position on the market, does not in itself constitute a violation of the personality right. Such a violation does not directly establish the right of the person in respect of whom the violation was committed to compensation for personal injury but, taking into account the circumstances of each case, it must establish a causal link between the harmful act and the damage. The plaintiff thus had to prove that the defendant's action had an impact on his business environment, which then reacted in a way that could be considered to undermine his business reputation.

Comment

In antitrust damages' actions, proceedings that are preceded by a Decision from a competition authority, the competent Court would be bound by the non-appealable and legally valid decision of the CCA.

However, in order to successfully obtain damages in civil proceedings, it is necessary to prove all other elements of this relationship. Namely, 1045 of the COA prescribes: whoever causes damage to another is obliged to compensate him if he does not prove that the damage occurred through no fault of his. Liability for damage is a mandatory legal transaction in which one party is obliged to repair the damage to the other party, and the other is authorized to demand its repair from the first. Liability for damage arises under the presumption that the person responsible for the damage has committed an unlawful and harmful act, which caused damage to the person seeking repair of the damage, and if there is a causal link between the harmful act and the damage, as a consequence. All of the above assumptions must be met cumulatively.

As the cumulative fulfilment of all the aforementioned preconditions is necessary for the occurrence of the liability relationship, the plaintiff was burdened with evidence of a causal link between the defendant's harmful action or its distortion of free competition and the resulting damage. The causal link between the harmful act and the damage is an important element that is not easy to prove, even in the case of a previous decision that the harmful act or infringement of competition law was committed.

However, as compensation for damages in the Republic of Croatia includes non-material damage, this legal matter clearly defines the elements that are necessary for someone to obtain compensation for non-material damage due to the violation of competition law.

Rosa Perna, Latium Regional Administrative Court

Italian Competition Authority (ICA), Decision 13th December, 2017, No. 26901 (A500A – Business sms)

Latium Administrative Tribunal (TAR Lazio), Decision 15th September, 2021, No..9803

Introduction

The case confirms the critical role of robust economic analysis that is conducted on the basis of the "as efficient operator test" in abuse of dominance cases. It concerns a margin squeeze under Art. 102(a) TFEU in the telecoms sector.

Margin squeeze occurs when an undertaking that is dominant in an upstream market, where it provides a useful factor for the exercise of an economic activity in the downstream market, sells that factor to its competitors in the downstream market at a price which prevents them from having a sufficient margin to remain competitive and, ultimately, on the downstream product market.

The ICA's final decision

The ICA found that Vodafone had abused its dominant position in the wholesale market for SMS termination on its own network, by charging the so-called "D43 Operators" (i.e., undertakings that are active in the downstream bulk SMS retail market) prices that were higher than those Vodafone charged to its own divisions that are active in the bulk SMS retail market (which are "packages" of SMS services purchased by large companies, such as banks, insurance companies, supermarkets, etc., for marketing communications to their customers, that are to be sent via mobile network operators).

According to the ICA, Vodafone had abused its market power by putting in place internal-external technical and economic discrimination, resulting in margin squeeze for equally efficient competitors in the related market for bulk SMS services. Furthermore, the alleged abusive practice in question concerned the whole national territory, limiting production and foreclosing or limiting access to the national market for any economic players wishing to enter, and/or operate, on the Italian market for bulk SMS services.

The ICA concluded that Vodafone's conduct had resulted in a margin squeeze, to the detriment of as-efficient competitors that were active in the provision of bulk SMS services. Given the seriousness of the conduct, the ICA decided to impose an administrative pecuniary sanction on Vodafone Italia S.p.A. in the amount of €5,843,814.

Vodafone's complaints

The company filed an application for the annulment of the ICA decisions to the TAR Lazio. Vodafone challenged, inter alia, the ICA's assessment of the downstream market, with particular reference to the final retail price that could be charged by a competitor that was as efficient as the dominant undertaking.

TAR Lazio upheld the Appeal that was brought by Vodafone against the decision of the Italian Competition Authority[37].

The TAR Lazio found that the ICA had incorrectly applied the "as efficient competitor test". As a result of that error, the ICA erroneously established the existence of a margin squeeze in the bulk SMS market.

37 At this stage, it does not appear that the appeal lodged by AGCM against the Tar Lazio Judgment has been settled.

Tar Lazio Judgment

In more detail, in its ruling, the TAR Lazio recalled that bulk SMS services consist of packages of messages that are delivered on the entire networks of three Italian mobile operators – Vodafone, Telecom and Wind Tre S.p.A. ("Wind Tre") – and that are sold to companies that want to send large numbers of messages to their customers.

The Court took the view that, in order to establish whether Vodafone had committed a margin squeeze, it had to take into account that the cost of the final product on the downstream market had been determined by the cost for SMS termination on all three networks. Moreover, the TAR Lazio acknowledged that the companies that buy the termination services to sell as bulk SMS packages (the so-called "aggregators") are intermediaries that do not purchase SMS termination in the same downstream market as the final customers.

At this point, the Court considered that the margin squeeze can be demonstrated through a test, of which there are several types.

The most common one is the so-called 'of the "equally efficient" operator' ("as efficient competitor test"), with which an attempt is made to verify whether the retail divisions of a vertically integrated company are able to compete profitably on the basis of the wholesale price that is requested from rivals for purchasing input; it is, therefore, a test that takes into account the costs of the dominant company that is accused of having carried out an abusive practice.

Here, the Court showed that it knows the difference with respect to the other tests that can also be used, namely, the "reasonably efficient competitor" test and the "current competitor" test, even though they are not as suitable, since the abusive nature of the tariff practices of a dominant company must be assessed, in principle, by referring to its position and, therefore, to its prices and costs, and not to the positions of current or potential competitors.

First, the Court found that the ICA had incorrectly applied the "as efficient competitor" test. In particular, the Court ruled that the ICA was required to assess whether Vodafone's retail divisions could profitably compete if they had to pay the same wholesale price that Vodafone charged third parties for the purchase of a specific input which, in this case, was the right to deliver an SMS on Vodafone's network.

However, when calculating the price of that input, the ICA had wrongly determined the reference price by taking into account only the cost incurred by the operators that, being equipped with a numbering infrastructure, purchase from Vodafone only the right to terminate on the network (so-called "D43 operators"), excluding the costs faced by aggregators. In this regard, the TAR Lazio ruled that aggregators do not qualify as users of the bulk SMS service, but, rather, act as intermediaries, which take on the task of acquiring SMS services from various operators in order to combine them into a bundle that is suited to the needs of the end users. For this reason, aggregators cannot be treated as end users that are similar to banks and other large corporate clients in the downstream market, where they act as resellers, and not as buyers. The ICA should have treated aggregators as competitors. As a consequence, determining the threshold price before assessing the existence of a margin squeeze was considered to have been an error.

Second, the ICA did not demonstrate that the final product (bulk SMS) was only affected by the input provided by Vodafone. This was a necessary element of the test to determine whether the price charged by Vodafone was capable of excluding the D43 operators from the downstream market. In fact, each bulk SMS is generally made up not only of messages to be dispatched on the Vodafone network, but also of messages to be dispatched on the networks that are operated by the other two MNOs (mobile network operators) that are active in Italy (TIM and Wind Tre). The price of the right to terminate an SMS on Vodafone's network therefore represented only a portion of the cost incurred by Vodafone's competitors who were active on the bulk SMS retail market. According to the TAR

Lazio, there was therefore no evidence that the prices charged by Vodafone were, alone, capable of squeezing its competitors' margins on the retail market.

Finally, the ICA did not carry out any assessment of the anti-competitive effects of the conduct .In order to establish whether a margin squeeze is abusive, it is necessary to provide evidence of:

- the anti-competitive intent of the dominant vertically integrated operator; and

- the reasons why, based on a market analysis, as-efficient competitors run the risk of being excluded from the market as a result of the margin squeeze.

In conclusion, the TAR Lazio stated that the allegation of a potential anti-competitive effect of the conduct at issue must be supported by at least a market analysis, explaining and demonstrating why non-vertical and integrated competitors run the risk of being excluded from the market as a result of an alleged margin squeeze.

Comments

This ruling clarifies the approach that the ICA should follow when assessing whether conduct amounts to a margin squeeze, and how to apply the "as-efficient competitor test".

In particular, the correct application of this test requires the identification of the competitors that risk being excluded from the market and an assessment of the anti-competitive effects of the margin squeeze.

It seems to me that this decision is firmly placed in the wake of European jurisprudence that most recently made school with the Intel case; at the same time, it represents one of the most successful expressions of our national advanced model of judicial review on antitrust decisions.

This model looks at the intrinsic technical reliability of the infringement decision, reconsiders the technical rules applied in the exercise of the sanctioning power, in the form of technical criteria, methods or economic models or logical models for the implementation of indeterminate legal concepts or, again, of technical assessments, which are characterized by a certain margin of appreciation, but without the Judge being able to go so far as to identify the optimal measure for the specific case and to parameterize his/her own judgment of legitimacy on a tertium comparationis that she or he has identified.

In compliance with these limits, the Court exercised its full and intrinsic review in an exhaustive way in the Vodafone case, which therefore deserves to be presented today in this prestigious venue.

Procedural Guarantees in Private Enforcement

Carlos Manuel Goncalves de Melo Marinho, Lisbon Court of Appeal

Judgment number: 83/18.7YUSTR-B.L1.

Date of delivery: 2022-06-15.

Parties: PORTUGUESE COMPETITION AUTHORITY (NRA intervening with supervisory and punitive powers) and BEIERSDORF (…, as the Defendant).

Petitioner and Appellant: IUS OMINIBUS.

Court: Court of Appeal of Lisbon – Intellectual Property, Competition, Regulation and Supervision Chamber (with nationwide and final jurisdiction).

Type of Case: 'Criminal' Appeal (Appeal on an administrative offence proceeding).

The request that is the object of the main proceeding: Declaration of the nullity of a Decision of the Competition NRA of 19.02.2018 on administrative measures that are related to a search warrant and the seizure of electronic mail.

The Application (of 07.04.2021) presented by a non-party (… IUS OMINIBUS): Consultation of the non-confidential contents of the files (the main file and all its annexes).

Legal rules quoted in that application: Arts. 86(1)(6)(c), 90(1) of the Criminal Procedure Code (CPC), 83 of Law 19/2012, of 08.05, and 27(4) and 27-A(5) of Decree (Portaria) 280/2013 of 26.08.

Appealed Decision

The First Instance Court dismissed the request to consider that there was no legitimate interest in the requested consultation of the procedural files, since:

a. the main proceedings are an interlocutory Appeal by BEIERSDORF (…) concerning the possibility of the seizure of e-mails from the Competition Authority dealing with evident and merely procedural matters, and not discussing any issues concerning the attribution of any administrative, or other, liability to the Appellant;

b. The documents in this case file are necessarily already in the administrative proceedings, whose consultation has already been made available to the Claimant;

c. Everything else, such as Appeals, allegations and Court decisions are procedural documents that are only limited to procedural issues, so there is no legitimate interest in the consultation of these files by the Claimant, if what he is interested in is the collection elements that may support a possible action for damages against the Appellant;

d. The proposed electronic consultation of the files is not even legally admissible, since the digital paperless procedure system ('Citius') does not have both a confidential and a non-confidential version of the case file;

e. There is no legal norm allowing such a file consultation by means of a DVD or USB key.

f.If it were admissible, consultation would always be carried out in the Court Office.

g. On the other hand, while it is true that the copying of parts of the proceedings is permitted, it is no less true that those parts of the proceedings must be duly and carefully identified, and a generic reference, such as the Appellant gives, is not legitimate.

Appeal

The Appellant held, before the Court of Appeal, that the mentioned order should be set aside and replaced by another, granting the Appellant access to:

a the non-confidential contents of the case file (including the writ of summons, its annexes and all subsequent pleadings and orders, excluding confidential material) or, in the alternative,

b the non-confidential version of Judgments (or final orders) and its appendices;

in any event, this would preferably be facilitated by making the documents available by electronic means, on DVD or USB key (to be provided).

Arguments of the Appellant

To justify its position, the Appellant argued that:

a. If the position adopted in the appealed dispatch were to prevail, the injured parties of anti-competitive practices to be investigated by an NRA, and their representatives, would suffer ignorance and obscurity about the progress and decisions relating to the interlocutory appeals of the proceedings, even when these proceedings are no longer under rules of secrecy and have already been completed;

b. It is not necessary to demonstrate a legitimate interest for the representatives of the Appellant to have access to non-confidential documents that are included in proceedings;

c. It follows from Art. 86(1) of the CPC that 'criminal proceedings are, under penalty of being declared void, public, subject to the exceptions provided for by law', and that this publicity includes, pursuant to Art. 86(6)(c) of the same code, the consultation of the writ of summons and the obtaining of copies, extracts and certificates of any part thereof;

d. The misdemeanour proceeding is public unless there is a justification for the exclusion of publicity;

e. Art. 90(1) of the CPC rules the mode of access to the proceedings and does not affect the substance of the determination of the publicity of the proceedings;

f. It also follows from Art. 79(1) of the Statute of the Bar Association, A lex specialis follows from Art. 79(1) of the Statutes of the Bar Association, that, for lawyers to access files, the demonstration of legitimate interest is not required;

g. In the Portuguese legal system, there is a presumption of interest when Court proceedings are consulted by lawyers (including criminal and misdemeanour proceedings);

h. The Court did not state that access would be prejudicial to any interest;

i. The Order restricts the publication of the file, and the right of access to it, where there is no defence.;

j. The restrictive interpretation of the right of access to the process sub judice is manifestly disproportionate to the protection of other interests, since there are no other interests to be protected;

k. The Applicant and its Representatives have a compelling interest in access to the non-confidential version of the file;

l. The interpretation of the legitimate interest, and its application to the instant case by the Court, was manifestly restrictive of the Appellant's rights, imposing a particularly demanding test relating to what constitutes a legitimate interest;,

m. The Court erred in law in holding that an injured party (or his representative) who wishes to prepare a potential claim for damages cannot have a legitimate interest in consulting a file in which only procedural questions are discussed, since the law does not differentiate the publicity of these proceedings according to whether they deal with substantive or procedural issues and proceedings in which procedural issues are discussed, and this may have an impact on the preparation and success of a damages claim that is based on the NRA investigation;

n. The reasoning of the Decision that is the object of the Appeal is also based on the erroneous idea that the Court, in order to decide whether to grant access, should not limit itself to identifying, in the abstract, the mere potentiality of the existence of a relevant question, and should proceed to a concrete analysis of what is in the file;

o. The Order is based on interpretations of Arts. 86(1), (6) and 90(1) of the CPC, in a sense that is contrary to the national Constitution (Arts. 20, 37 and 60) as well as to Art. 6 of the European Convention on Human Rights;

p. The Appellant does not know which documents exist in this case, whether it has been closed, what issues are at stake and on what grounds. It is impossible for it to provide further specifications or reasoning. The Court did not provide the Appellant with the necessary information on the content of the file that it needed, and did not give the Appellant the opportunity to make a more detailed or reasoned request.

Position of the Defendant

The defendant held the position of the Court and, therefore, asked for the Appeal to be dismissed, the upholding of the contested Order, and the rejection of the application for access to the case file.

Majority opinion on the legitimacy to appeal

The Court of Appeal decided, by a majority of the judges, that recourse to the CPC in order to establish that the applicant's legitimacy is not allowed, as it is contrary – according to Art. 41(1) of the General Ruling on Misdemeanour – to the provision made by the legislator in Art. 89(2) of the New Ruling on Competition. So, it dismissed the case, nonetheless examining it as its substance as if it considered the existence of the legitimacy denied, also concluding, as a result of this, for the dismissal of the Appeal.

To reach the mentioned decision on legitimacy, a majority in the Court argued that:

a. Within the general ruling on administrative offences, the legislator had established what has been called, by both doctrine and jurisprudence, the principle of the unappealability of decisions, under the terms of which only judicial decisions whose appeal is expressly provided for can be appealed;

b. Even within the scope of criminal law, the Constitutional Court has stated that the criminal procedure ensures all defence guarantees, including appeals, but does not grant an unlimited right to challenge any, and all, judicial decisions that are handed down in criminal proceedings;

c. Decisions and orders taken by the administrative authorities in the course of proceedings, provided that they conflict with the rights or interests of the persons concerned, as well as condemnatory decisions, may be judicially challenged;

d. The other final decisions are not appealable, since they are not condemnatory;

e. However, if this were not the case, the Appellant would still lack the legitimacy to bring this Appeal, since Art. 59(2) of the General Ruling on Misdemeanour only confers the possibility of Appeal on the defendant;

f. It does not result from the proposal for the transposition of the Private Enforcement Directive that the legislator intended to include the injured party of anti-competitive practices cases in the list of subjects with the legitimacy to intervene in the public enforcement of competition;

g. An appeal may only be lodged by a person with a legal interest in bringing proceedings, that is, a person whose right has been affected, and who is effectively in need of protection, which is not the case, since the Appellant is merely a possible future applicant in a civil liability claim on a class (popular) action, to be filed on behalf of third parties.

Dissenting opinion

The dissenting opinion issued stood for the existence of the legitimacy of the Appellant, and for the legal admissibility of an appeal.

It contained the following arguments:

a. It should have been taken into account that the Appellant appeared before the Court was exercising an essential right that is integrated into the structural principle of effectiveness which is recognised in Art. 4 of Directive 2014/104/EU, and that it did so in a reasoned manner, explaining the motives for the need for access to the files through a sustained and clear explanatory approach, and that there was no trace of an unjustified and unsupported attempt to gather evidence;

b. The protection of effectiveness corresponds to the search for the guarantee of full operation of the direct effect produced by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) at the level of enabling enforcement by individuals of the European competition rules;

c. Its mechanism corresponds to a simple equation: the European Union legislator wishes, very intensely and without hesitations, to ensure that compensation is awarded to the victims of infringements of legal provisions that are relevant to the competition area, thus enabling ‘anyone – be they an individual, including consumers and undertakings, or a public authority —‘ to ‘claim compensation before national courts for the harm caused to them by an infringement of those provisions’(see recital 3 of the Directive);

d. To achieve this goal, it recognises the central right of access to relevant evidence in judicial and extrajudicial proceedings, in the knowledge that, without this right, the above-mentioned desideratum would amount to an innocuous statement of good intentions;

e. As the principle mentioned above represents the central reference that affirms the instrumentality of a conduct in order to achieve a purpose (the right is granted for a specific intent, namely, to be able to exercise some rights), its limits are those emerging from the goals, that is, from such effectiveness;

f. This means that the so-called ‘fishing expeditions’ and ‘pre-trial discovery’ are not accepted, i.e., the taking of evidence that is not supported by tangible demonstrative needs is rejected;

g. In the present case, the solid explanation given in the application for access to the case file, which was submitted by the Appellant, leaves us a long way from the so-called fishing expeditions;

h. In order to guarantee effectiveness, Art. 5 of the Private Enforcement Directive – particularly in its Paras, 2 to 8 – and Arts. 6 to 8 -- firmly and peremptorily assure the right to the disclosure of evidence;

i. This right is indispensable to the architecture of the European system that relates to the private enforcement of competition rules;

j. This is due to the fact that, without such a right, an array of acts that are oriented to the exercise of individual rights arising from the infringement of the rules of EU competition law would not be feasible, and, therefore, would not exist;

k. Such a right is decisive for the co-adjoining function of public enforcement that is performed by the private enforcement of competition law;

l. We are, at this level, placed in an area that is very important to the European Union Law, a true element of the commonly called 'acquis communautaire', a place in which all European legal cultures converge – in particular, where the provisions of Art. 47 of the Charter of Fundamental Rights of the European Union (but no less important in this respect is Art. 6 of the European Convention on Human Rights) crossed with Art.1 of the same Charter, are relevant;

m. We face, here, the right to an effective remedy that calls for the unquestionable recognition of the right of at least one level of appeal –see the statements made in CJEU Judgments C-169/14 Sanchez Morcillo and C-69/10 Samba Diouf and, as to the necessary balance between the exercise of rights and national limitations, Judgments C-249/13 Boudjlida and C-317/08 to C-320/08 Alassini, also deserve analysis. In this context, the Judgments of the same Court C-583/11 P, Kanatami, T-49/07, Sofiane Fahas and, in the sphere of the jurisdiction of the European Court of Human Rights, the cases McFarlane v. Ireland, no. 31333/06, 2010, (albeit with a strong focus on procedural pendency times), Rotaru v. Romania, no. 28341/95, 2000, and Yarashonen v. Turkey, no. 72710/11, 2014;

n. From this case-law approach, which is based, above all, on the Charter, a transmutation of the interpretative tasks of the national courts emerges (as had already been clearly seen in the Judgment of the CJEU in Van Gend & Loos of 05.02.1963);

o. In effect, a mixture or hybridisation of remedies is created, which corresponds to the need to interpret the national means of protection or the effective access to the Courts and Justice (which can also be generically referred to as relating to the exercise of the 'right to a judge') in the light of the duly consolidated European standard that has emerged from a consistent interpretation of the EU rules;

p. One of the consequences of this well-known imperative of hybridisation is the need for national courts, which are faced with a conflict between European Union Law and the domestic rules of their Member States in adapting to European standards of effectiveness, their procedural rules and, above all, their remedies (or solutions for reaction and guarantee);

q. Such action may involve the actual creation of new remedies or the reinstatement of others that already existed and, in most situations, that will determine, at the very least, the adaption of the mechanisms that are already available under national law in order to fit the requirements of European Union law (see, in this regard, the Judgment of the Court of Justice of the European Union C-481/99, Heininger);

r. Recognising the abstract right to information, which is fundamental to taking a decision on bringing a case to Court and the preparation of the claim, it was up to the Court of Appeal, under the aforementioned imposition of the hybridisation of remedies, to find a solution in which that right might be applied, and never to conclude that the Appellant was illegitimate;

s. In addition, since the principle of effectiveness is mandatory and is inseparable from the essential recognition of the instrumental means without which there would be no private enforcement of competition rules, and since we are facing the process of the transposition of a Directive, the Court could only recognise two hypotheses:

s1. Either the right to a remedy exists, and it is provided for in domestic law, and the Directive has, therefore, been properly transposed, or

s2. There is no provision for judicial review under domestic law and, therefore, the transposition of the Directive has not complied with fundamental impositions that arise from EU law as it relates to the indispensability of remedies

t. What it could not do was to conclude that the Appellant was not entitled to bring an appeal when facing an illicit denial of the disclosure of evidence.

Comment

- This case was chosen because it can show how the EU competition law objectives can be set aside if the national courts just assume that there is a strictly internal perspective in cases brought to them.

- A dissenting opinion that is able to place the relevant questions in the due perspective is fundamental.

- That this opinion stressed the crucial importance of the private enforcement of the Competition Law and the inseparable connection and complementarity between private and public enforcement.

- It showed the essential and structural dimension of the principle of effectiveness which is recognised in the Private Enforcement Directive, and that the disclosure of evidence is fundamental in order to grant that effectiveness.

- It revealed that, placed before the exercise of the right to the disclosure of evidence, the national courts cannot demand additional requisites that are not comprehended between those that are indicated in the Private Enforcement Directive (‘reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages’).

- It brought to the forefront of attention the problem of the need for effective remedies, the importance of the rights to a judge and of appeal in regard to structural legal situations, and the value of the procedural empowerment of potential claimants for the private enforcement of competition (e.g., citizens, undertakings or representatives of consumers), granting them those rights that they are instrumental to the materialisation of the effectiveness of such an enforcement.

- It called attention to the need for the national courts to interpret the internal means of granting real access to the courts and Justice (which can also be generically referred to as relating to the exercise of the ‘right to a judge’) in the light of the duly consolidated European standard that is emerging from a consistent interpretation of EU rules.

Karina De Koning, Amsterdam District Court

Case CDC vs Kemira /Court of Appeal in Amsterdam d.d. 4th February, 2020[38].

Summary of the facts of the dispute

Kemira, a Finnish producer of sodium chlorate, which was formerly known as Finnish Chemicals Oy, on 2nd August, 2007, received an EU Commission of Objections Decision concerning their product, with regard to alleged competition infringements during 1994-2000. Together with 7 other undertakings, they formed a cartel with the purpose of dividing the market for the sale of sodium chlorate and to constrain the competition in that market (Art. 81 EC-Treaty, now Art. 101 TFEU). The cartel ended on 9th February, 2000. The cartel group was sentenced to pay a fine of almost €80 million. Kemira issued a press release in August 2007, not stating that there was a cartel, but just that it had received a Commission Statement on antitrust activities concerning the selling of sodium chlorate. The Commission sent out a press release, in which it was announced, on 11th June, 2008. A non-confidential summary, which gave the names of the members of the cartel, was published in the Official Journal of the EU on 17th June, 2009. Some of the producers addressed, but not Kemira, appealed against this Decision of the Commission. The Court of First Instance of the EU (Court of First Instance) has declared that this appeal is ungrounded by decisions of 17th May, 2011, 25th October, 2011, and, in Appeal. on 12th February, 2012. The Decision of the Commission then became irrevocable.

CDC is a claim company that bought the claims of producers of pulp and paperproducts (the Purchasers). These Purchasers bought and used sodium chlorate to whiten their products. This is a follow-on procedure in order to claim compensation payment in the amount of about €61 million. The Writ of Summons was filed on 31st May, 2011. The Purchasers were based in different countries. The sentence deals with the limitation period of the claim, according to the jurisdictions of these countries, because the place where the damage occurred is the place in which the Purchasers had their production plants. The applicable law is the law of these countries. The central question is whether the system of limitation period for claims, according to the national law, is in conformity with the rules that were set up by the Cogeco Case in the CJEU[39].

Directive 2014/104/EU of the EP and Council of 26th November, 2014 (Dir. 2014/104/EU) was not yet in force, and thus the national laws involved were not yet adjusted accordingly.

The Dutch District Court of Amsterdam ruled that the claims were time barred. CDC appealed this decision at the Court of Appeal of Amsterdam (Court of Appeal).

Summary of the judicial proceedings

The relevant jurisdictions are those of Spain, Finland and Sweden, as well as others which will not be discussed, because they were not decisive in this case. On every claim, Kemira held that the limitation period, according to all of these jurisdictions, had elapsed and the claims were time-barred. CDC held the opposite, reverting to the Cogeco Ruling.

Spanish law provides for a subjective limitation period in which to file actions of one year, starting when the claimant is aware of the tort and the liable person, and beyond that, the amount of damage must be known. The question is, thus, when did the limitation period commence? The Spanish Supreme Court had ruled, in earlier cases, that this period commences when the liable person and the (amount of) damage are known to the injured person. In Finland, the objective limitation period is 10 years (Art. 7 (2) Limitation Act), commencing at the moment of the infringement itself. According to Finnish law, the period can be interrupted by an act of the claimant. The Finnish Supreme Court regards claims in cartel cases as being a series of

38 ECLI:GHAMS:2020:194
39 C-637/17, 28 maart 2019, ECLI:EU:C:2019:263

single events that cause damage. So, the period of limitation starts at every moment when there is a transaction in which damage – mostly in the sense of overcharging – has occurred. On 1st October, 1998, the Competition Restriction Act came into force. For transactions between 1994 and 1st October, 1998, the Writ of Summons had to be issued between 2004 and 1st October, 2008. CDC states that the claims were time barred even before the publication in the Official Journal in October, 2009, and the Decision of the Court of First Instance, which is contrary to the principle of effectiveness.

Kemira states that Purchasers could have interrupted the limitation period after Kemira's press release in August, 2007, or after the Commission's press release in June, 2008.

In Sweden, Art. 33 of the Swedish Competition Act (SCA) deals with claims that arose before 1st August, 2005, and gives an objective limitation period of 5 years from the moment the damage occurred. In all cases, the objective limitation period, according to Swedish law, is 10 years from the day on which the damage occurred. There is no Swedish jurisprudence on Art. 33 SCA. It is therefore not certain when this period commences: is it at the moment of each transaction, or at the end of the cartel? A subjective limitation period does not exist under Swedish law.

The Ruling of the Court of Appeal

Spanish, Finnish and Swedish law must be explained in conformity with EU-law.

If, according to the applicable law, the claim is time barred, the Court of Appeal has to access whether this is in conformity with the principle of effectiveness, and the right to claim damages has not become impossible or very difficult (CJEU Cogeco ruling). The Court of Appeal decided as follows.

Spanish situation

According to EU-law, as ruled in the Cogeco Case, in this case, the limitation period of one year cannot commence until at least the final decision of the competition-law authorities. It is important in this case that the Decision of the Commission deals with a cartel infringement that had impact on all of the members of the cartel. It is difficult to know which infringements have been committed by which members of the cartel, and in which periods of time. This means that the whole Decision of the Commission should be known before, according to Spanish law, the amount of damages is known to the injured person. Although Kemira did not appeal the Decision of the Commission, this whole set of facts became final with the Decisions of the Court of First Instance of the EU, so, at the earliest, on 17th May, 2011. The fact that the fining of Kemira was final at an earlier stage, is not important because, this is a fact that is unknown to the claimant. The decision of the Court of First Instance is relevant to the estimating of the damage and the period of the cartel because claimants can then estimate the liability of the whole cartel. The Writ of Summons was issued on 31st May, 2011, which is within the period of one year after the Decision of the Court of First Instance. Even if the limitation period started with the publication in the Official Journal in 2009, the claim was thus not time-barred. Interruption of the limitation period, which is possible according to Spanish law, needs some time for preparation. With a short limitation period of one year, and given the specific character of competition law infringements, it is in violation of the principle of effectiveness if the claim were to be considered to be time barred.

Finnish situation

Kemira's press release in August, 2007, does not state that there was an infringement of Art. 81 EU-Treaty clearly enough to hold Kemira responsible for this infringement. A Writ of Summons could not be substantiated on the basis of this press release, nor could an interruption of the limitation period be prepared before the end of the period of limitation that ran from 2004 to 1st October, 2008. Since the Finnish law does not request knowledge of the amount of damage before the limitation period commences (as the Spanish law does), the claim could have been filed with Kemira after the press release of 11th June, 2008, from the Commission. That would have interrupted the limitation period. The Finnish Purchasers would have had the time from 12th June, 2008, until 1st October, 2008, to interrupt the limitation period only for those purchases that arose from 12th June, 1998, onwards. This is too short a period of time to prepare the interruption letter, and only a small number of the possible claims would been saved. For those reasons, this period of limitation is contrary to the Principle of Effectiveness (Cogeco Ruling). The claims of Finnish Purchasers are thus not time barred.

Swedish situation

The Court of Appeal decided that the objective character of Art. 33 SCA cannot coincide with commencement of the limitation period, depending on the knowledge of the claimant, which is a subjective reason for commencement. Even when the end of the cartel was chosen, the period of 5 years would have expired when the Commission published the press release and, even more so, when the Decision of the Court of First Instance was taken. Given the Cogeco Ruling, this system would be contrary to the principle of effectiveness and therefore has to be set aside. The general limitation period of 10 years also cannot be a substitute for Art. 33 SCA, because there is not enough evidence, and this would only relate to Swedish law. The limitation periods of claims would then not agree with the principle of predictability and legal certainty that are necessary in this field of law. The possibility of the interruption of the limitation period needs no assessment, because the limitation period had already expired and an effective action by the injured person was not possible.

In line with the Cogeco Ruling, CDC was allowed to await the ruling of the Court of First Instance. CDC filed the Writ of Summons shortly after that, so the claims of Swedish Purchasers are not time barred.

Personal comment

"Follow-on" cases, like this one, make a significant contribution to the maintenance of effective competition in the European Union and to the effective application of Article 102 TFEU. This case shows how difficult, and possibly unequal, the results of bringing a case concerning the infringement of competition law before a national court can be. The Dutch Court had to apply Spanish, Finnish and Swedish law and to assess the conformity of these legal systems with the Cogeco Ruling of the CJEU. Before the Cogeco Ruling, the Kone Ruling[40] had already emphasised the goals of equality and effectiveness. The Cogeco Ruling made it easier to assess the conformity of short limitation periods in terms of their effectiveness. Short limitation periods that start to run before the injured person is able to ascertain the identity of the infringer may render the exercise of the right to claim compensation either practically impossible or excessively difficult. Limitation periods that end before the Final Decision of the National Competition Authority (NCA) or of the Review Court, are too short in relation to the duration of these proceedings, and they cannot be suspended or interrupted during the course of such proceedings. The Court of Appeal had to use the argument of complexity and the lengthy investigation of competition law cases to state that an injured person needs time to file claims to the Court, but also to prepare a letter in order to suspend or interrupt the limitation period.

40 Kone e.s., C-557/12 ECLI:EU:C:2014:1317

I will reflect on some of the complications that occur in civil "follow-on" cases.

a. Lengthy research, and its complexity in Competition Law infringements

A claim must be substantiated when it is brought before the Court. The full Decision of the NCA is therefore necessary. An injured party can never do enough research, or discover, through disclosure proceedings, the competition behaviour of the infringing undertaking, as an NCA can. The costs for that investigation would also be excessive. The research period of the NCA is mostly lengthy, and the infringing period is mostly also lengthy. The possibility of suspending or interrupting the limitation period before the final decision of the NCA, in my opinion, is theoretical, because, to invoke these, the name of the infringing undertaking, the means of operation, the effect on the injured person and the possibility of damage should be known. A general letter of infringement to the infringing undertaking may not be enough to effectively suspend or interrupt the limitation period in several of the law systems. I think that, in Competition Law cases, suspending or interrupting the limitation period before the Final Decision would not be an effective way of maintaining the equality and effectiveness of competition in the EU.

b. Single or continuous act

According to Finnish law, each and every single infringement constitutes the commencement of a limitation period. This is not the case in Spain or Sweden. This makes a huge difference if the infringement of Competition Law has to be seen as a continuous act of tort. The different, but coherent, acts which lead to competition infringement, in the sense of Article 101 TFEU is, in fact, no single act, but secretly bargained, coherent behaviour by a group of undertakings. It would help in the equal maintenance of fair competition if a Directive were to state that inherent to competition law infringements relating to Article 101 TFEU is a coherent set of acts by different undertakings, that will count as a continuous act. The limitation period then has to commence no earlier than when the infringement stops.

Limitation period and Directive 2014/104/EU

This Directive constitutes, in Art. 10[41] a set of rules vis à vis limitation periods, and this is very welcome. The limitation period cannot start before the infringement has ceased, thus the interruption or suspension of the limitation period is not necessary before the infringement has ceased. The knowledge of the amount of damage is not necessary, under the terms of this Directive. In this sense, Spanish law is more protective of the injured persons. The limitation period is at least five years, and it is suspended or interrupted if an NCA is investigating the case, but it shall end, at the earliest, one year after the infringement decision has become final, or after the proceedings are otherwise terminated.

41 Art. 10 Limitation Periods
1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.
2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:
(a) of the behaviour and the fact that it constitutes an infringement of competition law;
(b) of the fact that the infringement of competition law caused harm to it; and
(c) the identity of the infringer.
3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.
4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

All of this is in conformity with the goal of EU Competition Law: that the enforcement of damage claims contributes to the maintenance of fair competition, and this Directive was urgently needed. The Court of Appeal had to use some controversial arguments to annul the decision of the Dutch District Court. It had to interpret Spanish, Finnish and Swedish law, where the national Supreme Courts had not done that. This is a tricky business, which for the greater part is solved when the Directive is correctly implemented in national law.

List of participants to ENTraNCE for Judges 2022

1. Enerjeta Shehaj, First Instance of the Administrative Court of Tirana (Albania).
2. Asim Vokshi, Supreme Court (Albania).
3. Altin Shkurti, District Court of Tirana (Albania).
4. Frederik Fogli, Market Court (Belgium).
5. Anne-Marie Witters, Market Court (Belgium).
6. Nathalie Bonhomme-Iouck, Court for the Enterprises of Liège (Belgium).
7. Birgit Burm-Herregodts, Brussels Commercial Court (Belgium).
8. Goran Iskra, Commercial Court of Zagreb (Croatia).
9. Manuela Ostoic Cacinovic, Administrative Court of Zagreb (Croatia).
10. Jelena Čuveljak, High Commercial Court (Croatia).
11. Ivana Manestar, Commercial Court of Zagreb (Croatia).
12. Maja Valusnig, Administrative Court of Zagreb (Croatia).
13. Elita Gavriel, Administrative Court (Cyprus).
14. Lucie Mikulikova, Municipal Court of Prague (Czech Republic).
15. Tiina Pappel, Tartu Court of Appeal (Estonia).
16. Maret Altnurme, Distict Court of Tallinn (Estonia).
17. Jukka Koivusalo, Supreme Administrative Court (Finland).
18. Jenni Poropudas, Market Court (Finland).
19. Juliane Nahra, Council of State (France).
20. Stephanie Vacher, Supreme Court (France).
21. Elise Mellier, High Court of Paris (France).
22. Axel Walz, Regional Court Munich I (Germany).
23. Aikaterini Souki, Council of State (Greece).
24. Iannis Symplis, Council of State (Greece).
25. Katalin Surányi, Metropolitan Court of Budapest (Hungary).
26. Gianmario Palliggiano, Administrative Regional Court Of Campania (Italy).
27. Rosa Perna, Regional Administrative Tribunal of Latium (Italy).
28. Gian Paolo Macagno, Court of Appeal of Turin (Italy).
29. Emanuela Germano, Court of Appeal of Turin (Italy).
30. Andrea Postiglione, Court of Rome (Italy).
31. Linda Vīnkalna, Administrative Regional Court (Latvia).

32. Mikelis Zumbergs, Market Court (Latvia).
33. Eglė Mauricė, District Court of Vilnius (Lithuania).
34. Dalia Visinskiene, Supreme Administrative Court (Lithuania).
35. Joanne Vella Cuschieri, Council of the Judiciary (Malta).
36. Ivan Popovic, Court of Podgorica (Montenegro).
37. Karina De Koning, District Court of Amsterdam (the Netherlands).
38. Martin Vaessen, Amsterdam District Court (the Netherlands).
39. Aleksandra Rutkowska, Regional Court of Warsaw (Poland).
40. Anna Kowalik, District Court of Warsaw (Poland).
41. Paula Pott,Lisbon Court of Appeals (Portugal).
42. Pedro Marques, Administrative Court of Lisbon (Portugal).
43. Ana Paula Lobo, Supreme Administrative Court (Portugal).
44. Carlos Manuel Gon̦çalves De Melo Marinho, Lisbon Court of Appeal (Portugal).
45. Doina ViŞan, High Court of Cassation and Justice (Romania).
46. Andreea Marchidan, High Court of Cassation and Justice (Romania).
47. Diana Ungureanu, Court of Appeal of Pitesti (Romania).
48. Martin Baran, District Court of Prešov (Slovakia).
49. Jesus Angel Suarez Ramos, Spanish General Council of the Judiciary (Spain).
50. Fernando Nieto MartÍn, Supreme Court of Justice of the Valencian Community (Spain).
51. Eva Edwardsson, Svea Court of Appeal (Sweden).
52. Linda Kullberg, Patent and Market Court (Sweden).

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