Major Events and Policy Issues in EU Competition Law 2018–2019: Part 1

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Abstract

John Ratliff and his colleagues set out their annual review of major events in EU Competition law in 2018-2019, dealing with legislative/European Commission practice developments (such as the use of confidentiality rings; and new EC consultations on the Vertical and Horizontal Block Exemptions). They then review European Court judgments. Of particular interest are: (i) judgments related to national rules and damages claims (whether national limitation rules are changed to comply with the EU principle of effectiveness (Cogeco) and whether EU or national rules define who is liable for an infringement if a business is sold (Vantaan Kaupunki); (ii) the General Courts' rulings in the Servier and Others pay-for-delay cases; and (iii) various judgments in cartel cases on the EC's reasoning of fines in novel or "exceptional circumstances" under the EC Fining Guidelines (Steel Abrasives/Pometon; EIRDs/NEX International (ICAP); Paper Envelopes/Printeos; Euribor/HSBC).

This article is designed to offer an overview of the major events and policy issues related to arts 101, 102 and 106 TFEU[1] from November 2018 until the end of October 2019[2].

The paper is divided into an overview of:

- legislative/EC practice developments;
- European Court judgments;
- European Commission decisions; and
- policy and reports.

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

[2] The views expressed in this article are personal and do not necessarily reflect those of Wilmer Cutler Pickering Hale and Dorr LLP. References to the EC's website are to DG Competition's specific competition page available at: *http://ec.europa.eu/competition/index_en.html* [Accessed 12 January 2020]. References to "I.C.C.L.R." are to previous articles in the series "Major Events and Policy Issues in EU Competition Law", published in the *International Company and Commercial Law Review*.

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Legislative/EC practice developments and European Court judgments on general issues and cartel appeals are included in Part 1. The remaining European Court judgments (on art.102 TFEU and procedural issues) and other sections will be published in the next issue of the I.C.C.L.R.

Box 1

- **Major themes/issues in 2018/19**
  - The Digital Economy and Competition law:
    - * *Google Android*: "Ecosystem competition"
    - * "The year of the reports"
  - *Servier/Krka* judgments—Pay-for-delay
  - Cases on EU competition damages claims and national law
  - Court rulings on reasoning of EC fines in novel and exceptional cases
  - EC fine reductions for co-operation in other cases than cartels
  - Several vertical restraint cases
  - Coming reviews on Vertical and Horizontal BEs and Guidelines

The major themes of the year are:

First, the huge focus on the digital economy and competition law, ranging from specific decisions on "ecosystem competition" such as *Google Android*, and the way that various competition authorities around the world have commissioned reports on competition law in the digital era. This is addressed in Part 2 of this article.

Second, the GC issued its judgments in the *Servier* pay-for-delay pharma cases, generally upholding the EC's approach that where inducements are given to settle IP disputes, the EC will find a restriction by object; and dealing with how to assess "side-deals" or related licence agreements, in order to see if they are lawful in the circumstances. These judgments are summarised below.

Third, there have been several references to the European Court from national courts on practical issues in competition damages claims:

- what is the relevant limitation period?
- who is liable for infringement damages if a business is transferred?
- can a purchaser from a dealer sue the dealer's supplier for damage caused by participation in cartel?

These cases are described below. They raise important questions including about what issues are "directly" part of EU competition law and what/how national rules can be affected by the EU principle of effectiveness.[3]

[3] See *Cogeco Communications Inc v Sport TV Portugal SA* (C-637/17), Judgment of 28 March 2017, EU:C:2019:263, outlined below, at [39]–[44]; and *Kone AG v OBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5 at [21].

Fourth, we summarise below a number of cases where the EU Courts focus on the EC's reasoning for fines in exceptional cases, either under point 37 of the EC Fining Guidelines or through taking a proxy for sales and then discounting it to establish the reference "turnover" for a fine. These are described below. In general, given the "exceptional" nature of the EC decision, the EU Courts are requiring the EC to give more detail in their reasoning as to how they come to their decision, at least on key principles and their relevance to a case, not just a general assurance that they have been taken into account.

Fifth, there are further examples of EC fine reductions for co-operation in non-cartel cases. These are dealt with in Part 2 in the next journal.

Sixth, there have been more vertical restraint infringement cases, dealing with online issues (*AdWords* auction restrictions and online restrictions); and territorial restrictions through licensing agreements. The EC appears to be continuing its revived vertical restraint enforcement.[4]

Finally, there are important reviews coming on the Vertical and Horizontal BEs (and the related Guidelines), raising issues as regards vertical restraints, such as how to deal with the online/"bricks & mortar" balance now; and online platforms; and as regards horizontal restraints, issues such as sustainability co-operation, and artificial intelligence as concerted practices and information exchange. These are discussed below.

Legislative/EC Practice Developments

Box 2

- **Legislative/practice developments**
  - ECN+ Directive adopted
  - EC Guidelines for courts on estimating passing-on in damages cases
  - Guidance on confidentiality rings and confidentiality claims

ECN+

In January 2019, the ECN+ Directive was published in the *EU Official Journal*.[5] The Directive, as a proposal, was extensively summarised in our 2017 article,[6] and developments were noted in last year's article.[7] The key points are recapped in the Box below.

The publication follows the formal adoption of the text by the EP and the Council in December 2018. The Member States have to transpose the Directive by 4 February 2021.

[4] See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 2" [2019] I.C.C.L.R. 195, 210.

[5] With thanks to Su Şimşek and Virginia Del Pozo. Directive 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3.

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

[7] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 1", [2019] I.C.C.L.R. 121, 122.

Box 3

- **ECN+: Key points**
  - Aims to ensure NCAs are independent and have adequate resources
  - Underlines that NCA defence rights should meet the standards of general principles of EU law and the EU CFR (confirming *Eturas*,[8] e.g. SO, right to be heard, right to an effective remedy before a Tribunal)
  - Incorporates points from EU Court cases (e.g. *Automec II*,[9] NCAs to be able to set priorities)
  - NCAs to have effective powers to send RFIs, access information on any medium, take interviews and inspect private premises
  - Harmonises some core notions in fining (fine on an "undertaking"; based on gravity and duration; economic successor liability)
  - Sets a "minimum maximum" fine (10% of turnover)
  - Cartel immunity applications co-ordination
    - Member States to grant immunity and accept summary applications under the same conditions
    - Marker systems for immunity applications
    - NCAs generally not to ask for further information until EC has decided on whether to take case
  - Requirement to extend immunity from non-criminal sanctions to employees/directors (as well as company)
  - For criminal sanctions, Member State can either grant full protection or decide, weighing up prosecution interest v. individual's contribution to investigation
  - Expansion of mutual assistance rules between NCAs (e.g. re inspections, notification of decisions, enforcement of fines)

Interestingly, given a new EC emphasis on interim measures recently, in a declaration attached to the Directive the EC commits to assess whether it is possible to simplify the adoption of interim measures in the ECN before 4 February 2023. The idea is to enable competition authorities to deal more effectively with developments in fast-moving markets.

The EC will also present a report to the EP and the Council on the implementation of the Directive by 12 December 2024.

It may be interesting to note some of the NCA reactions to adoption of the Directive. For example, the French Competition Authority (French NCA) noted that the transposition of the ECN+ Directive into French law would bring the "*ex officio* interim measure" as a new enforcement tool.[10] Accordingly, the French NCA will be able to bring such measures without having to receive a complaint first. The French NCA also highlighted that the ability to prioritise cases would result in optimisation of its resources and that it would now be in a position to

[8] *Eturas v Lietuvos Respublikos Konkutencijos Taryba* (C-74/14) EU:C:2016:42; [2016] 4 C.M.L.R. 19.

[9] *Automec Srl v Commission of the European Communities* (T-24/90) EU:T:1992:97; [1992] 5 C.M.L.R. 431.

[10] Isabelle de Silva, "The Future of Competition Law: Time to Change or Time to Adapt?", speech delivered at Fordham Competition Law Institute 46th Annual Conference on International Antitrust Law and Policy (12 September 2019). A transcript of the speech is available at *https://www.autoritedelaconcurrence.fr/sites/default/files/2019-09/keynote_article_fordham.pdf* [Accessed 7 February].

order structural remedies and to impose higher fines on associations of undertakings.[11]

In Ireland, the Competition and Consumer Protection Commission highlighted the importance of the Directive as introducing non-criminal financial sanctions in cases of anti-competitive conduct.[12]

Likewise, the Finnish Competition Authority expects that the transposition of the ECN+ Directive into Finnish law will enable the imposition of "sufficiently high" fines on association of undertakings.[13]

The transposition of the ECN+ Directive will have less substantial effects in the Netherlands, according to the Explanatory Memorandum to the amendments to the Dutch Competition Act.[14] Under the draft legislation to transpose the ECN+ Directive, for example, the Dutch NCA will have to seek judicial approval to inspect private vehicles or buildings. To guarantee the independence of the Dutch NCA, the Minister's right of annulment with regard to Dutch NCA's decisions will be curbed.[15]

EC Guidelines on Estimating Passing-on in Damages Cases

In August 2019, the EC published Guidelines (the Guidelines)[16] for national courts on how to estimate the share of overcharge resulting from a breach of EU competition law, which is "passed on" by those who paid the affected price (direct purchasers) to their own customers (indirect purchasers) by way of corresponding price increases. Although the Guidelines are non-binding, courts are expected to consider them as best practice when dealing with the evidence relevant for assessing the passing-on of overcharges.

The EC hopes that the Guidelines may be useful when an infringer uses passing-on as a defence, claiming that its direct purchasers did not suffer harm since they passed on the alleged overcharge to their own customers ("shield" function), or when an indirect customer claims that it suffered harm because direct customers passed on their overcharge ("sword" function).[17]

By reference to multiple examples, the Guidelines outline: (1) the relevant legal context; (2) the economic theory of passing-on; and (3) the quantification of passing-on (price and volume) effects. They are some 53 pages long.

The key points made by the EC are outlined below.

[11] The French NCA Press Release of 14 January 2019, *https://www.autoritedelaconcurrence.fr/sites/default/files/2019-09/keynote_article_fordham.pdf* [Accessed 7 February].

[12] Competition and Consumer Protection Commission, *Annual Report 2018*, p.33, *https://www.ccpc.ie/business/wp-content/uploads/sites/3/2019/09/Annual-Report-2018.pdf*. [Accessed 8 January 2020].

[13] The Finnish NCA Press Release of 20 August 2019, available at: *https://www.kkv.fi/en/current-issues/press-releases/2019/20.8.2019-the-supreme-administrative-court-imposes-a-heavier-penalty-payment-on-the-finnish-bakery-federation-for-a-serious-competition-infringement* [Accessed 8 January 2020].

[14] Explanatory Memorandum to the amendments to the Dutch Competition Act, para.4.2, available at: *https://www.internetconsultatie.nl/richtlijntoekenningbevoegdhedennationalemededingingsautoriteiten/document/4867* [Accessed 21 January 2020].

[15] PaRR,"Dutch government consults on ECN+ directive implementation", 31 July 2019, *https://app.parr-global.com/intelligence/view/prime-2880023#* [Accessed 7 February].

[16] With thanks to Alessia Varieschi. EC, "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" [2019] OJ C267/4 (The Guidelines), available at: *https://ec.europa.eu/competition/antitrust/actionsdamages/passing_on_en.pdf* [Accessed 8 January 2020].

[17] The Guidelines, paras 1–7.

Legal context

Cartelised overcharges may result in inflated prices (actual harm) and lower sales (loss of profit). Full compensation is allowed to claimants having suffered such harm as long as there is a causal relationship between the harm and the infringement of arts 101 or 102 TFEU. Full compensation relates to the actual loss, the loss of profit, plus the payment of interest.[18]

The assessment of the overcharge and its passing-on can be difficult as national courts often will have to rely on assumptions, because the determination of the counterfactual scenario (i.e. but-for the infringement) is by definition hypothetical, and the courts generally will not be able to quantify the harm with absolute accuracy.

The Guidelines suggest that courts, where appropriate, should make use of their powers to estimate the share of any overcharge that was passed on and to order the disclosure of evidence.

The Guidelines also state that, in the event of parallel claims, courts should avoid conflicting rulings leading either to over-compensation or under-compensation by staying proceedings, declining jurisdiction, joining several claims or using other procedural means.[19]

Economic theory of passing-on

The Guidelines state that the economic theory of passing-on should serve as one of several relevant factors and must be assessed on the basis of the available factual evidence. In particular, courts should consider the following factors going to the existence and magnitude of passing-on:

- variable costs affected by the overcharge are more likely to be passed on than fixed costs;
- increased prices normally result in decreased demand;
- intense competition generally prevents a purchaser affected by an overcharge from passing it on; and
- there may be other relevant elements, such as price regulation.[20]

Quantification of passing on price and volume effects

The principle of full compensation requires placing the injured party in the position it would have been had the infringement not occurred. When constructing a counterfactual scenario, first the effect of the infringement should be isolated from other factors affecting the price to determine the overcharge. Then the magnitude of the passing-on related price effect has to be estimated. Finally, the Court should consider the passing-on related volume effect.[21]

As regards the quantification of passing-on related price effects, courts may apply different methods to estimate the share of the inflated price that was passed-on (actual harm). The most common method is to compare the price comprising the

[18] The Guidelines, paras 12–15.
[19] The Guidelines, paras 25–45.
[20] The Guidelines, paras 46–59.
[21] The Guidelines, paras 65–73.

cartelised overcharge with the price set on a comparator market. This might be the same market before or after the infringement, the same product market, but in a different geographic area, or a combination of comparisons over time and comparison across markets. Although this comparator-based approach has the advantage of using real-life data, courts should take into account the differences between the market affected by the cartel and the comparator market.[22]

The quantification and estimation of volume effects require courts to assess the change in sales volumes due to increased prices and the margin absent the infringement. The Guidelines recognise that this assessment is difficult and they suggest that courts should use comparator-based methods and methods evaluating the link between price increases and the relevant demand (elasticity approach).[23]

Apart from the described quantitative methods, the Guidelines emphasise the important role of qualitative evidence, such as internal documents or witness statements when estimating the passing-on related volume and price effects.

EC Decision on Processing of Personal Data in EC Proceedings

Regulation 2018/1725 (the Regulation),[24] which entered into force on 11 December 2018, covers the processing of personal data by the EU Institutions and brings their data-processing operations into line with the General Data Protection Regulation (GDPR).[25] The Regulation applies to the EC's competition investigations since they lead to the processing of individuals' personal data.[26]

The Regulation provides that the EU may restrict its application where such restrictions respect the essence of the individuals' fundamental rights and freedoms; where they are necessary and proportionate measures in a democratic society; and where they safeguard a monitoring, inspection or regulatory function connected to the exercise of official authority to protect important objectives of general public interest of the EU.[27]

According to the EC, this includes competition investigations since they serve the promotion and protection of a competitive internal market, thereby safeguarding an important economic and financial interest of the EU and the Member States.[28]

It is on that basis that the EC adopted Decision 2018/1927 (the Decision) to reconcile individuals' rights pursuant to the Regulation with the needs of investigations and enforcement activities.[29] The Decision also entered into force on 11 December 2018.

The Decision is important because it provides a framework for the conditions under which the EC may process personal data in the context of an investigation,

[22] The Guidelines, paras 84–119.
[23] The Guidelines, paras 134–146.
[24] With thanks to Itsiq Benizri. Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) 45/2001 and Decision 1247/2002/EC [2018] OJ L295/39.
[25] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1.
[26] Decision 2018/1927 laying down internal rules concerning the processing of personal data by the European Commission in the field of competition in relation to the provision of information to data subjects and the restriction of certain rights [2018] OJ L313/39, 10 December 2018, Recital 2.
[27] Regulation 2016/679 art.25(1)(c) and (g).
[28] Decision 2018/1927 Recital 2.
[29] Decision 2018/1927 Recital 8.

beyond the existing conditions under competition law.[30] In other words, this Decision provides companies under investigation with an additional legal standard to apply to the EC's scope of investigation.

We describe below: (1) the possible restrictions on individuals' data protection rights and obligations; (2) the grounds for such restrictions; (3) their consequences; and (4) their duration. We also discuss (5) the Data Protection Officer's (DPO) review.

Possible restrictions

The EC may restrict the application of the following individuals' data protection rights: the right to information about the EC's processing activities, including the EC's transparency obligations; the right of access to personal data; the right to erase personal data; the right to restriction of processing; and the obligation to communicate a personal data breach to affected individuals.[31]

Grounds for restriction

The EC may restrict individuals' data protection rights where exercising them would jeopardise the purpose of the EC's investigative and enforcement activities, including by revealing its investigative tools and methods. The EC may also restrict individuals' data protection rights where exercising them would adversely affect the rights and freedoms of other individuals.[32]

In addition, the EC may apply restrictions in relation to personal data obtained from other EU institutions, bodies, competent authorities of Member States of third countries, or from international organisations in three situations.

First, where such restrictions could be applied by other EU institutions on the basis of other acts provided for in art.25 of the Regulation, subject to prior consultation with them, unless it is clear to the EC that the application of a restriction is provided for by art.25 of the Regulation.[33]

Second, where such restrictions could be applied by competent authorities of Member States on the basis of exemptions referred to in art.23 GDPR (which inspired art.25 of the Regulation), or exemptions under the Law Enforcement Directive (which covers public authorities' processing operations in the context of criminal law), subject to prior consultation with these authorities, unless it is clear to the EC that the application of a restriction is provided for by art.23 GDPR.[34]

Third, where the exercise of data protection rights and obligations could jeopardise the EC's co-operation with third countries or international organisations in the conduct of competition investigations or enforcement of competition decisions, unless that interest is overridden by the individuals' interests or fundamental rights and freedoms.[35]

[30] Decision 2018/1927 pp.39–44.
[31] Decision 2018/1927 art.2(2).
[32] Decision 2018/1927 art.2(2).
[33] Decision 2018/1927 art.2(3)(a).
[34] Decision 2018/1927 art.2(3)(b).
[35] Decision 2018/1927 art.2(3)(c).

Consequences of restrictions

The EC shall inform individuals, in its reply to their requests for access, erasure or restriction, of the restrictions applied, the principal reasons thereof, and the possibility of lodging a complaint with the European Data Protection Supervisor (EDPS) or of seeking a judicial remedy from the ECJ.[36] However, the EC does not have to provide such information as long as it would undermine the purpose of the restriction.[37] In any event, the EC shall publish data protection notices on its website to inform all individuals of its activities involving processing of their personal data.[38]

If the EC restricts the right to access, individuals may exercise their right through the intermediary of the EDPS.[39] The EDPS will investigate and inform them whether the data has been processed correctly and, if not, whether any necessary corrections have been made.[40]

The EC shall record the reasons for any restrictions applied, including an assessment of the necessity and proportionality of the restriction.[41] The record shall state how the exercise of the right would jeopardise the purpose of the investigation and enforcement activities, or of the restrictions, or would adversely affect the rights and freedoms of other individuals.[42] The record and, where applicable, the documents containing underlying factual and legal elements shall be registered and made available to the EDPS upon request.[43]

Duration of restrictions

Restrictions shall continue to apply as long as the reasons justifying them remain applicable.[44] Where the reasons for a restriction no longer apply, the EC shall lift the restriction and provide the reasons for the restriction to the individual.[45] At the same time, the EC shall inform the individual of the possibility of lodging a complaint with the EDPS at any time or of seeking a judicial remedy from the ECJ.[46] The EC shall review the application of the restrictions every year and at the closure of the investigation.[47]

The EC DPO's review

The EC DPO ensures, in an independent manner, that the EC correctly applies the law protecting individuals' personal data. The DPO shall be informed, without undue delay, whenever data individuals' rights are restricted.[48] Upon request, the DPO shall be provided with access to the record and any documents containing

[36] Decision 2018/1927 art.4(1) and Regulation 2016/679 art.25(6).
[37] Decision 2018/1927 art.4(2) and Regulation 2016/679 art.25(8).
[38] Decision 2018/1927 art.3(1).
[39] Decision 2018/1927 art.4(4).
[40] Regulation 2016/679 art.25(7).
[41] Decision 2018/1927 art.6(1).
[42] Decision 2018/1927 art.6(2).
[43] Decision 2018/1927 art.6(3).
[44] Decision 2018/1927 art.7(1).
[45] Decision 2018/1927 art.7(2).
[46] Decision 2018/1927 art.7(2).
[47] Decision 2018/1927 art.7(3).
[48] Decision 2018/1927 art.8(1).

underlying factual and legal elements.[49] The DPO may request a review of the restriction.[50] The DPO shall be informed about the outcome of the requested review.[51]

EC guidance on access to EC files (confidentiality rings; confidentiality claims)

In December 2018, the EC published on its website two guidance documents with the purpose of facilitating access to file in cases related to antitrust proceedings. Through these two guidance documents, the EC aims to increase transparency and assure due process.[52]

The first document provides guidance and templates for the use of voluntary "confidentiality rings".[53] It reflects the current practice and experience of DG Competition so far. For example, as noted below, in *Google Android*, the EC used a confidential ring with 26 related non-disclosure agreements.

In a confidentiality ring, the SO addressee agrees with the information provider that a restricted circle of persons would be given access to confidential information. Confidentiality rings safeguard the right of defence while respecting the confidential nature of the information. They also speed up the access to the file procedure by removing or reducing the burden of drafting non-confidential versions of documents.

DG Competition has discretion on whether a confidentiality ring is appropriate, and its role is to facilitate the conclusion of a suitable negotiated disclosure agreement. It may decide to propose one, either on its own motion or upon a request from an SO addressee or information provider. There is no obligation for either side (EC or an addressee) to accept such a proposal. If the principle of using a confidentiality ring is accepted, a negotiated disclosure agreement must be agreed upon by the SO addressee and the information provider.[54]

The second document[55] contains an updated version of the 2012 guidance on business secrets and other confidential information.[56] The new guidance includes detailed definitions and examples of what constitutes business secrets and other confidential information and what does not, while also providing general principles for such an assessment. It includes specific references to case law and explains the practical aspects of claiming confidentiality.

In July 2019, the EC also invited comments on a draft Communication on the protection of confidential information by national courts in private competition law enforcement.[57] The draft Communication notes how Courts may have to

[49] Decision 2018/1927 art.8(1).
[50] Decision 2018/1927 art.8(2).
[51] Decision 2018/1927 art.8(2).
[52] With thanks to Marilena Nteve. EC, "New guidance to facilitate access to Commission files" (12 December 2018), *https://ec.europa.eu/luxembourg/news/new-guidance-facilitate-access-commission-files_fr* [Accessed 8 January 2020].
[53] EC DG Competition, "The use of confidentiality rings in antitrust access to file proceedings", *https://ec.europa.eu/competition/antitrust/conf_rings.pdf* [Accessed 8 January 2020].
[54] EC DG Competition, "The use of confidentiality rings in antitrust access to file proceedings", para.13.
[55] EC, "Guidance on confidentiality claims during Commission antitrust procedures", *https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf* [Accessed 8 January 2020].
[56] EC, "DG Competition informal guidance paper on confidentiality claims" (March 2012), available at *https://ec.europa.eu/competition/antitrust/guidance_en.pdf* [Accessed 8 January 2020].
[57] EC Press Release IP/19/4809 (29 July 2019). The consultation document is available at *https://ec.europa.eu/competition/consultations/2019_private_enforcement/en.pdf* [Accessed 8 January 2020].

organise the disclosure of confidential information in competitive damages claims and highlights how that can be done, consistent with protecting confidentiality (e.g. through confidentiality rings, redactions and appointment of experts). Responses were sought by October 2019.

Box 4

- **Coming**
  - Consultation on Vertical Restraints/Guidelines
    - Adaptation to growth in e-commerce and online platforms?
    - While respecting traditional "brick & mortar" channels
  - Consultation on Horizontal BEs/Guidelines
    - What place for sustainability?
    - How to deal with A.I. and digitalisation?

Consultation on Vertical Restraints BE/Guidelines review

In February 2019, the EC launched a public consultation to ask stakeholders their views on the "effectiveness, efficiency, relevance, coherence and added value" of the EU Vertical Block Exemption Regulation (VBER). Responses were required by 27 May 2019. A summary of the responses, together with contributions is available on the EC's website.[58] It may be recalled that the VBER expires in May 2022.

Issues raised in the EC's summary of responses included:

- revision of the guidance concerning online sales restrictions (especially in the context of the distinction between passive and active sales);
- the treatment of "most favoured nation" or "price parity" clauses (and variations in Member States' enforcement practices);
- online marketplace bans;
- hardcore restrictions relating to selective distribution;
- dual pricing (as between online and offline supply);
- retail channelling (as an indirect form of resale price maintenance); and
- restrictions on the purchasing of keywords for the purposes of online advertising and vertical restrictions imposed by intermediaries.

The EC is expected to "prolong and revise" the VBER, rather than to allow it to lapse.

Central issues appear to be how to adapt these rules to the very rapid development of e-commerce and online distribution, taking into account (1) the EC's 2017 report following its e-commerce inquiry; (2) the many interventions at EC and NCA level for online resale price maintenance and other online sales restrictions; (3) how to treat online platforms in the EC rules; (4) the European Courts' recent case law;

[58] With thanks to Itsiq Benizri. See EC, "Public Consultation: EU competition rules on vertical agreements—evaluation", *https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981/public-consultation_en* [Accessed 8 January 2020].

and (5) the changing regulatory context of recent EU regulations affecting distribution.

Taking these in turn:

First, we summarised the EC's e-commerce report at length two years ago.[59] For present purposes we would note three points. The EC's report showed:

- the huge growth in online sales and noted that there were online restrictions in place, prompting some recent enforcement actions;
- the considerable variation in the amount of online sales, with a high take-up in some Member States and a much lower level in others, where sales through traditional "bricks & mortar" shops were more frequent. Notably, the use of online marketplaces varies immensely between Member States (62 per cent of respondents using them in Germany, but only 4% in Belgium); and
- the considerable use of algorithms in distribution.[60]

Second, recent enforcement actions of the EC and NCAs appear focused on resale price maintenance, which they consider as a hardcore violation of competition law that in principle is prohibited. For example, in July 2018, the EC imposed a total fine of €111 million on manufacturers of consumer electronics for restricting the ability of online retailers to set their own prices.[61] There have been many cases at Member State level also.[62]

As noted below, the EC also recently imposed a €40 million fine on the fashion supplier *Guess* for entering into agreements that prevented its retailers from online advertising and sales, as part of an apparent strategy to reserve online sales to Guess.[63]

Third, there is discussion about how to deal with online platforms in these rules in at least two ways. On the one hand, insofar as they may have important market positions in online sales and generally. On the other hand, insofar as they may operate using agency arrangements rewarded by commission, yet might be viewed as independent, in particular if they also have own-branded sales.

Fourth, as regards EU case law, it will be recalled that in December 2017 the ECJ ruled, in *Coty Germany*,[64] that online marketplace bans may be lawful under EU law in defined conditions, while a blanket internet sale ban is prima facie considered unlawful under EU law. As explained in previous papers, that ruling was controversial with, for example, the *Bundeskartellamt* (BKA, the German Competition Authority) taking the view that it should be construed as relating to luxury goods, but not electronics goods.[65]

[59] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016-2017: Part 2" [2018] I.C.C.L.R. 227, 266 (with Itsiq Benizri and Álvaro Mateo Alonso).

[60] See EC, *Final report on the E-commerce Sector Inquiry* (2017), *https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf* [Accessed 8 January 2020].

[61] EC Press Release IP/18/4601, 24 July 2018. The EC also pointed out that the use of pricing algorithms, which automatically lower prices to match those of competitors, broadened the impact of the anti-competitive pricing restrictions imposed on low-pricing online retailers on overall online prices.

[62] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016-2017: Part 2" [2018] I.C.C.L.R. 227, 269 (with Itsiq Benizri and Álvaro Mateo Alonso)

[63] EC Press Release IP/18/6844, 17 December 2018.

[64] *Coty Germany GmbH v Parfümerie Akzente GmbH* (C-230/16) EU:C:2017:941; [2018] 4 C.M.L.R. 9.

[65] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 1" [2019] I.C.C.L.R. 121, 132.

The BKA also considered that market conditions in Germany might justify a different approach, notably, since online marketplace use is very developed in Germany and many small retailers in Germany use such online marketplaces to expand their sales. Others are concerned that traditional physical distribution should not be wiped out by online sales; and that there should not be variations by Member State or region, so that pan-European distribution systems can be used that are based on the same principles.

Fifth, there is an evolving e-commerce regulatory context. Notably, since December 2018, the EU Geo-blocking Regulation prevents companies from requiring their distributors to apply discriminatory conditions of access to goods or services, or requiring them to apply discriminatory practices related to payment.[66] In July 2019, the EP and the EU Council also adopted a new Platform-to-Business Regulation, which requires e-commerce platforms to be more transparent about the data they hold about traders' performance, how traders can access such data, and the ranking parameters used to display products. The Platform-to-Business Regulation will apply as of 12 July 2020.[67]

Consultation on Horizontal Restraints BEs/Guidelines review

In September 2019, the EC invited comments on the roadmap for the evaluation of the two Block Exemption Regulations (BER) for horizontal co-operation agreements,[68] the Research and Development[69] and Specialisation BERs.[70] Given their expiration on 31 December 2022, the EC seeks to determine whether they should be terminated, prolonged or amended given new market developments. It will also evaluate the accompanying Guidelines on Horizontal Co-operation Agreements (the Horizontal Guidelines). The EC planned a public consultation, a stakeholder workshop and discussions with competition authorities of the EU Member States.[71]

There has been vigorous debate already among diverse stakeholders on updating the Horizontal Agreements BERs and the Horizontal Guidelines. The primary focus appears to be on issues such as sustainability and technology and innovation.

Sustainability agreements

The concept of sustainability is based on three main pillars: economic, environmental, and social. Sustainable development has been a part of international

[66] Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) 2006/2004 and (EU) 2017/2394 and Directive 2009/22 [2018] OJ L60I/1, 2 March 2018; EC, "Geo-blocking", *https://ec.europa.eu/digital-single-market/en/geo-blocking-digital-single-market* [Accessed 8 January 2020].

[67] Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57; EC Press Release IP/19/1168, 14 February 2019; and EC, "Platform-to-business trading practices", *https://ec.europa.eu/digital-single-market/en/business-business-trading-practices* [Accessed 8 January 2020].

[68] With thanks to Marilena Nteve. See EC, "EU competition rules on horizontal agreements between companies – evaluation", *https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393_en* [Accessed 8 January 2020].

[69] Regulation 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L335/36.

[70] Regulation 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L335/43.

[71] The consultation was launched on 6 November 2019.

initiatives even before its official adoption in the Rio Declaration in 1992.[72] The EU has been a pioneer with regard to environmental initiatives and climate change is a central topic in the EU agenda. For example, the new President of the Commission, Ursula von der Leyen, has committed that, within the first hundred days of the new European Commission, a "European Green Deal" will be proposed.[73]

It may be recalled that in the previous EC Horizontal Guidelines from 2001 there was a section specifically dedicated to environmental agreements.[74] Many then criticised omission of this section in the current Guidelines (from 2010), pointing out inconsistency between the DG COMP and DG ENERGY approaches.

As a result there is a movement to re-introduce a section on environmental agreements in the upcoming Guidelines, to enhance legal certainty. For example, this topic was extensively discussed at a recent conference on "Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy".[75] There are many initiatives on these issues, including questions of corporate social responsibility, with calls for co-operation on climate change and the issue of living wages.[76]

On the other hand, it is clear from the debate that there is a reluctance to provide "*carte blanche*" to sustainability agreements. For example, Commissioner Vestager has stated that there is no need for new competition rules to make sustainable development possible.[77] Equally that, even if competitors get together to agree standards on sustainable products, that cannot be an excuse for authorising a cartel. "Sustainability" should also not be misused to keep other companies out of the market and harm consumers.

Commissioner Vestager has emphasised use of standards, in compliance with the competition rules:

> "[S]ometimes, businesses can respond … even better, if they get together to agree standards for sustainable products … they can do that, without breaking the competition rules; just as long as they design those agreements so they don't harm competition and consumers. That means, for instance, that sustainability agreements mustn't be used as cover for a cartel. You can get together, to agree what you mean by 'sustainability' and create a well-monitored label – but it isn't acceptable to agree how to pass on the extra costs to consumers. It's also important that sustainability agreements aren't used to make it hard for some businesses to compete. We don't want a handful of companies to misuse the idea of sustainability, to define what products are allowed in the market, in a way that suits them – and that keeps others out. So it's important that every business that wants to take part in defining the

[72] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26; 31 I.L.M. 874 (1992).

[73] EC, "Political Guidelines for the next European Commission 2019–2024", *https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf* [Accessed 8 January 2020].

[74] EC, "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements" [2001] OJ C3/2, Section 7.

[75] GCLC Conference (24 October 2019) *https://www.ucl.ac.uk/laws/events/2019/oct/conference-sustainability-and-competition-policy-bridging-two-worlds-enable-fairer[Accessed 8 January 2020]*.

[76] EC, "Feedback from: Fair Trade Advocacy Office", *https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393/feedback/F473560_en?p_id=5763121* [Accessed 8 January 2020].

[77] Ms Vestager speech at GCLC Conference, Brussels, 24 Oct 2019 "Competition and sustainability", available at: *https://wayback.archive-it.org/12090/20191129200523/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en* [Accessed 8 January 2020].

> standard has a chance to get involved. And every business has to have a fair and equal right to use the standard – so that, for example, any product that meets the requirements for a sustainability label should be able to use that label."

All this is likely to be a hot topic in formulating the next Guidelines.

Technology and innovation

Another key issue under consideration during the evaluation of the Horizontal Agreements BE and the Horizontal Guidelines is technology and innovation. Since the last Guidelines in 2010, new developments in digitalisation have occurred, which have brought transformational changes across markets: for example, developments such as blockchain, 5G networks, algorithms (AI) and Internet of Things standards.

There are also significant IP issues, including standardisation, licensing under FRAND terms and patent holding.

EC Notice on Competition Law and Brexit

In March 2019, the EC issued a Notice[78] to interested parties on the application of EU competition rules to the United Kingdom (UK), following its withdrawal from the EU, when the UK will become a third country vis-à-vis the EU.

The EC recalled that EU antitrust and merger rules apply regardless of an undertaking's nationality, its country of incorporation or the location of its headquarters. Conduct that occurred outside the EU may also be covered.

The EC noted that all previously adopted decisions remain valid. However, those concerned may want to ask the EC to waive, modify or substitute commitments which concern UK market issues only.

The EC notes that:

- the EC would not be allowed to carry out inspections in the UK under Regulations 1/2003 and 139/2004 (EUMR), but it will still be able to ask for information;
- companies will not benefit from the "one-stop-shop principle' under the EUMR, i.e. the EC and the CMA (UK competition authority) will both be competent in parallel to review a transaction;
- the EC will not include the parties' turnover obtained in the UK for the calculation of EU-wide and relevant national thresholds;
- the UK will not be able to refer merger cases to the EC for review or to join referral requests or to ask the EC to review a concentration instead of the EC; and
- the EC will not be competent to determine if a planned transaction would significantly impede competition on national UK markets.

[78] With thanks to Katrin Guéna. EC, "Notice to Stakeholders: Withdrawal of the United Kingdom and EU competition Law", for a full text of the Notice, see *https://ec.europa.eu/info/sites/info/files/eu-competition-law_en.pdf* [Accessed 8 January 2020].

Clearly these are mainly "no deal" merger control points. If there is a "deal" on UK exit, merger filings already with the EC will be completed by the EC.[79] If there is no deal, it is possible that the CMA may request a UK filing or other information in order to ensure that special UK issues are considered and dealt with.

It is an open question what will happen otherwise both in terms of substance and procedure. Notably, at times the UK has shown interest in American law principles, in particular as regards abuse of dominant position. On the other hand, the UK competition rules are currently aligned closely with the EU law principles, and it may be difficult to expect UK-based companies to apply multiple, varying standards. While a co-operation agreement between the UK/CMA and the EU/EC may be envisaged, much will depend on what "deal", if any, occurs.

Clearly also there are a number of important points on competition/antitrust cases. Notably:

- first, in cases with a European dimension, the UK/CMA may take its own decisions. So, in cartel cases and other competition law issues companies may face parallel proceedings with the EC and the UK/CMA. Also there will be an increased need to make leniency applications to the CMA in cartel cases in parallel to any made to the EC (although in practice, often this happens already);
- second, the UK/CMA will not be in the ECN (unless some specific co-ordination is agreed). So co-operation, if any, will have to worked out otherwise; and/or be through OECD and ICN structures; and
- third, the UK/CMA will not be in the EU Cooperation Notice system on allocation of cases between NCAs and the EC[80], or with national courts.[81]

European Court Cases

General

Box 5

- **Court Cases—General**
  - *Cogeco:*
    - Portuguese limitation rules contrary to EU principle of effectiveness in a competition damages context
  - *Vantaan Kaupunki/Skanska:*
    - Finnish law limiting liability to a company had to give way to EU rules on liability of the "undertaking" in EU competition damages case
    - Who is liable is "directly" part of EU law
  - *Tibor-Trans/DAF Trucks:*
    - Truck purchaser from a Hungarian dealer can sue cartel participant, even if no direct contractual relationship

[79] See Mlex, "Competition, state-aid cases keep same runoff conditions under new Brexit deal", 18 Oct 2019.
[80] EC Notice on co-operation within the Network of Competition Authorities [2004] OJ C101/43.
[81] EC Notice on co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54 (as amended).

- *Kendrion/Guardian:*
  - Delay at General Court not the determining cause of material damage through increased bank guarantee charges
- *Printeos (Interest):*
  - EC has to pay default interest as non-contractual damages if fine paid and decision overturned at GC
- *PZU v PCA:*
  - No infringement of *ne bis in idem* if rulings on infringement of EU and national competition law in parallel.

Cogeco Communications Inc v Sport TV Portugal SA

In March 2019, the ECJ delivered its judgment in *Cogeco Communications Inc v Sport TV Portugal SA*.[82] This was on a preliminary reference from the Portuguese Competition Court and concerned the interpretation of the Competition Damages Directive[83] and the compatibility of Portuguese limitation periods with EU law more generally. This was the first preliminary reference on the interpretation of the Damages Directive.

The case arose from a damages action related to an alleged abuse of dominant position brought in Portugal after publication of the Damages Directive, but before the deadline for its transposition into national law and before Portugal transposed the Directive.[84] Cogeco Communications owned a shareholding in Cabovisão, a Pay-TV service provider, which claimed to be the victim of discriminatory pricing.

At the time the action was brought, Portuguese law generally provided for a limitation period of three years, even if the claimant was unaware of the potential defendant's identity and the full extent of the relevant damage. In addition, this limitation period was not interrupted in the event of proceedings by the Portuguese Competition Authority (PCA).[85]

On the other hand, under the Damages Directive the minimum limitation period is five years, and that only starts to run when the infringer's identity is known. Further, it is suspended while a competition authority is investigating the conduct concerned.[86]

There are three aspects to the ECJ's judgment which are of interest:

First, the ECJ had to determine whether the limitation period in the Damages Directive was applicable. The Court's answer was "no".

Article 22(2) of the Damages Directive specifically provides that measures adopted to comply with the Directive's procedural provisions shall not apply to actions brought before the Directive's publication in December 2014.[87] Member States also had a discretion as to whether the measures implementing the Damages Directive's procedural provisions would apply to actions initiated after December 2014, but before the deadline for transposition.[88]

[82] With thanks to Cormac O'Daly. *Cogeco Communications Inc v Sport TV Portugal SA* (C-637/17) EU:C:2019:263.
[83] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.
[84] *Cogeco* EU:C:2019:263 at [19]–[23].
[85] *Cogeco* EU:C:2019:263 at [9] and [23].
[86] Directive 2014/104 art.10.
[87] *Cogeco* EU:C:2019:263 at [27].
[88] *Cogeco* EU:C:2019:263 at [28].

The Court referred to the Portuguese transposing law and concluded that the measures implementing the Directive were not intended to apply to actions brought before entry into force of the transposing law. So the Directive's rules on limitation periods were not applicable.[89]

Second, the ECJ considered whether the Portuguese limitation period complied with EU law more generally and, in particular, with the principle of effectiveness. The Court's answer was also "no".

The Court recalled that the full effectiveness of art.102 TFEU would be at risk if individuals could not claim compensation for its infringement (or infringement of the national law equivalent).[90] The Court noted that competition damages cases involve complex factual and economic analysis[91] and therefore:

> "Short limitation periods that start to run before the person injured by the infringement of EU competition law is able to ascertain the identity of the infringer may render the exercise of the right to claim compensation practically impossible or excessively difficult."[92]

The Court also considered that it was indispensable that short limitation periods could be suspended during competition authority investigations or court review of an authority's decision. Otherwise, there was a risk that the limitation period could expire even before the competition authority's proceedings were completed.[93]

So, the ECJ ruled that the general Portuguese limitation period was not compatible with EU law in relation to EU competition law claims: yet another example of the importance of the "effectiveness of EU law" case law on national procedural questions in competition cases.

Third, there was a deceptively simple ruling by the Court on the admissibility of another question by the Portuguese Competition Court.[94] The issue was whether the decision of the PCA that there had been an infringement was a binding assessment for the Portuguese Courts or only a rebuttable presumption.

The ECJ dealt with it by noting that, on appeal against the PCA's ruling the Portuguese Courts had found that the PCA had not shown an effect on trade between Member States, so there was no follow-on action from an infringement of art.102 TFEU and no jurisdiction for the ECJ to rule.[95]

However, what appears more complex is that the Court had not raised the same point as regards the limitation period issue. AG Kokott in her Opinion[96] reviewed admissibility in detail and noted also that neither the PCA nor the Portuguese Courts could rule that there was no infringement of art.102 TFEU (see *Tele2 Polska* (C-375/09)[97]). It may be that the Court wanted to keep that door open.

It is also interesting to see how some NCAs appear to be imposing fines with two separate amounts for infringements contrary to national competition law and

[89] *Cogeco* EU:C:2019:263 at [31]–[33].
[90] *Cogeco* EU:C:2019:263 at [39].
[91] *Cogeco* EU:C:2019:263 at [46].
[92] *Cogeco* EU:C:2019:263 at [49].
[93] *Cogeco* EU:C:2019:263 at [51] and [52].
[94] *Cogeco* EU:C:2019:263 at [56].
[95] *Cogeco* EU:C:2019:263 at [58]–[60].
[96] Opinion *Cogeco* (C-637/17), 17 January 2019, EU:C:2019:32.
[97] *Prezes Urzedu Ochrony Konkurencji i Konsumentow v Tele2 Polska sp z oo (now Netia SA)* (C-375/09) EU:C:2011:270; [2011] 5 C.M.L.R. 2.

EC competition law. This comes up again below as regards Polish Competition law.

Vantaan Kaupunki v Skanska Industrial Solutions

This case arose on a reference from the Finnish Supreme Court, the *Korkeinoikeus*.[98] The context was damages claims further to the judgment of a Finnish Court imposing fines on various companies for participation in a cartel concerning asphalt works.

The municipality of Vantaa sued the cartel participants, including a company called Lemnunkainen, for damages as regards overpricing in asphalt works that it had commissioned between 1998 and 2001.

In 2000, three cartel members were acquired by other companies and subsequently wound up, while others continued their commercial activities.

A Finnish court ruled that, in such circumstances, the municipality of Vantaa could not claim damages from the new owners of those acquired companies since, in Finnish law, liability was personal to the company which had committed the unlawful act alone.

Lemnunkainen paid the damages, but appealed that its liability should be reduced, and the purchasing companies should pay their part under joint and several liability. The municipality of Vantaa also appealed.[99]

The Finnish Supreme Court then asked the ECJ whether the determination of the private law liability for damages for infringement of art.101(1) TFEU was directly under EU law as attaching to the "undertaking" concerned, as was the case in EU public law enforcement of penalties for infringement, or whether such liability was to be determined under Finnish law, albeit subject to the principle that such law could not undermine the effectiveness of EU law.

It appears that, under Finnish law, the "corporate veil" would only be lifted to allow a claim against a company purchasing another if the restructuring in question had been unlawfully or artificially implemented in order to avoid the liability, or otherwise fraudulently, or at least the purchaser ought to have known of the infringement, when implementing the restructuring.

Advocate General Wahl (AG Wahl) gave an Opinion in February 2019, arguing that the determination of the persons liable to pay compensation for an infringement of EU competition law was a "constitutive condition of liability governed EU law" (i.e. directly governed by EU law), not a "detailed rule" on the exercise of a right to compensation, which was left to domestic law, subject to the observance of minimum requirements of equivalence and effectiveness.[100] In doing so he was influenced by the view that damages rules are also designed to have a deterrent function, like public law enforcement rules, and that there should not be different rules for the public law and private law situations.[101] He also argued that the constitutive conditions of liability had to be uniform, not subject to variation across Member States.[102]

[98] *Vantaan Kaupunki v Skanska Industrial Solutions Oy* (C-724/17) EU:C:2019:204; [2019] 4 C.M.L.R. 26.

[99] See Opinion of AG Wahl in *Vantaan Kaupunki* (C-724/17) EU:C:2019:100, 6 February 2019, at [8]–[18]; and the judgment at [6]–[11].

[100] Opinion *Vantaan Kaupunki* EU:C:2019:100, at [58]–[62].

[101] Opinion *Vantaan Kaupunki* EU:C:2019:100, at [26]–[51].

[102] Opinion *Vantaan Kaupunki* EU:C:2019:100, at [66]–[67].

The ECJ agreed and ruled as follows:

First, that the determination of the entity required to provide compensation for an infringement of art.101 TFEU is directly governed by EU law.[103] Such liability attached to the "undertaking concerned" (and therefore the EU rules concerning continued liability for economic successors applied).

Second, the Court disagreed with the EC's view that the issue was one for national law, drawing a distinction between the issue of which entity/entities is/are to compensate for the damage (which was to be governed by EU law) and attribution of liability *between* those entities (which was for national law).[104]

Third, such an approach was required for the effective implementation of the EU competition rules.[105]

Finally, the ECJ ruled that no distinction could be drawn between the Court's case law on liability in the context of EC fines for infringements and liability in the context of an action for damages. The parties had argued this and the Finnish Court had therefore raised the question.[106] The Court's reasoning, shared by AG Wahl in his Opinion, was that damages actions were an integral part of the system to enforce the EU competition rules and deter companies from engaging in such conduct.[107] As such, the same concept of "undertaking" should apply in the two situations.[108]

As a result, the purchasing companies could be held liable for the unlawful activities of the companies that they had acquired in the asphalt cartel.

It is an interesting judgment. This is partly because of the ruling itself, finding certain elements of EU Competition law *directly* applicable to damages claims,[109] and partly because the judgment may also mean that *parents* which are "undertakings" with their subsidiaries in EU Competition law, would be liable for EU Competition law damages claims, an issue which has been coming up in some Member States, where the principle of personal liability of the company is also the general rule.

Tibor-Trans Fuvarozo es Kereskedelmi v DAF Trucks

This was a reference from the Györ Regional Court of Appeal in Hungary[110] concerning the jurisdictional rules of the Recast Brussels Regulation, now art.7(2) of Regulation 1215/2012.[111]

The case concerned a claim for damages in relation to the EC's *Trucks* cartel decision in 2016. The plaintiff, Tibor-Trans, had purchased trucks from Hungarian dealers. It claimed that the prices were artificially distorted as a result of the cartel and that it could sue DAF Trucks (DAF) in Hungary since it suffered damage

[103] *Vantaan Kaupunki* EU:C:2019:204; [2019] 4 C.M.L.R. 26 at [28].
[104] *Vantaan Kaupunki* EU:C:2019:204; [2019] 4 C.M.L.R. 26, at [33]–[35].
[105] *Vantaan Kaupunki* EU:C:2019:204; [2019] 4 C.M.L.R. 26, at [40].
[106] *Vantaan Kaupunki* EU:C:2019:204; [2019] 4 C.M.L.R. 26, at [41]–[47].
[107] *Vantaan Kaupunki* EU:C:2019:204; [2019] 4 C.M.L.R. 26, at [45].
[108] *Vantaan Kaupunki* EU:C:2019:204; [2019] 4 C.M.L.R. 26, at [47].
[109] See *Eturas UAB v Lietuvos Respublikos Konkutencijos Taryba* (C-74/14), EU:C:2016:42; [2016] 4 C.M.L.R. 19.
[110] With thanks to Cormac O'Daly. *Tibor-Trans Fuvarozo es Kereskedelmi Kft v DAF Trucks NV* (C-451/18) EU:C:2019:635; [2019] 5 C.M.L.R. 15.
[111] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

there. Tibor-Trans had not purchased directly from DAF; all its purchases were from Hungarian dealers.

DAF argued that it could not reasonably foresee such a claim, and that any such action should be brought before the courts in the Member State where it was domiciled, rather than in Hungary.

Following on from its *flyLAL-Lithuanian Airlines* judgment,[112] the Court considered whether the damage claimed was "initial damage" (which could be a basis for jurisdiction), or "subsequent adverse consequences" (which would not be enough for jurisdiction).[113] The Court also noted that, on the case law, direct damage could found jurisdiction, but not indirect damage which is a consequence of direct damage to others.[114]

The Court found, first, that the damage was additional costs through artificially high prices, passed on to end-users such as Tibor-Trans through Hungarian dealers. In the Court's view, that was not a "financial consequence" of damage that could have been suffered by a direct purchaser (such as a loss of sales by a dealer), but an "immediate consequence" of the *Trucks* cartel and therefore constituted direct damage to Tibor-Trans.[115]

Second, since the EC had found that the cartel extended to the whole of the EEA, a claim for such direct damage could be brought in Hungary.[116]

Third, a cartel member could reasonably expect to be sued in a Hungarian court.[117]

Otherwise, Tibor-Trans had only sued DAF Trucks, not all the cartel members. This was not considered objectionable since the infringement concerned the joint and several liability of all the undertakings involved therein.[118]

Delay in court proceedings

EU v Gascogne, Kendrion and Others

In December 2018, the ECJ ruled on five appeals brought against the GC's 2017 judgments in *Gascogne Sack Deutschland GmbH and Gascogne v European Union,Kendrion NV v European UnionandPlásticos Españoles SA (ASPLA)* and *Armando Álvarez, SA v European Union*.[119]

It may be recalled that in January and February 2017, the GC had awarded compensation to Gascogne (formerly Groupe Gascogne SA) and its subsidiary, Gascogne Sack Deutschland GmbH (formerly Sachsa Verpackung GmbH) (Gascogne), Kendrion, ASPLA and Armando Álvarez, for material and non-material

[112] *Proceedings Brought by Tietosuojavaltuutettu* (C-25/17) EU:C:2018:551; [2019] 1 C.M.L.R. 5.
[113] *Tietosuojavaltuutettu* EU:C:2018:551; [2019] 1 C.M.L.R. 5 at [27]–[28].
[114] *Tietosuojavaltuutettu* EU:C:2018:551; [2019] 1 C.M.L.R. 5 at [29].
[115] *Tietosuojavaltuutettu* EU:C:2018:551; [2019] 1 C.M.L.R. 5 at [31].
[116] *Tietosuojavaltuutettu* EU:C:2018:551; [2019] 1 C.M.L.R. 5 at [32]–[33].
[117] *Tietosuojavaltuutettu* EU:C:2018:551; [2019] 1 C.M.L.R. 5 at [34].
[118] *Tietosuojavaltuutettu* EU:C:2018:551; [2019] 1 C.M.L.R. 5 at [36].
[119] With thanks to Georgia Tzifa. *European Union v Gascogne Sack Deutschland GmbH and Gascogne SA* (C-138/17 P) and *Gascogne Sack Deutschland GmbH and Gascogne SA v European Union* (C-146/17 P), EU:C:2018:1013; *European Union v Kendrion NV* (C-150/17 P), EU:C:2018:1014; Joined Cases (C-174/17 P and C-222/17 P), *European Union v Plásticos Españoles SA (ASPLA) and Armando Álvarez SA* (C-174/17 P) and *Plásticos Españoles SA (ASPLA) and Armando Álvarez SA v European Union* (C-222/17 P), EU:C:2018:1015, Judgments of 13 December 2018.

damage suffered as a result of a breach of the fundamental right to adjudication within a reasonable time.[120]

In particular, the GC had found that there was a sufficiently direct causal link between the breach of the obligation to adjudicate within a reasonable time in the actions for annulment and the material and non-material damage suffered by the companies in question. That material damage consisted in the payment of bank guarantee charges during the period which corresponded to the excessive length of the proceedings at first instance.[121]

The GC recognised that, on the case law, alleged damage consisting in bank guarantee charges incurred by a company penalised by an EC decision later annulled by the GC was not the direct consequence of the unlawfulness of that decision, but of that company's own decision to provide a bank guarantee so as not to comply with the obligation to pay the fine within the period stipulated in the contested decision.[122]

However, the *Gascogne,Kendrion* and *ASPLA and Armando Álvarez* cases could be distinguished on the facts from that case law. The reasons were that:

- at the time when the companies in question brought their actions for annulment and provided bank guarantees, the breach of the obligation to adjudicate within a reasonable time was unforeseeable; and
- the reasonable time for adjudicating at first instance was exceeded after the initial decision of these companies to provide a bank guarantee.

Therefore, the causal link between the breach of that obligation and the material damage sustained by the companies in question had not been severed, according to the GC.[123]

The ECJ disagreed with that assessment. In particular, the Court held that the two circumstances relied on by the GC above could not be relevant to finding that there was a sufficiently direct causal link between the breach of the obligation to adjudicate within a reasonable time and the material damage sustained by the companies in question, in the form of bank guarantee charges paid during the period by which that time was exceeded.[124]

The Court stated that would have been the case only if it were compulsory for companies that had provided a bank guarantee to maintain it until the delivery of the GC's judgment. However, the maintenance of that guarantee was at the discretion of the companies concerned in the light of their financial interests. Nothing prevented them from terminating the bank guarantee that they had provided and paying the fine imposed where, in view of the evolution of the circumstances

[120] *Gascogne Sack Deutschland GmbH and Gascogne v European Union* (T-577/14), EU:T:2017:1; [2017] 5 C.M.L.R. 10; *Kendrion NV v European Union* (T-479/14), EU:T:2017:48; and *Plásticos Españoles SA (ASPLA) and Armando Álvarez SA v European Union* (T-40/15), EU:T:2017:105; [2017] 5 C.M.L.R. 12.

[121] *Gascogne* EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [131]; *Kendrion* EU:T:2017:48 at [99]; and *ASPLA* EU:T:2017:105; [2017] 5 C.M.L.R. 12 at [120].

[122] *Gascogne* EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [118]; *Kendrion* EU:T:2017:48 at [68]; and *ASPLA* EU:T:2017:105; [2017] 5 C.M.L.R. 12 at [109].

[123] *Gascogne* EU:T:2017:1; [2017] 5 C.M.L.R. 10 at [119]–[121]; *Kendrion* EU:T:2017:48 at [87]–[89]; and *ASPLA* EU:T:2017:105; [2017] 5 C.M.L.R. 12 at [110]–[112].

[124] *Gascogne* EU:C:2018:1013 at [27]; *Kendrion* EU:C:2018:1014 at [57]; and *ASPLA* EU:C:2018:1015 at [28].

in relation to those existing on the date when that guarantee was provided, those companies deemed that option more advantageous for them.[125]

That might be the case, in particular, where the conduct of the proceedings before the GC leads the companies in question to take the view that the judgment will be delivered at a date later than that which they had initially envisaged and that, consequently, the cost of the bank guarantee will be higher than the cost that they had initially envisaged when providing that guarantee.[126]

In this case, the oral proceedings had not begun within the time these companies had considered as normal for dealing with actions for annulment in competition matters. By then, therefore, Gascogne, Kendrion, ASPLA and Armando Álvarez could not have been unaware that the duration of the proceedings in those cases would considerably exceed that which they had initially envisaged and they could have reconsidered the appropriateness of maintaining the bank guarantee, having regard to the extra costs that its maintenance might entail.[127]

The ECJ found that, in those circumstances, the breach of the obligation to adjudicate within a reasonable time at first instance could not have been the determining cause of the material damage suffered by these companies as a result of paying bank guarantee charges during the period by which that time was exceeded. Such damage was the consequence of the companies' own decision to maintain the bank guarantee throughout the proceedings in those cases, despite the financial consequences which that entailed.[128]

Therefore, the ECJ found that the GC erred in law by finding that there was a sufficiently direct causal link between the two.[129]

Finally, the ECJ confirmed, in the *Kendrion* case, that the *Baustahlgewebe v Commission* case law,[130] on which Kendrion relied to support its claim for compensation amounting to 5 per cent of the fine, was subsequently modified by the ECJ and is therefore no longer relevant for the purposes of determining compensation aimed at making good, under art.340 TFEU (the basis for non-contractual damages in EU law), the non-material damage caused by the breach of the obligation to adjudicate within a reasonable time.

Consequently, the GC did not err in law when it found that compensation of €6,000 granted to Kendrion constitutes adequate reparation for the non-material damage it suffered as a result of a breach of the fundamental right to adjudication within a reasonable time.[131]

Guardian Europe

In September 2019, the ECJ delivered its judgment on two appeals against the GC's 2017 judgment in *Guardian Europe Sàrl v European Union* (represented by the EC and the CJEU).[132]

[125] *Gascogne* EU:C:2018:1013 at [29]; *Kendrion* EU:C:2018:1014 at [59]; and *ASPLA* EU:C:2018:1015 at [30].
[126] *Gascogne* EU:C:2018:1013 at [29]; *Kendrion* EU:C:2018:1014 at [59]; and *ASPLA* EU:C:2018:1015 at [30].
[127] *Gascogne* EU:C:2018:1013 at [30]; *Kendrion* EU:C:2018:1014 at [60]; and *ASPLA* EU:C:2018:1015 at [31].
[128] *Gascogne* EU:C:2018:1013 at [31]; *Kendrion* EU:C:2018:1014 at [61]; and *ASPLA* EU:C:2018:1015 at [32].
[129] *Gascogne* EU:C:2018:1013 at [32]; *Kendrion* EU:C:2018:1014 at [62]; and *ASPLA* EU:C:2018:1015 at [33].
[130] *Baustahlgewebe GmbH v Commission of the European Communities*(C-185/95 P) EU:C:1998:608; [1999] 4 C.M.L.R. 1203.
[131] *Kendrion* EU:C:2018:1014 at [106]–[107] and [112]–[113].
[132] With thanks to Cormac O'Daly. *European Union v Guardian Europe and Guardian Europe v European Union* (Joined Cases C-447/17 P and C-479/17 P), EU:C:2019:672; [2019] 5 C.M.L.R. 20.

The case arose from the EC's *Flatglass* cartel decision[133] and the GC's subsequent infringement of art.47 of the CFR for delay, resulting in no ruling on Guardian's application for partial annulment of that decision within a reasonable time.[134] The GC had awarded damages of €654,523 plus interest to compensate for additional guarantee costs that Guardian Europe had paid during the period corresponding to the GC's unreasonably delay in ruling.[135]

In the appeal brought by the CJEU, the ECJ applied the reasoning in the *Kendrion*[136] case noted above, that the infringement of the obligation to adjudicate within a reasonable time was not the determining cause of damage resulting from paying bank guarantee costs during the period by which the reasonable time was exceeded.[137] Rather, these additional guarantee costs had been caused by Guardian Europe deciding to maintain its bank guarantee throughout the entire period of the GC proceedings.[138]

Guardian Europe had also claimed damages for loss of profit and reputational damage before the GC. The GC had rejected these claims. Guardian Europe appealed. However, the ECJ rejected it.[139]

Printeos (Interest)

It may be recalled that the EC found Printeos had participated in the *Envelopes* cartel in 2014. Printeos was fined €4.7 million. On appeal, the GC annulled the EC decision for insufficient reasoning as regards Printeos's fine.[140]

Printeos had paid its fine after the EC decision. The EC repaid the principal amount, but paid no interest. Printeos appealed,[141] arguing that it should have received interest.

The EC's position was that, under the specific regulation applicable then, dealing with the payment of fines (Delegated Regulation EU 1268/2012[142]), the EC undertakes to invest sums received and pay any "interest produced". In this case and given the recent position on financial markets, there was no interest, so the EC could not pay more.

Printeos's position was that the EC was obliged to put Printeos back into the position in which it would have been if it had not faced the unlawful EC decision. Non-contractual damages in the form of default interest were due since Printeos

[133] *Flat glass* Case COMP/39.165, EC decision of 28 November 2007.

[134] *Guardian Industries Corp and Guardian Europe Sàrl v Commission* (C-580/12 P) EU:C:2014:2363, [2015] 4 C.M.L.R. 5; and *Guardian Industries Corp and Guardian Europe Sàrl v Commission* (T-82/08), EU:T:2012:494; [2012] 5 C.M.L.R. 26.

[135] *Guardian Europe Sàrl v European Union (represented by the European Commission and the Court of Justice of the European Union)* (T-673/15), EU:T:2017:377; [2017] 5 C.M.L.R. 8.

[136] *Kendrion* EU:C:2018:1014.

[137] See *European Union v Guardian Europe and Guardian Europe v European Union* EU:C:2019:672; [2019] 5 C.M.L.R. 20.

[138] *European Union v Guardian Europe and Guardian Europe v European Union* EU:C:2019:672; [2019] 5 C.M.L.R. 20 at [39] and [41].

[139] *Guardian Europe v European Union* EU:C:2019:672; [2019] 5 C.M.L.R. 20.

[140] *Printeos SA v European Commission* (T-95/15) EU:T:2016:722; [2017] 4 C.M.L.R. 9; see John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016-2017: Part 1" [2018] I.C.C.L.R. 143, 170. The EC has retaken its decision since and the GC has ruled on Printeos's further appeal. See below.

[141] *Printeos v Commission* (T-201/17), Judgment of 12 February 2019, EU:T:2019:81.

[142] Commission Delegated Regulation (EU) 1268/2012 on the rules of application of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union [2012] OJ L362/1.

was denied the use of the amount of the fine paid.[143] This was not limited by the EC's Delegated Regulation.

The GC agreed with Printeos. It awarded Printeos €184,592 in interest for the period until the EC repaid Printeos the principal amount, given that Printeos had claimed interest at the ECB refinancing rate increased by 2%.[144]

The main issues before the Court were (1) whether the failure to pay the interest, linked to the annulment of the EC decision for lack of sufficient reasoning, was a "manifest" infringement of EU law so that it could found a claim in non-contractual damages; and (2) whether the EC's position was defined and restricted by its own delegated legislation.

The Court's reasoning in finding for Printeos was as follows:

First, art.266(1) TFEU requires an EU institution whose act is annulled to implement the relevant court judgment: an "absolute" and "unconditional" obligation.[145] In such a case, reimbursement of the fine and default interest are due.[146]

Second, Regulation 1268/2012 has to be read in the light of the requirements of art.266(1) TFEU. In circumstances where annulment has retroactive effect, the EC is necessarily paying interest for being late in returning the fine to the party which has had to pay it unlawfully, so it has to pay default interest, calculated from the date on which the decision ruled to be unlawful was taken.[147]Regulation 1268/2012 did not limit the EC's obligation.[148]

Third, such a failure to pay interest was a clear infringement of the legal rule that the EC had to implement an EC judgment, so it could give rise to a claim for non-contractual damages.[149]

This is a judgment that has caught the eye of practitioners. Taking together *Kendrion* and *Printeos*, this confirms that, if a defendant can afford to so, it makes sense to pay the fine, rather than offer a guarantee.

Powszechny Zaklad Ubezpieczen v Polish Competition Authority

In April 2019, the ECJ ruled on a request for a preliminary ruling from the Polish Supreme Court concerning the interpretation of the principle of *ne bis in idem* in the context of parallel and simultaneous application of national and EU competition laws by NCAs.[150]

The case related to a decision of the Head of the *Prezes Urzędu Ochrony Konkurencji i Konsumentów* (the Polish Competition Authority) (the PCA), in which the Head of the PCA found that *Powszechny Zakład Ubezpieczeń na Życie SA* (PZU) infringed:

[143] Based in part on *Corus UK Ltd v Commission of the European Communities* (T-171/99), EU:T:2001:249; [2001] 5 C.M.L.R. 34.

[144] Also based on *European Commission v IPK International - World Tourism Marketing Consultants GmbH* (C-336/13 P) EU:C:2015:83.

[145] *Printeos v Commission* EU:T:2019:81 at [55].

[146] *Printeos v Commission* EU:T:2019:81 at [56].

[147] *Printeos v Commission* EU:T:2019:81 at [64]–[65].

[148] *Printeos v Commission* EU:T:2019:81 at [66]–[67].

[149] *Printeos v Commission* EU:T:2019:81 at [69].

[150] With thanks to Su Şimşek. *Powszechny Zakład Ubezpieczeń na Życie SA v Prezes Urzędu Ochrony Konkurencji i Konsumentów* (C-617/17) EU:C:2019:283; [2019] 4 C.M.L.R. 28.

- Polish competition law by abusing its dominant position in the market for group life insurance for employees in Poland; and
- art.102 TFEU as well as Polish competition law by negatively affecting the entry of foreign insurers to the Polish market, which could have an adverse effect on trade between EU Member States.[151]

On these grounds, the PCA imposed a fine comprising two separate amounts on PZU.

In its appeal to the Polish Supreme Court, PZU argued that the decision infringed the principle of *ne bis in idem* under art.50 of the EU CFR. PZU claimed that the PCA imposed fines twice for the same offence, first, infringing EU law directly under art.102 TFEU as applied through Regulation 1/2003, and second, infringing under national competition law.[152]

The Polish Supreme Court referred two questions to the ECJ. First, whether the principle of *ne bis in idem* applied only where the legal interest protected, offender and offence were the same. Second, whether national competition law and EU competition law applied in parallel by a national competition authority protect the same legal interest.[153]

In his Opinion, AG Wahl stated that the PCA's methodology in setting the fine constituted a "textbook example" of how an NCA could apply national competition law and EU competition law in parallel.[154] Notably, the fine was composed of two parts, one sanctioning the breach of Polish competition law before May 2004 when Poland joined the EU; and the other sanctioning the breach of EU competition rules as well as Polish competition law after that date. As for the second part, AG Wahl considered that the PCA had correctly assessed the effect of the conduct on trade between Member States, in addition to the effects in Poland.

AG Wahl also took the view that this parallel application of EU rules and the national laws did not infringe the principle of *ne bis in idem* because there was no *repetition* of proceedings.

Agreeing with the Advocate General, the Court considered that, in cases where the EC did not have an open proceeding, Regulation 1/2003 required NCAs to apply art.102 TFEU in parallel to the national law prohibiting unilateral conduct affecting trade between Member States within the meaning of art.102 TFEU.[155]

The Court stated that, under art.50 of the CFR, which set out the principle of *ne bis in idem*, an undertaking could not be tried or found liable *again* for the same offence under competition law.[156] Consequently, the Court held that the principle of *ne bis in idem*, whose rationale is to ensure legal certainty and fairness, did not apply to the situation here, where the NCA applied national competition law and EU competition law *in parallel* in a single decision.[157]

[151] *Powszechny Zakład* EU:C:2019:283; [2019] 4 C.M.L.R. 28 at [10] and [11].
[152] *Powszechny Zakład* EU:C:2019:283; [2019] 4 C.M.L.R. 28 at [14].
[153] *Powszechny Zakład* EU:C:2019:283; [2019] 4 C.M.L.R. 28 at [21].
[154] *Powszechny Zaklad Ubezpieczen na Zycie SA v Prezes Urzedu Ochrony Konkurencji i Konsumentow* (C-617/17), Opinion of AG Wahl EU:C:2018:976 at [58].
[155] *Powszechny Zakład* EU:C:2019:283; [2019] 4 C.M.L.R. 28 at [26].
[156] *Powszechny Zakład* EU:C:2019:283; [2019] 4 C.M.L.R. 28 at [27] to [31].
[157] *Powszechny Zakład* EU:C:2019:283; [2019] 4 C.M.L.R. 28 at [33] to [35].

However, the Court noted that in such a case, an NCA must observe the principles of EU law in its application of art.102 TFEU and that the referring court had to ensure that the fines were proportionate to the nature of the infringement.[158]

Comment

This is an interesting case, partly because both the Polish Supreme Court and the Advocate General in his Opinion noted how, generally, under the ECHR and in EU law, the principle of *ne bis in idem* is infringed if there are two proceedings as regards the same facts and the same alleged offender, but only in EU competition law cases is it also required to have protection of the same legal interest.

The Advocate General was critical of this as AG Kokott was in *Toshiba*.[159] Clearly, excessive sanctioning may be avoided if, with respect to proportionality, the two fines are considered overall. However, that still leaves the alleged offender facing multiple overlapping proceedings for the same facts.

Cartel appeals

Perindopril—Servier and Others

These cases involved appeals by Servier and other companies against the EC's decision in 2014,[160] finding that they had infringed art.101(1) TFEU and, in Servier's case, also art.102 TFEU, through agreements and conduct designed to restrict competition with a medicine called perindopril. The medicine is used in cardiovascular treatment and mainly intended for the treatment of hypertension and heart failure. The GC ruled on the appeals in December 2018.[161]

Various parts of these judgments overlap. For present purposes we refer mainly to the *Krka* judgment with additions from others where appropriate, notably the *Servier* judgment as regards art.102 TFEU.

It may be recalled that perindopril was developed by Servier. Its compound patent expired in various EU Member States in the 2000s. Servier filed a new patent for the active ingredient of perindopril, erbumine, in 2001, which was granted in 2004.

There were then disputes about the latter patent (called the "947 patent"), in which its validity was challenged. Servier settled with a number of generic companies in agreements which required the companies not to enter the market, and/or not to challenge the patent. Biogaran, a subsidiary of Servier, also entered into a licence and supply agreement with a generic producer, Niche.

It was these agreements which the EC considered unlawful as *restrictions by object* and *by effect*. Servier was also found to have abused its dominant position.

[158] *Powszechny Zakład* EU:C:2019:283; [2019] 4 C.M.L.R. 28 at [36] and [39].

[159] *Toshiba Corp v Urad pro ochranu hospodarske souteze* (C-17/10), AG Opinion EU:C:2011:552.

[160] *Perindopril (Servier)* Case AT. 39612. See John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 1" [2019] I.C.C.L.R. 121, 141.

[161] GC Press Release 194/18; *Biogaran v European Commission* (T-677/14) EU:T:2018:910; *Teva UK Ltd v European Commission* (T-679/14) EU:T:2018:919; [2019] 4 C.M.L.R. 11; *Lupin Ltd v European Commission* (T-680/14) EU:T:2018:908; [2019] 4 C.M.L.R. 12; *Mylan Laboratories Ltd v European Commission* (T-682/14) EU:T:2018:907; [2019] 4 C.M.L.R. 13; *Krka Tovarna Zdravil dd v European Commission* (T-684/14) EU:T:2018:918; [2019] 4 C.M.L.R. 14; *Niche Generics Ltd v European Commission* (T-701/14) EU:T:2018:921; [2019] 4 C.M.L.R. 15; *Unichem Laboratories Ltd v European Commission* (T-705/14) EU:T:2018:915; [2019] 4 C.M.L.R. 16; and *Servier v Commission* (T-691/14) EU:T:2018:922 (Judgments of 12 December 2018).

The EC fined Servier €330.99 million and the generic companies between €10 million and €40 million.

Box 6

- **Court cases—*Servier and Others*:**
  - Pay-for-delay assessments:
    - Potential competition
    - Inducement = Unlawful = Restriction by object
    - Side deals and licences?
      - Careful evidentiary assessment
    - Restriction by effect?
      - Assess actual context
      - Whether realistic and probable that generic would enter at risk of litigation
    - GC did not accept EC's market definition in Art. 102 TFEU case

Overview of the GC's rulings

On appeal there were three main issues: (1) whether the generic company concerned in an agreement was a potential competitor; (2) whether there was an inducement to settle; and (3) evidentiary issues.

The main points were as follows:

First, the GC agreed with the EC that the generic companies were potential competitors of Servier when they entered into the agreements. Notably, the EC had found correctly that the companies had "real, concrete possibilities" to enter the market with their generic perindopril.[162]

Second, the GC agreed with the EC's approach on how to distinguish legitimate patent settlements from unlawful ones: if an IP originator which owns a patent grants advantages to a generic company, *inducing* it to refrain from entering the market, or from challenging the originator's patent, the agreement granting such advantages is considered a market exclusion agreement and a restriction by object; even if presented as a settlement of an IP dispute.[163] The inducement is then considered to be the real reason for the restrictions on competition in the settlement, not a recognition by the parties of the validity of the patent.

Third, the GC upheld the EC's position that this applied to agreements between Servier and most of the generic companies. However, the GC reduced the fine on Servier by 30% as regards the agreement with Mylan, insofar as the infringement overlapped with other agreements with other generics companies. As a result, the relevant fine was reduced from €79.12 million to €55.38 million.

Fourth, the GC considered that the EC had not established the inducement by Servier to Krka to withdraw from the market. The key point was that Servier had settled with Krka and offered Krka *a licence agreement* to sell in certain EU

[162] *Servier* EU:T:2018:922 at [325].
[163] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [141]–[152].

Member States.[164] The GC did not agree with the EC that the royalty paid by Krka to Servier on its sales in these Member States was not at arm's length and therefore an inducement and that the licences were a restriction by object. The EC had not shown that the rate was abnormally low, especially since Krka's rights under the licence were not exclusive vis-à-vis Servier. (This is discussed in more detail below.)

Fifth, the Court did not consider that a restriction by effect had been shown in the settlement with Krka. Notably, the GC found that the EC had not established that Krka would have entered the market but for the settlement, taking the risk of winning further litigation, or that such action by Krka would have led to a faster or more complete invalidation of Servier's 947 patent.

The key point here was that, *at the moment of settlement*,[165] Servier had just won two proceedings, one at the European Patent Office (EPO), the other an interim injunction in the English High Court, suggesting that its 947 patent was valid.[166] Krka argued that it was "totally unrealistic" to think that it would go further in such circumstances,[167] so the licence into which it entered was not an inducement. The Court agreed with Krka. (This is discussed in more detail below.)

Sixth, the GC also did not consider that Servier's payment of €30 million for the assignment of Krka's patent applications for technologies related to the production of perindopril was a restriction by object. The EC's position was that the assignment was designed to reinforce the market-sharing as a result of the settlement and licence agreements.[168] However, the Court considered that this was not established, given that Krka was not given exclusive rights to any part of the market.[169]

As a result, the €10 million fine on Krka was annulled.[170]

Finally, the GC found that the EC had not established Servier's *abuse of dominant position* because the EC's approach to market definition was incorrect.[171]

The EC considered that the relevant market was for perindopril, in its originator and generic versions, whereas the Court considered that perindopril did not differ, in terms of therapeutic use from other similar medicines (ACE inhibitors).[172] Further, that the EC had underestimated the propensity of patients treated with perindopril to change medicines.[173] The Court also considered that the EC attributed excessive importance to price in analysing competitive constraints, when other factors could play a role.[174]

The GC therefore considered that the EC had not shown that Servier was dominant in certain EU Member State perindopril markets, and on the upstream market for the perindopril active ingredient technology.

[164] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [20].
[165] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [17].
[166] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [9] and [12].
[167] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [300].
[168] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [287]–[291].
[169] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [217].
[170] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [473].
[171] *Servier* EU:T:2018:922 at [1589] and [1626].
[172] *Servier* EU:T:2018:922 at [1481].
[173] *Servier* EU:T:2018:922 at [1540].
[174] *Servier* EU:T:2018:922 at [1584]–[1585].

As a result, the Court annulled the fine on Servier for abuse of dominant position, some €102.67 million.[175]

Krka

It may be of interest to focus on the *Krka* judgment[176] and, in particular, the issues raised about side deals and licence agreements and the related evidence.

The main points are the following:

First, the GC reiterated its general position that if non-marketing or no-challenge to patent restrictions were entered into as a result of an inducement, then the relevant agreement would be considered a restriction by object.[177]

Second, the Court explained that if a "side deal" was linked to a settlement, and the side deal was an inducement, then it was unlawful.[178] However, given the presumption of innocence, the burden of proof was on the EC to show that the side deal was an inducement.

Third, the Court noted as a matter of evidence that the existence of a side deal may constitute a *strong indication* of the existence of an inducement, e.g. if entered on the same day, if the agreements are conditional on each other, or if the context shows that they are indissociable.[179]

However, that in itself is not enough. The EC also had to put forward *other consistent evidence* that a side deal was an inducement.[180] Here the EC had looked at whether the value paid was not at arm's length (referring to similar case law on the issue in State aid cases). The idea was to see if the value paid was abnormal.

Fourth, the Court noted that, "amongst side deals, licence agreements were a special case".[181] The Court considered that linking a non-challenge clause to a licence agreement was *not a strong indication* that the agreement was offered as an inducement, because it might be justifiable to do so.[182] It was therefore necessary to show *other indicia* before a restriction by object could be found[183]: for example, that the licence fee was too low for the grant.[184]

Fifth, the Court considered that the restriction of competition was "mitigated" by the licence agreement, since the latter allowed the generic competitor to enter the market, whereas it might not have done otherwise because of the risk of litigation.[185]

Sixth, applying these considerations, the Court:

- noted that the licence agreement had been entered into just after the EPO and the English High Court had upheld Servier's rights[186];
- considered that the EC had not shown that the 3% licence fee was abnormally low[187]; and

[175] *Servier* EU:T:2018:922 at [1633].
[176] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14
[177] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [141]–[151].
[178] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [164]–[178].
[179] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [164]–[165] and [170].
[180] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [171]–[175].
[181] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [178], [179]–[184].
[182] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [179] and [199].
[183] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [185].
[184] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [188].
[185] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [189]–[190] and [192].
[186] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [203]–[204] and [207]–[208].
[187] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [219]–[220].

- noted that the agreement was not a market-sharing agreement, since Krka's licence was not exclusive.[188]

Moreover, in assessing the decision to enter into the licence agreement, the Court emphasised that it is necessary to focus on the information objectively foreseeable then.[189] Krka had obtained entry into seven EU markets, where its position was strongest, rather than face significant risks of litigation with Servier, if it sought to enter across the EU, into some 18–20 Member States.

Overall, the GC did not consider therefore that this licence agreement reflected an inducement and was a restriction by object.[190]

Seventh, the GC disagreed with the EC that there had been a *restriction by effect*. The EC had looked at whether Krka was a potential competitor and the likely effects of the settlement and the licence agreement. The EC considered that had the settlement agreement not been entered into, Krka would have remained a "competitive threat" to Servier and would probably have entered three national markets.

The GC disagreed.[191] The Court stated that to look at "potential" or "likely" effects was not enough in a restriction by effect case. The EC should have looked at the "actual context" and shown that it was "realistic" and "probable" that Krka would have entered the market "at risk of litigation for patent infringement", despite the rulings that Servier's patents were valid which had just occurred.[192]

In doing so, the Court stated that the EC should have taken into account the facts subsequent to the conclusion of the licence agreement, which took place before the EC adopted its decision.[193] The GC also noted that the EC had not mentioned the EPO decision and the English High Court interim injunction when assessing Krka's likely behaviour in the absence of the settlement and licence agreement.[194] Nor had the EC referred to other pieces of evidence in the case file supporting the finding that Krka might be infringing the '947 patent.[195]

The EC had not done so because it regarded any recognition of the validity of Servier's rights as "vitiated in its very principle" by the inducement of the licence agreement, whereas the Court had found that inducement not to be established.[196]

The GC stated that the EC's approach meant that the EC had not paid attention to the actual course of events after the conclusion of the agreements (in 2006) and before the adoption of its decision (in 2014). Notably, possible changes to Krka's perception of the validity of the 947 patent as a result (apparently referring to a subsequent successful counterclaim by another generic company in the English High Court in 2007 and the subsequent invalidation of the 947 patent in 2009).[197] However, it was not for the Court to substitute its own reasoning for that of the EC in this respect.[198] Nor had the EC shown that if Krka had continued its litigation,

[188] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [217].
[189] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [225]–[226].
[190] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [268].
[191] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [392], [394], [398] and [406–[407].
[192] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at t [315], [328], [330], [359], [366], [368], [377] and [465].
[193] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [368].
[194] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [387].
[195] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [388].
[196] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [390]–[391].
[197] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [408] and [435]–[438].
[198] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [409–[410].

rather than settling with Servier, that would have led to a faster invalidation of Servier's '947 patent (as had happened later).[199]

Both sides have appealed.

Box 7

- **Court Cases—Cartel Appeals**
  - *Lucchini*:
    - A company has to appeal to benefit from annulment of an EC decision
  - *Coopbox/Pometon/Euribor/NEX (ICAP)/Printeos:*
    - If the EC makes a special assessment of a fine (a proxy for value of sales; or an adjustment for exceptional circumstances) it has to explain at least the weighting and assessment of the factors going to the exceptional figure
    - So:
      - Why was a 25% fine reduction the right balance of deterrence v restructuring plan considerations? (*Coopbox*)
      - Why was 60% the right reduction in fine v. total turnover (the GC thought it should be 75%)? (*Pometon*)
      - Why was 98.849% the right discount reduction allowing for netting out of in- and outflow in derivatives trading? (*HSBC*)
    - *and* the explanation has to be in the EC decision, not just revealed at Court

Italian concrete reinforcing bars cartel—Lucchini

In May 2019, the GC held that a cartel participant that did not appeal an EC infringement decision could not seek reimbursement of fines paid, where that decision was annulled in proceedings to which it was not a party.

Background

It may be recalled that in December 2002, the EC imposed a fine of more than €85 million on eight Italian steel manufacturers (Alfa Acciai, Ferriere Nord, Feralpi, IRO, Leali, Lucchini, Riva Fire and Valsabbia) and the Italian steel manufacturers' association, finding that they infringed art.65 of the ECSC Treaty (the 2002 Decision). The EC found that the companies participated in a cartel in the Italian market for concrete reinforcing bars.[200]

In October 2007, the GC annulled the EC's decision, finding that the EC erred in using art.65 of the ECSC Treaty as legal basis, since that treaty had lapsed at the time of the adoption of the 2002 Decision.

In September 2009, the EC re-adopted a decision imposing fines on all eight companies on the basis of Regulation 1/2003 (the 2009 Decision). All the addressees of this decision brought actions to challenge it.

In December 2014, the GC upheld the 2009 Decision.[201] Among others, Lucchini's appeal was dismissed.

[199] *Krka* EU:T:2018:918; [2019] 4 C.M.L.R. 14 at [440]–[444].
[200] With thanks to Alessia Varieschi. *Reinforcing bars*, Case COMP/37.956, EC Decision of 17 September 2002.
[201] *Lucchini SpA v European Commission* (T-91/10) EU:T:2014:1033.

However, five companies (Alfa Acciai, Ferriere Nord, Feralpi, Riva Fire and Valsabbia) appealed the GC's judgment to the ECJ arguing, among other things, that the EC had made a fundamental procedural error when it had adopted the new decision under Regulation 1/2003, without first seeking the opinion of the representatives of the Member States as required by that regulation.

The ECJ agreed, and in September 2017, set aside the GC's judgment and annulled the 2009 Decision. The ECJ concluded that the GC had made an error in law in holding that the EC was not obliged to organise a new hearing before adopting the 2009 decision, on the ground that the undertakings concerned already had had the opportunity of being heard orally at hearings held in June and September 2002. Failure to hold such a hearing constituted an infringement of an essential procedural requirement.[202]

In July 2019, the EC re-imposed the fine on the five manufacturers, *including a 50% reduction for all of them*. Re-adoption of the decision was based on the public interest in pursuing an effective and deterrent enforcement against cartels. However, the EC said the fine reduction was to recognise the long duration of the proceedings, which was not attributable to the companies involved (see below, in the section on EC cartel decisions).

Lucchini

Lucchini attempted to have the EC re-examine its case in light of the ECJ judgments, asking for a reimbursement of the fine paid and for admission to the infringement procedure reopened by the EC for the successful appellants. The EC, however, refused both requests.

Lucchini then lodged an action before the GC to annul the EC's rejection letters and, in the alternative, to seek compensation from the EC on the basis of non-contractual liability.[203]

The Court dismissed that action. The main points of interest are as follows:

First, Lucchini claimed that the EC's refusal to reimburse its fine and to allow participation in the administrative procedure infringed Lucchini's right to a fair hearing and its rights of defence.[204]

The GC disagreed, holding that an infringement decision concerning several participants adopted pursuant to a common procedure consists of several individual decisions. If an addressee of the decision brings an action for annulment, the resulting judgment relates only to the aspects of the decision which concern that specific appellant. Such a judgment cannot result in the annulment of an individual decision that was not so challenged.

Accordingly, the GC's judgment in 2014 and the infringement decision had become final against Lucchini, and therefore Lucchini could not benefit from the ECJ upholding the other participants' appeals.[205]

Second, the GC rejected Lucchini's main argument that the 2009 decision should be regarded as legally non-existent. The procedural irregularities of the 2009

[202] *Ferriera Valsabbia SpA and Others v European Commission* (C-86/15 P and C-87/15 P) Judgment of 21 September 2017, EU:C:2017:717; [2017] 5 C.M.L.R. 24.
[203] *Lucchini* EU:T:2014:1033 at [10]–[14].
[204] *Lucchini* EU:T:2014:1033 at [26].
[205] *Lucchini* EU:T:2014:1033 at [33]–[38].

decision were not of such obvious gravity that they affected the conditions essential to its adoption and existence.[206]

Third, the GC rejected Lucchini's claim for damages as time-barred because the alleged harm and the payment of the fine occurred more than five years before the date of Lucchini's action.[207]

Retail food packaging

It may be recalled that the EC took its decision as regards this cartel in June 2015,[208] imposing a €115.8 million fine on manufacturers and distributors of food packaging trays for participating in market and customer sharing cartels.

The EC found that the companies participated in five different cartels in the period 2000–2008. The infringements were defined based on the geographic area (Italy, South-West Europe, North-West Europe, Central and Eastern Europe, and France). the case of *Consorzio Cooperative di Produzione e Lavoro's* (CCPL) concerned only the infringements in Italy, South-West Europe and Central and Eastern Europe. CCPL was the parent of a company called Coopbox, which had been involved in the infringements.

In the course of the year, there has been one appeal which was successful. The others have been dismissed.

CCPL/Coopbox

In July 2019, the GC ruled on CCPL's appeal against the EC's decision in this case.[209] CCPL, an Italian company, raised five grounds of appeal. The GC upheld one ground, related to the EC's infringement of the obligation to state reasons, whereas it rejected the other four pleas.

As regards the obligation to state reasons, the EC stated in its decision that the imposition of a full fine could prejudice the restructuring plan of the CCPL group, as well as its economic sufficiency, leading it to forced liquidation.

However, the EC considered that the CCPL group should have been able to generate additional resources, through the sale of a minority interest and/or the shareholders' financial support.

Finally, the EC considered that there could have been alternative solutions to maintain business continuity and safeguard the company's assets. The EC therefore decided that a reduction in the amount of the fine of 25% was sufficient and appropriate to avoid the company from being forced into liquidation and set the fine at €33.69 million.[210]

However, the GC considered that the EC had not adequately explained why a 25% reduction was the appropriate figure.[211]

The EC in its decision had considered ratios of profitability, solvency and cash flow provided, but that was not enough for the Court.

[206] *Lucchini* EU:T:2014:1033 at [43]–[50].
[207] *Lucchini* EU:T:2014:1033 at [61].
[208] With thanks to Alessia Varieschi. *Retail Food Packaging* Case AT.39563; [2018] 5 C.M.L.R. 1, EC decision of 24 June 2015.
[209] *CCPL – Consorzio Cooperative di Produzione e Lavoro SC and Others v European Commission* (T-522/15) EU:T:2019:500.
[210] *CCPL* EU:T:2019:500 at [170].
[211] *CCPL* EU:T:2019:500 at [170].

The EC had considered the €5 million allocated to paying the fine in CCPL's restructuring plan was too little given that revenues of €165 million were provided for; and that a fine of €33.9 million was a more reasonable balance of deterrence against the restructuring interests and paying debts.[212] This was all the more so as the CCPL had made a provision in its 2013 budget for a fine of €45 million.[213]

As a result, the GC annulled some €22.26 million of the total €33.7 million fine imposed on CCPL for the Italian cartel, the South-West Europe cartel and the Central and Eastern Europe cartel.

The GC dismissed CCPL's other grounds of appeal.

First, CCPL argued that the EC failed to investigate the infringement correctly. Notably, the EC failed to take into account that the conduct did not take place because of the structure of demand, made up of large-scale retailers and industrial customers. The GC disagreed, noting that the EC stated in a clear and unequivocal way the reasons why each of the five cartels was often implemented.[214] Further, the EC could not have considered the lack of implementation of the cartel because CCPL did not clearly and substantially oppose its implementation to the point of having disrupted its very operation.[215]

Second, CCPL argued that the EC breached the principles of equal treatment and proportionality in setting the sales' value for its fine. According to CCPL, the EC should have fixed the basic amount of the fine based on the average value of sales during the infringement, since the value of sales made in the last year of participation was not representative of the sales realised in the infringement period.

The GC dismissed this, because even if one sales increase had been high in the cartel period (256%), in general the increases noted (of around 30%) were not exceptional, since they covered a fairly long period.[216]

The Court also noted that the increase in the value of sales during the infringement period might be the typical consequence of an agreement aimed at increasing prices.[217]

Further, the increase in sales did not affect all the undertakings to the same extent,[218] while using a common reference year allowed the EC to impose a uniform fine.[219] So, overall the Court considered that CCPL had not proved that its turnover in the last year of participation in the cartel did not reflect its true size and economic power.[220]

Third, the GC dismissed CCPL's claim that the EC had incorrectly calculated the 10% fine ceiling (in art.23(2) of Regulation 1/2003), since the figure included the turnover of the CCPL group, whereas the EC had not proved (1) the liability of the parent company, and (2) included the turnover of the Energy branch that was no longer part of the CCPL group at the time of the EC's decision.

The GC rejected these arguments, noting that CCPL was presumed to form a single undertaking with its subsidiary Coopbox, since the latter was wholly owned

[212] *CCPL* EU:T:2019:500 at [157].
[213] *CCPL* EU:T:2019:500 at [167].
[214] *CCPL* EU:T:2019:500 at [39].
[215] *CCPL* EU:T:2019:500 at [46]–[48].
[216] *CCPL* EU:T:2019:500 at [63]–[64].
[217] *CCPL* EU:T:2019:500 at [65].
[218] *CCPL* EU:T:2019:500 at [66].
[219] *CCPL* EU:T:2019:500 at [67].
[220] *CCPL* EU:T:2019:500 at [68].

or nearly so. Here, that was the case (even though there had been some shareholding changes, so that the parent only held 93.9% directly or indirectly of one of its infringing subsidiaries for part of the time).[221] Further, CCPL had not shown that Coopbox determined its market conduct independently of CCPL.[222]

The Court also noted that CCPL's Energy branch in fact had not been divested at the time of the EC decision. It had been "rented" to another business. That meant that it was still part of the CCPL group and CCPL was, at the least, receiving rental income for it.[223]

Finally, the GC dismissed CCPL's claims that the EC did not consider the crisis facing the packaging sector and that the fines were disproportionate compared to those imposed on the other addressees of the decision. The GC found that, according to the 2006 Fining Guidelines, exceptional reductions are only allowed where, in view of the specific economic context, the imposition of the fine would irretrievably jeopardise the economic viability of the undertaking concerned.[224]

Also, when determining the amount of the fines imposed on several undertakings involved in the same infringement, the EC is not required to ensure that the fines reflect any distinction between the undertakings in terms of their overall turnover.[225]

Silver Plastics, Huhtamäki, Italmobiliare

Otherwise the GC dismissed appeals by Silver Plastics, Huhtamäki and Italmobiliare in their entirety. The main points were as follows:

First, Silver Plastics argued that the EC did not show its participation in the cartel in 2002-2007. The GC disagreed, holding that Silver Plastics' presence at a fringe meeting was corroborated by handwritten notes from another company, Vitembal.

Second, as regards alleged errors regarding the participation in the North-West Europe cartel, the GC found that the EC was entitled to consider the companies responsible for a single and continuous infringement since their actions formed part of an overall plan. Moreover, the companies were aware of the other participants' unlawful conduct in pursuit of common objectives.

Third, the appellants complained that the EC had fixed a uniform fine percentage for gravity of 16%, whereas the cartels and the undertakings' participation differed greatly. The GC disagreed, holding that the five cartels consisted of practices (e.g. price increases, market sharing, customer allocation and bid rigging) which justified a gravity percentage of 16% in each case.

Fourth, some appellants argued that the EC erred in the attribution of liability since the EC incorrectly found that the companies involved formed a single economic entity. In one case, arguing that the overall parent was just an administrative vehicle[226]; in the other, arguing that a subsidiary had commercial autonomy and operational independence.[227]

[221] *CCPL* EU:T:2019:500 at [74] and [87]–[88].
[222] *CCPL* EU:T:2019:500 at [80]–[86].
[223] *CCPL* EU:T:2019:500 at [75] and [111]–[114].
[224] *CCPL* EU:T:2019:500 at [144].
[225] *CCPL* EU:T:2019:500 at [152].
[226] *Silver Plastics GmbH & Co.KG and Johannes Reifenhäuser Holding GmbH v European Commission* (C-702/19 P) EU:T:2019:497 at [250].
[227] *Huhtamäki Oyj v European Commission* (T-530/15) EU:T:2019:498; [2019] 5 C.M.L.R. 14 at [209].

The Court recalled that where a parent company owned 100% of the shares of its subsidiary, it was presumed to have control in the absence of specific and sufficient proof to the contrary, which with these arguments, the appellants had not done.

Coveris Rigid

In December 2018, the GC ruled on a different type of appeal by Coveris Rigid France (Coveris) related to successor liability and the principle of economic continuity.[228]

In its *Retail food packaging* cartel decision, the EC found that Coveris had participated in the infringement in France from September 2004 to November 2005. At the time of the infringement Coveris was a wholly owned subsidiary of Huhtamäki, so the EC held both jointly and severally liable for a fine of €4.7 million.

Subsequently, in June 2006, some assets of Coveris related to the manufacture in France of polystyrene trays were sold to ONO Packaging (apparently a form of management buyout).

At the same time, another subsidiary in Portugal in the Huhtamäki group, Huhtamäki Embalagens, was sold by share transfer to ONO Developpement, the parent of ONO Packaging. The Huhtamäki company was then renamed ONO Packaging Portugal.[229]

In its decision in 2015, the EC considered Coveris still to be liable since, although part of its business had been transferred to ONO Packaging, it still continued to exist.

On appeal, Coveris challenged this, arguing, first, that in June 2006, there had been one undertaking made up of Coveris and Huhtamäki Embalgens which had been sold to new owners, a new undertaking, and that they had taken over the liability of Coveris in France. Coveris argued that the two parts of the transaction, the asset transfer and the share acquisition, should be treated "holistically" and that it was artificial to split the two.[230]

The GC disagreed. The Court noted that Coveris and its parent during the infringement, Huhtamäki correctly had been considered by the EC as an "undertaking" and since Coveris had not ceased to exist, Coveris remained liable for its part of the infringement.[231]

The Portuguese side of the "ONO" transfer was irrelevant to the infringement in France,[232] as was the fact that from the perspective of company law, Coveris and Huhtamäki Embalgens were part of the Huhtamäki group before being sold.[233]

The EC had also found that Huhtamäki Embalgens (by the time of the EC decision, ONO Packaging Portugal) and Huhtamäki were 'an undertaking' for the purposes of the EC's decision, responsible for the infringement in South-West Europe.[234]

[228] *Coveris Rigid France v European Commission* (T-531/15) EU:T:2018:885; [2019] 4 C.M.L.R. 5.
[229] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [1]–[14].
[230] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [19] and [35]–[36].
[231] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [22]–[25].
[232] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [38].
[233] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [31]–[32].
[234] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [29]–[30].

Second, Coveris argued that ONO Packaging should be liable for the infringement in France on the basis of the "economic continuity" of the relevant business, which could be treated as equivalent to an internal restructuring.[235]

The Court rejected this. The Court noted that liability based on economic continuity could be transferred, even if a company which had committed an infringement still existed, where the entities concerned were under the control of the same person and had close economic and organisational links.[236]

However, without ruling on what had happened in the partial management buyout here, the Court noted that the principle of economic continuity was meant to be used in exceptional cases, in order to punish cartels and ensure enforcement, by preventing *internal restructurings* to avoid liability.[237]

The application of the principle here could only be permissible if the transaction had taken place between two independent undertakings acting in bad faith, in particular to avoid EU competition law penalties.[238]

The Court could not conclude that in this case there were such 'specific machinations'.[239]

Steel Abrasives—Pometon

In April 2014, the EC decided in a settlement procedure that four companies (Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth) participated in a cartel to coordinate steel abrasives prices in Europe, infringing art.101 TFEU and imposed a total fine of €30 million.

The fifth participant, the Italian producer Pometon SpA (Pometon), did not reach a settlement. In May 2016, the EC fined Pometon €6.19 million for its participation in the cartel under the ordinary investigation procedure. Pometon appealed.

In March 2019, the GC partially upheld that appeal and reduced its fine to €3.87 million.[240]

Pometon raised the following grounds:

First, Pometon argued that the EC had ascribed a specific conduct to Pometon in the settlement decision. Therefore its decision as regards Pometon was not impartial and denied Pometon the opportunity to defend itself.[241] In particular, the references to Pometon in the settlement decision were not necessary.[242]

The Court dismissed this, notably since the EC had expressly excluded Pometon in the settlement decision.[243] Therefore, Pometon had not lost its right to be treated impartially, nor its right to the presumption of innocence.[244]

Moreover, the Court noted that the EC could refer to Pometon as a potential cartel participant in a settlement decision addressed to other cartel participants, as long as this was "useful and necessary" for the analysis of the facts, in line with

[235] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [47].
[236] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [42]–[43].
[237] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [49].
[238] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [50]–[51].
[239] *Coveris Rigid* EU:T:2018:885; [2019] 4 C.M.L.R. 5 at [52].
[240] With thanks to Marilena Nteve. *Pometon SpA v European Commission* (T-433/16) EU:T:2019:201.
[241] *Pometon* EU:T:2019:201 at [38] and [41].
[242] *Pometon* EU:T:2019:201 at [39].
[243] *Pometon* EU:T:2019:201 at [65] and [75]–[76].
[244] *Pometon* EU:T:2019:201 at [71].

case law of the European Court of Human Rights (*Karaman v Germany*).[245] Nor was the EC required to delay its settlement decision because of the opening of the ordinary procedure as regards Pometon.[246]

Second, Pometon argued that it did not participate in aspects of the anti-competitive agreement, namely (1) the introduction of a uniform calculation method for a common scrap surcharge (that would be applicable to the price of all steel abrasives in the EEA); and (2) the co-ordination with respect to individual customers within the EEA. Pometon also contested the EC's finding that it participated in a single and continuous infringement (SCI).[247]

The Court dismissed these claims after a detailed review of the evidence. As regards the first point, the Court found that the new calculation system for the scrap surcharge based on published indices was automatically applicable.[248] Moreover, the Court found that Pometon had participated not only in the introduction of the new system, but also in the monitoring of its application.[249]

As regards the second point, the GC upheld the EC's finding, based on a number of faxes, emails and meetings, that Pometon participated in the co-ordination with respect to certain individual customers in Spain, France, Belgium, Germany and Italy.[250]

Finally, the Court agreed that Pometon took part in an SCI: Pometon had participated in both the conclusion and the application of the agreement, which had the same anti-competitive objective. The GC found that Pometon was aware of the essential features of the cartel, as well as of its geographic scope.[251]

Third, Pometon argued that the EC should have carried out an analysis of the market concerned.[252] The GC disagreed, noting that here, in the context of horizontal price-fixing which is a restriction by object, the analysis of the economic and legal context is limited to what is strictly necessary so that the existence of a restriction by object can be established.[253]

Fourth, Pometon argued that the EC had not proved its participation beyond elements in 2005 and therefore the EC's fining decision was time-barred.[254]

The Court noted that, in the absence of evidence directly proving the duration of the infringement, the EC must rely on facts sufficiently proximate in time, so that it can be accepted that the infringement continued uninterruptedly between two specific dates.[255]

Applying that here, the GC noted that the EC had proved that Pometon participated in a number of contacts that took place between August 2003 and November 2005. Pometon had also been involved in the preparation of a meeting in Milan in May 2007.[256] The Court concluded that, despite the absence of direct evidence as regards the period November 2005 to March 2007 (a period of some

[245] *Pometon* EU:T:2019:201 at [72]. *Karaman v Germany* (17103/10) (2015) 60 E.H.R.R. 20.
[246] *Pometon* EU:T:2019:201 at [99]–[100].
[247] *Pometon* EU:T:2019:201 at [105].
[248] *Pometon* EU:T:2019:201 at [146]–[147].
[249] *Pometon* EU:T:2019:201 at [159]–[160].
[250] *Pometon* EU:T:2019:201 at [235].
[251] *Pometon* EU:T:2019:201 at [266].
[252] *Pometon* EU:T:2019:201 at [269].
[253] *Pometon* EU:T:2019:201 at [279] and [281]–[285].
[254] *Pometon* EU:T:2019:201 at [289] and [292]–[293].
[255] *Pometon* EU:T:2019:201 at [295].
[256] *Pometon* EU:T:2019:201 at [296]–[297].

16 months), Pometon continued to participate to the cartel until May 2007 given the overall assessment of the evidence and the lack of public distancing from the cartel.[257]

Fifth, Pometon challenged the EC's decision on the basis that the level of its fine was not sufficiently justified and not in line with the principles of proportionality and equal treatment.[258]

In its decision, the EC stated that it had used its discretion to adapt the fines imposed during the settlement procedure based on point 37 of the EC Fining Guidelines.[259]

The EC considered that the same should apply to Pometon for various reasons. First, the basic amount of the fine, adapted due to mitigating circumstances, would exceed the 10% turnover limit laid down in art.23(2) of Regulation 1/2003. Second, there were differences between the individual participation of Pometon in the anti-competitive agreement and the participation of the other cartel members. Third, the fine had to be adapted to a proportionate level given Pometon's participation, while ensuring that it was sufficiently deterring.[260]

The GC ruled that the EC had not provided sufficient information on the method of the calculation and the factors taken into account. The EC had stated, during the settlement procedure, that the value of specific sales in steel abrasives as compared to the overall turnover of the four cartel participants was a factor, whereas this factor was not mentioned among the reasons in the ordinary procedure concerning Pometon.[261]

Moreover, the GC noted that the EC had looked at the worldwide sales of the companies concerned for this assessment, not those in the EEA, where the infringement had occurred. The Court considered that wrong.

As a result, the Court ruled that it was not possible to determine the calculation method, or compliance with the principles of proportionality and equal treatment and annulled the fine.[262]

The GC then decided, as requested by Pometon, in the exercise of its unlimited jurisdiction, to grant to Pometon an exceptional reduction of 75%, taking into account the important role it played in the first part of the cartel and the sporadic one it played in the second part of the cartel.[263]

In doing so, the Court considered the relative positions of the cartel participants in the EEA; and the different exceptional reductions which the EC had granted them. Pometon had had 60%, the settling parties between 67% and 90%.[264]

As a result, the Court set the fine on Pometon at €3.9 million.

[257] *Pometon* EU:T:2019:201 at [300]–[313].
[258] *Pometon* EU:T:2019:201 at [317].
[259] Guidelines on the method of setting fines imposed pursuant to art.23(2)(a) of Regulation 1/2003 [2006] OJ C210/2.
[260] *Pometon* EU:T:2019:201 at [345]–[346].
[261] *Pometon* EU:T:2019:201 at [349]–[350].
[262] *Pometon* EU:T:2019:201 at [352]–[361].
[263] *Pometon* EU:T:2019:201 at [376]–[393].
[264] *Pometon* EU:T:2019:201 at [20] and [391].

Yen Interest Rate Derivatives—NEX International (formerly ICAP)

In July 2019, the ECJ dismissed the EC's appeal against the GC's judgment by which the EC had annulled in part the EC decision to fine ICAP, an inter-broker dealer, €14.9 million for *facilitating* six bilateral infringements between banks in the Yen Interest Derivatives (YIRDs) cartel for the lack of sufficient reasoning as to how the EC set the fine.[265]

Background

As reported last year,[266] the case notably concerned ICAP's position in a hybrid settlement procedure and the determination of a fine under point 37 of the EC Fining Guidelines.

It may be recalled that, in December 2010, after receiving an application for leniency, the EC initiated proceedings against seven banks and two brokers. While settlement meetings were taking place, including with ICAP, the latter decided to discontinue the settlement procedure.

The EC issued a settlement decision in December 2013 with regard to the other parties, then continued with ICAP, sending it an SO.

Ultimately, ICAP was fined €14.9 million as noted above, for facilitating anti-competitive contacts between banks, by serving as a conduit for collusive communications and by influencing the banks which were not participating in the cartel, with the aim of manipulating the JPY LIBOR (a reference interest rates for YIRDs' pricing).

In setting the amount of the fine, the EC, in accordance with point 37 of its EC Fining Guidelines, departed from the general methodology for the setting of fines. The EC considered that the general methodology based on value of sales could not be used, given that ICAP was only a broker, not active on the YIRDs market.

However, in November 2017, the GC annulled in part the EC's decision against ICAP, finding that the EC had incorrectly determined the duration for some of the bilateral infringements and provided insufficient reasoning regarding the amount of the fine.[267]

On appeal to the ECJ, the EC submitted just one plea, alleging an error of law in the interpretation and application of the case law relating to statement of reasons for decisions imposing fines. The EC referred to *AC Treuhand* case[268] to argue that it was not required to indicate all figures and calculations made to determine the amount of its fine.[269]

The ECJ's judgment

The ECJ dismissed the EC's appeal. The main points of interest are as follows:

[265] With thanks to Geoffroy Barthet. *NEX International Ltd (formerly Icap Plc) v European Commission* (C-39/18 P) EU:C:2019:584; [2019] 5 C.M.L.R. 8.

[266] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2017-2018: Part 1" [2019] I.C.C.L.R. 121, 142.

[267] *ICAP plc and Others v European Commission*, Judgment of 10 November 2017, EU:T:2017:795.

[268] *AC-Treuhand AG v European Commission* (C-194/14 P) EU:C:2015:717; [2015] 5 C.M.L.R. 26.

[269] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [14]–[19] and [22].

First, the ECJ noted that the EC Fining Guidelines may be unsuited to set the fine in certain cases, e.g. in a cartel facilitator case. So, the EC may be justified in using an alternative methodology to that set out in the EC Fining Guidelines.[270]

Second, the ECJ stated that when the EC departs from the Fining Guidelines methodology, the EC's decision may be reasoned in a summary manner when it fits into a well-established line of decisions. However, the EC must provide a fuller account of its reasoning if a decision goes *appreciably further* than previous decisions.[271]

Third, the ECJ addressed the EC's reference to the *AC Treuhand* case. The Court held that the EC satisfies its obligation to give sufficient reasoning when it sets out the factors to determine the gravity and the duration of the infringement. Although the EC is not required to provide all of the figures for each step of the calculation, the Court noted that the EC must explain the weighting and assessment of the factors taken into account to set the fine.[272]

Fourth, however, it could not be inferred from the *AC Treuhand* case that a reasoning taking into account gravity and duration of an infringement is always sufficient, irrespective of the particularities of the situation in question.[273] The Court noted that in the *ICAP* case, the EC established a specific alternative method for facilitators which was based on five steps. Those circumstances differed from those in *AC Treuhand*, where the EC had defined the basic amount of the fine as a lump sum.[274]

Fifth, the ECJ agreed with the GC that the EC decision

> "does not provide details on the alternative method … but is limited to a general assurance that the basic amounts reflect the gravity, duration and nature of Icap's involvement and … a sufficiently deterrent effect".[275]

As a result, the ECJ agreed that the GC was right to hold that the EC decision did not enable ICAP to understand the reasoning in the alternative methodology; or the GC to verify that reasoning.

Further, the EC did not provide the minimum information required to assess the relevance of the factors taken into consideration to determine the basic amount of the fine.[276]

Sixth, the Court rejected the EC's contention that the obligation to provide sufficient reasons for the relevance and weighting of the factors taken into account would mean that it would be required to provide figures relating to the method of calculating the fine or to explain in detail its internal calculations.

Finally, the ECJ reiterated that the explanations on the methodology provided by the EC during the proceedings before the GC or in exploratory discussions for settlement could not be taken into account to assess whether the EC had complied with its obligation to state reasons in its decision.[277]

[270] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [27].
[271] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [28].
[272] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [31].
[273] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [33].
[274] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [35].
[275] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [36].
[276] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [37].
[277] *ICAP* EU:C:2019:584; [2019] 5 C.M.L.R. 8 at [40]–[41].

Car Battery Recycling—Recylex

In May 2019, the GC dismissed Recylex's appeal[278] against the EC's decision fining Recylex for its participation in the car battery recycling cartel.[279] It will be recalled that the case involves a purchasing cartel: collusion on the prices to be paid by recycling companies to scrap dealers for scrap lead-acid automotive batteries in Belgium, Germany, France and the Netherlands, which are used for the production of recycled lead.[280]

Background

In July 2012, JCI applied for immunity of fines. The EC started on-site investigations in September 2012. Eco-Bat in September 2012 and Recylex in October 2012 also applied for immunity or, failing that, for a reduction of the fine. Finally, Campine applied for a reduction of fine in December 2012.

In June 2015, the EC informed Eco-Bat and Recylex of its provisional conclusion that the evidence which they had submitted represented significant added value. That was not the case for Campine.

A year and a half later, in December 2016, the EC notified Campine, JCI, Recylex and Eco-Bat by letter that, in order to achieve deterrence, the EC intended to apply a specific increase to the fines in accordance with point 37 of the EC Fining Guidelines.

In its decision, the EC found that the recycling companies participating in the cartel sought to increase their profit margin by (1) co-ordinating prices for the purchase of scrap lead-acid car batteries from scrap dealers or traders; and (2) restricting competition for their purchase. The EC found evidence of bilateral anti-competitive contacts by phone or emails between the recycling companies. These contacts related to prices, market forecasts and negotiations with scrap dealers.

The EC decision also provided details as regards the basic amount of Recylex's fine as well as the application of the 2006 Leniency Notice. As a result, Recylex was fined €26.7 million in February 2017.[281] Recylex appealed.

The GC Judgment

Overall, the GC dismissed Recylex's claims. There are three main points of interest.

First, the Court rejected on the facts two claims by Recylex that it should have been given partial immunity for revealing to the EC an additional period of the infringement and that it concerned co-ordination of the French market.[282]

Second, the EC had considered that Recylex was the second undertaking to provide significant added value and that accordingly it should be granted a 20–30% reduction of the fine under point 26 of the Leniency Notice.

[278] With thanks to Geoffroy Barthet. *Recylex SA v European Commission* (T-222/17) EU:T:2019:356; [2019] 5 C.M.L.R. 3.

[279] *Car battery recycling* Case AT.40018, EC decision of 8 February 2017.

[280] John Ratliff, "Major Events and Policy Issues in EU Competition Law 2016-2017: Part 2" [2018] I.C.C.L.R. 227, 247.

[281] The calculation of Recylex's fine by the EC is summarised in [52] to [72] of the GC judgment.

[282] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [95]–[96] and [105]–[108].

However, before the GC, Recylex claimed that Eco-Bat, which was the first company to provide evidence with significant added value, failed to fulfil its duty of co-operation under point 12 of the Leniency Notice in several respects.[283] In view of Eco-Bat's disqualification, Recylex took the view that it should be entitled to the maximum reduction of 50% of the fine which is granted to the first undertaking to provide evidence with significant added value.[284]

The GC disagreed, noting that such an interpretation was not supported by the wording or the logic of the Leniency Notice.[285] The idea of the Leniency Notice is to create a climate of uncertainty in which cartel participants know that only one of them can benefit from immunity. The chronological order and speed of co-operation are therefore fundamental elements of the system.

The second undertaking which provided evidence that represents significant added value should not therefore

> "take the place of the first undertaking if it transpires that the latter's cooperation did not meet the requirements of point 12 of the 2006 Leniency Notice".[286]

If not, two undertakings might benefit from the fine reductions concerned, undermining the incentives to co-operate with the EC as fast as possible, without increasing the incentive to cooperate with it fully.[287]

The GC concluded that, even if Eco-Bat had failed to fulfil its duty to co-operate, it remained the case that Recylex was only the second undertaking to provide evidence that had significant added value.[288]

Third, Recylex argued that the EC wrongly applied point 37 of the Guidelines to increase the fines imposed on the addressees of the EC decision by 10%. In particular, Recylex argued that the EC should have looked at the effects of the cartel, before setting such a figure. Further, that it would be relied on in damages claims, which would adversely affect its position.[289]

The Court rejected this, noting that the EC had not claimed that the cartel had any effects on purchase prices. The EC had merely stated that the value of purchases was the only available value in the absence of the value of sales and that the EC considered it to be an imperfect basis for ensuring that the fine had a deterrent effect. The EC had then assessed that deterrent effect and considered that it justified a 10% increase in the fine on Recylex (with which reasoning the Court agreed).[290]

Optical Disk Drives—Sony and others

It may be recalled that in October 2015, the EC fined eight suppliers of optical disk drives (ODDs) €116 million for co-ordinating their behaviour through a parallel network of bilateral contacts in relation to procurement tenders organised

[283] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [136] and [137].
[284] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [138].
[285] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [147]–[151].
[286] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [150].
[287] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [151].
[288] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [153].
[289] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [110]–[112].
[290] *Recylex* EU:T:2019:356; [2019] 5 C.M.L.R. 3 at [127]–[128].

by Dell and HP.[291] In particular, the EC found that the ODD suppliers had exchanged information on pricing, production and supply capacity and monitored the final results of the closed procurement events. The cartel participants sought to accommodate volumes and ensure that the prices remained at levels higher than they would have been in the absence of the cartel.[292]

The EC concluded that the cartel members participated in a single and continuous infringement (SCI), which consisted of several separate infringements. The infringement period lasted from June 2004 to November 2008.

The companies concerned were Sony Corporation and Sony Electronics Inc, Sony Optiarc Inc, Quanta Storage Inc, Hitachi-LG Data Storage Inc and Hitachi-LG Data Storage Korea Inc, and Toshiba Samsung Storage Technology Corp (TSST) and Toshiba Samsung Storage Technology Korea Corp.

All the ODD suppliers appealed the EC decision. In July 2019, the GC dismissed their appeals.[293]

Since the applicants presented similar arguments, the most interesting ones are summarised here under the following broad categories:

First, Quanta challenged the EC's jurisdiction in the case. Quanta argued that the "implementation test" and the "qualified effects test" are cumulative. The former was replaced by the latter, which was not satisfied in its case. The EC did not provide any evidence that the participants, whose registered offices are in Asia and whose alleged contacts took place in Asia and the United States, were aware that the ODDs they offered ultimately would be shipped to locations within the EEA.[294]

The GC disagreed, considering that the "implementation test" and the "qualified effects test" were alternative.[295]

The Court stated that the "implementation test" is satisfied by mere sale within the EU, irrespective of the establishment of an undertaking in a third country or the location of the sources of supply.[296] In the present case, the "implementation test" was satisfied, because: (1) the ODDS were supplied globally, including in the EEA; (2) the suppliers were active in supplying to a number of EEA Member States; (3) Dell and HP were established in the EEA; and (4) the procurements tenders at issue had a global dimension.[297]

Second, TSST argued that there was no assessment of the appreciable effect on trade between Member States. Moreover, TSST claimed that the location of customers purchasing the products concerned is decisive for determining whether the infringement has been implemented and for determining the geographic scope of the cartel. According to TSST, the agreement was not EEA-wide, since the

[291] With thanks to Alessia Varieschi and Marilena Nteve. *Optical Disk Drives* Case AT.39639, EC Decision of 21 October 2015.

[292] John Ratliff, "Major Events and Policy Issues in EU Competition Law, 2014-2015 (Part 2)" [2016] ICCLR 99, 112.

[293] *Quanta Storage Inc v European Commission* (T-772/15) EU:T:2019:519; [2019] 5 C.M.L.R. 11 at [41]. GC Press Release No.97/19, 12 July 2019.

[294] *Quanta Storage* EU:T:2019:519; [2019] 5 C.M.L.R. 11 at [41].

[295] *Quanta Storage* EU:T:2019:519; [2019] 5 C.M.L.R. 11 at [40]–[47].

[296] *Quanta Storage* EU:T:2019:519; [2019] 5 C.M.L.R. 11 at [44] and [52].

[297] *Quanta Storage* EU:T:2019:519; [2019] 5 C.M.L.R. 11 at [49]–[52].

infringement concerned Dell and HP, whose subsidiaries are established only in the Netherlands and Germany respectively.[298]

The GC disagreed, considering that point 53 of the Guidelines on the concept of the effect on trade[299] establishes a rebuttable presumption of effect on trade, when the agreement by its very nature is capable of affecting trade between Member States, or when the market share of the parties exceeds at least 5% of the market or their turnover in the products covered by the contested agreement exceeds €40 million. In the present case, these criteria were satisfied.[300] The Court also noted that it is the cartel conduct and its participants that delineate the parameters of an infringement, as well as its geographic scope.[301]

Third, Sony Corporation and Sony Optiarc claimed that the EC had not shown that the alleged unlawful contacts with their competitors had taken place, since they were not supported by enough evidence and they concerned old information or communications pertaining to future conduct.[302]

The GC disagreed, noting that the exchange of contacts between Sony and its competitors was sufficient to establish an infringement by object.[303] An exchange of information among competitors has an anti-competitive object if it is capable of removing uncertainties regarding the intended conduct of the undertakings.[304] The presumption is that the undertakings involved in concerted arrangements and remaining active on the market consider the information exchanged with their competitors when determining their conduct.[305]

The Court considered that prices related to past negotiations could be useful because the pricing bid was often the lowest priced bid in previous negotiations, and competitors would maintain previous prices for further bids. Moreover, the independence requirement applies all the more in the case of a concentrated oligopolistic market, like the ODDs market.[306]

Fourth, the applicants raised various points challenging the EC's finding of an SCI. Notably, all the applicants apart from Hitachi argued that there was an inconsistency between the SO and the contested decision as regards the legal characterisation of the facts. In the SO, the conduct was characterised as an SCI, whereas in its decision the EC stated that the infringement was also composed of "several separate infringements". The applicants claimed that this violated their rights of defence.[307]

The Court disagreed, finding that all the applicants were clearly informed, since the SO referred to a number of elements, indicating that the EC considered that the cartel consisted of different agreements. Further, the Court reiterated that the

[298] *Toshiba Samsung Storage Technology Corp and Toshiba Samsung Storage Technology Korea v European Commission (TSST)* (T-8/16) EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [179] and [192].

[299] EC Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101/81 of 27 April 2004.

[300] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [183]–[191].

[301] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [195] and [198].

[302] *Sony Corp and Sony Electronics Inc v European Commission (Sony Corp)* (T-762/15), EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [68]; *Sony Optiarc Inc v European Commission* (T-763/15) EU:T:2019:517; [2019] 5 C.M.L.R 10 at [61].

[303] *Sony Corp* EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [195].

[304] *Sony Corp* EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [59].

[305] *Sony Corp* EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [60].

[306] *Sony Optiarc* EU:T:2019:517; [2019] 5 C.M.L.R 10 at [91]–[92] and [63].

[307] See, e.g., *Sony Corp* EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [227].

concept of an SCI presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive aim.[308]

Sony Corp., Sony Optiarc and TSST also argued that the EC had not shown that they were aware of the whole infringement.[309] However, the Court disagreed, finding that they were aware of the overall cartel, and intentionally contributed to its objective, since they exchanged emails acknowledging contacts between other competitors and provided information on their own and other competitors' practices.[310]

TSST also argued that a link of complementarity between various actions is an essential criterion for establishing an SCI, an accumulation of similarities between the instances of conduct is not enough. TSST contended that the EC had to prove a synergetic link between them (a 'plus factor').[311]

Further that the EC had not substantiated the existence of an SCI, because, among other reasons, Dell and HP are two different customers and the conduct towards each customer was different in terms of duration, participants and other aspects.[312]

The GC disagreed, stressing that it is not necessary to establish such a link of complementarity. The only decisive criterion is that the instances of conduct concerned are part of an 'overall plan' having a single objective. On that issue, similarities of conduct are relevant, irrespective of the existence of a common plan drawn up in advance.[313] In addition, the Court found that, even though the cartel related to two separate customers, the overall plan was the distortion of competition in the ODD market.[314]

Finally, the fact that certain characteristics of the cartel changed over time did not preclude the finding of an SCI, as long as the objective remained the same.[315]

Fifth, various applicants claimed errors in the calculation of the fines.

Hitachi claimed that the EC should not have applied the general methodology in setting the fine because of three exceptional circumstances:[316] (1) Hitachi derived the bulk of its revenues from a single product; (2) the fine was close to the 10% of turnover fining ceiling; and (3) Hitachi was in financial difficulties owing to its restructuring plan.

Toshiba raised the same argument regarding the single-product nature of the business. Toshiba claimed that the EC breached the principles of equality and proportionality since its sales of ODDs represented a higher proportion of its overall turnover compared with that of other cartel participants.[317]

The GC dismissed these grounds of appeal, stating that the turnover derived from the goods in respect of which the infringement was committed was a fair

[308] *Sony Corp* EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [236] and [238]; *Sony Optiarc* EU:T:2019:517; [2019] 5 C.M.L.R 10 at [209] and [211]; *Quanta* EU:T:2019:519; [2019] 5 C.M.L.R. 11 at [65] and [66]; and *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [56].

[309] See, e.g., *Sony Optiarc* EU:T:2019:517; [2019] 5 C.M.L.R 10 at [176].

[310] *Sony Optiarc* EU:T:2019:517; [2019] 5 C.M.L.R 10 at [182]–[194].

[311] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [202] and [211].

[312] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [218].

[313] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [205] and [212].

[314] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [232].

[315] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [230].

[316] *Hitachi-LG Data Storage Inc and Hitachi-LG Data Storage Korea Inc. v European Commission* (T-1/16) EU:T:2019:514; [2019] 5 C.M.L.R. 12 at [101]–[123].

[317] *TSST* EU:T:2019:522; [2019] 5 C.M.L.R. 13 at [483].

representation of the scale of the infringement on the relevant market.[318] Moreover, the fine was not close to the 10% cap after the reduction under the Leniency Notice.[319] Finally, the EC is not required to consider a company's financial situation.[320]

Sony Corp also claimed that a multiplier for deterrence was only applied to Sony, although the turnover of the other addressees' parent companies was comparable or higher than that of Sony.[321] The GC rejected this, judging that Sony Corp was liable for its subsidiary's (Sony Electronics) infringement, whereas the infringements of TSST and Hitachi Data Storage were not imputed to their parents, Samsung and Hitachi, respectively.[322]

Paper Envelopes—Printeos

In September 2019, the GC dismissed Printeos's appeal against the re-adopted EC decision in the paper envelopes cartel case.[323]

Background

It may be recalled that, in December 2014, the EC fined paper envelope producers €19.5 million for fixing prices and allocating customers for certain types of envelopes in a settlement decision. The cartel covered Denmark, France, Germany, Norway, Sweden and the UK as regards standard catalogue envelopes and special printed envelopes. Printeos was fined some €4.7 million for participation in the cartel.[324]

Printeos appealed the EC decision and, in December 2016, the GC upheld the appeal, concluding that the EC failed to give adequate reasons for applying different adjustments to the basic amount of the fines imposed on the cartel participants. In particular, the EC applied reductions to ensure that the fines would remain below the 10% fine ceiling. Those reductions were based on recognised principles, but also individualised and the decision did not make clear how the EC had reconciled all this. As a result, the GC annulled the EC's decision.[325]

By its decision of June 2017, the EC then re-imposed the €4.7 million fine on Printeos with more detailed reasoning.[326] Printeos appealed again.

The GC's judgment

In September 2019, the GC rejected Printeos's appeal. The main points are as follows:

[318] *Hitachi* EU:T:2019:514; [2019] 5 C.M.L.R. 12 at [110].
[319] *Hitachi* EU:T:2019:514; [2019] 5 C.M.L.R. 12 at [117].
[320] *Hitachi* EU:T:2019:514; [2019] 5 C.M.L.R. 12 at [121].
[321] *Sony Corp* EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [295].
[322] *Sony Corp* EU:T:2019:515; [2019] 5 C.M.L.R. 9 at [296].
[323] With thanks to Alessia Varieschi. *Printeos SA and Others v European Commission* (T-466/17), Judgment of 24 September 2019, EU:T:2019:671.
[324] *Envelopes* Case AT.39780, EC Decision of 10 December 2014.
[325] *Printeos SA v European Commission* (T-95/15) EU:T:2016:722; [2017] 4 C.M.L.R 9.
[326] *Envelopes* Case AT.39780, EC Decision of 16 June 2017. The reasoning is set out in the Court's judgment at [31]–[44].

First, the GC rejected Printeos's argument that the EC, by re-imposing the fine, breached Printeos's right not to be tried twice for the same offence (the *ne bis in idem* principle).[327]

The GC found that the resumption of the proceeding in respect of the same anti-competitive conduct is allowed if the first decision was annulled for procedural reasons, without any ruling on the substance of the alleged facts. Here, Printeos did not challenge the part of the original decision establishing its liability for the infringement in question, which was the only part of the original decision which became final. Therefore, the *ne bis in idem* principle was not applicable.[328]

Second, Printeos argued that the EC breached the principle of equal treatment by applying different rates of fine reduction to the basic amount of the fine under point 37 of the EC Fining Guidelines to bring the companies concerned under the 10% fine ceiling.[329]

Printeos's key theme was that the basic amount of its fine, as compared with its total sales, was higher than that of other cartel participants and much closer to the 10% fine ceiling than for the others (9.7 per cent as compared with 4.7% and 4.5%).[330] Printeos argued that was discriminatory in particular as regards GPV.[331]

The GC reviewed these issues in considerable detail.

The Court recalled that only the final amount of the fine imposed had to be within the 10% fine ceiling.[332] Further, the simple fact that a fine is nearer the 10% fine ceiling for one cartel participant than for another does not infringe the principle of equality of treatment.[333]

However, the Court stated that if the EC takes account of the 10% fine ceiling *at an intermediate stage* in its fine calculation (i.e. to determine the basic amount), it was required to comply with the principle of equality of treatment.[334]

The Court then reviewed the EC's general approach and compared the specific situations of three other cartel participants, Bong, Hamelin and GPV to that of Printeos.[335]

The Court noted that generally the EC had made fine reductions to come under the 10% fine ceiling on the basis of the ratio of cartelised turnover to total sales. These were non-linear. Then the EC had sought to re-establish a balance between the resulting figures through individual reductions reflecting the comparable involvement of the cartel participants in the cartel with, in one case, a specific adjustment.[336] Overall the Court upheld that approach.[337]

The Court then specifically reviewed Printeos's position as compared with that of Bong and Hamelin, and agreed with the EC's approach.[338]

However as regards GPV, the Court was critical. The Court found that in GPV's case the EC's approach was no longer clearly linked to the ratio of cartelised

[327] *Printeos* EU:T:2019:671 at [53].
[328] *Printeos* EU:T:2019:671 at [58]–[69].
[329] *Printeos* EU:T:2019:671 at [70]–[78].
[330] *Printeos* EU:T:2019:671 at [71].
[331] *Printeos* EU:T:2019:671 at [75]–[77].
[332] *Printeos* EU:T:2019:671 at [96].
[333] *Printeos* EU:T:2019:671 at [99].
[334] *Printeos* EU:T:2019:671 at [104].
[335] *Printeos* EU:T:2019:671 at [106]–[142].
[336] *Printeos* EU:T:2019:671 at [113]–[117].
[337] *Printeos* EU:T:2019:671 at [119], [121]–[124] and [170].
[338] *Printeos* EU:T:2019:671 at [127]–[129] and [132]–[135].

turnover to overall sales. Rather it turned on the fact that GPV's ratio of cartelised turnover to overall sales was the highest and that GPV's global sales had fallen in 2012/2013. This put GPV in a special position and meant that the adjusted basic amount for GPV did not reflect GPV's size and economic weight and give a suitably deterrent fine.[339] The Court therefore found that the EC had infringed the principle of equal treatment.[340]

However, insofar as Printeos had not challenged the fines of the other cartel participants, which were, moreover, final at this stage of the proceedings; and since Printeos could not invoke in its favour an unlawful act affecting the position of GPV, the Court dismissed Printeos's claim.[341]

Apparently frustrated at the EC's insufficient reasoning in its decisions on this, the GC however awarded Printeos its costs of appeal.[342]

Third, Printeos also claimed that the EC breached the principles of proportionality and non-discrimination by refusing to reduce Printeos's fine on that basis that Printeos had been fined previously by the Spanish Competition Authority for anti-competitive practices in the paper envelope sector.[343]

The GC dismissed this claim, concluding that the two proceedings concerned different facts, different periods and different geographic areas.[344] Moreover, Printeos could not rely on the alleged deterioration of its economic situation, which could have been the subject of a request for a reduction of the fine on the basis of ability to pay.[345]

Euribor—HSBC

In September 2019, the GC ruled on HSBC's appeal in the *Euro Interest Rate Derivatives* cartel case.[346] It may be recalled that the EC found that HSBC had participated in a manipulation of Euro Interest Rate Derivatives (EIRDs) that were linked to the Euro Interbank Offered Rate (Euribor) and/or the Euro Over-Night Index Average (EONIA) for some weeks in 2007.[347]

Euribor is a set of benchmark interest rates intended to reflect the cost of interbank loans, calculated on the average of prices offered by a panel of 47 prime banks at the time of the decision. EONIA fulfils an equivalent function to Euribor. It is the overnight interest rate computed with the help of the European Central Bank as a weighted average of all overnight unsecured lending transactions in the interbank market.

The unlawful conduct was focused on: (1) a specific manipulation on 19 March 2007; (2) discussion of a repeat manipulation on 27 March 2007; and (3) other unlawful related conduct.[348]

[339] *Printeos* EU:T:2019:671 at [139]–[141].
[340] *Printeos* EU:T:2019:671 at [139]–[142] and [170].
[341] *Printeos* EU:T:2019:671 at [143]–[145].
[342] *Printeos* EU:T:2019:671 at [176]–[177].
[343] *Printeos* EU:T:2019:671 at [147]–[151].
[344] *Printeos* EU:T:2019:671 at [158].
[345] *Printeos* EU:T:2019:671 at [160].
[346] *HSBC Holdings, HSBC Bank, HSBC France v Commission* (T-105/17), Judgment of 24 September 2019 EU:T:2019:675; [2019] 5 C.M.L.R. 21.
[347] *EIRDS* Case AT. 39914, 7 December 2016. See further in the EC decisions section in Part 2.
[348] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [16]–[21], [68] and [222].

HSBC had not settled with the EC and was fined €33.6 million after a standard procedure.[349]

On appeal, HSBC mainly argued that its conduct did not amount to a restriction by object (RBO); and that it had not participated in a single and continuous infringement (SCI).

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

First, the GC upheld the EC approach generally,[350] save that, as regards the RBO, the Court found that the EC had viewed incorrectly two discussions in which HSBC traders exchanged information on their trading positions[351]; and that, as regards the SCI, the Court found that HSBC had participated in the SCI only through its own conduct; and the conduct of other parties involved in the manipulation on 19 March 2007 and any potential repeat thereof.

Second, there were two types of RBO found in the case.

Those related, first, to the manipulation in question: submitting low quotes on 19 March 2007 for Euribor to reduce that rate in order to make a gain on derivatives falling due on that date, as a result of differences in rate (spread) as compared to derivatives linked to EONIA. In other words, a manipulation of interest rate futures linked to the Euribor, under which one party, termed the buyer, receives the fixed rate during the contract, while the other party, termed the seller, receives a variable rate. The manipulation consisted in gradually gaining a very large "buyer" exposure, in respect of which the bank thus receives the fixed rate and pays the variable rate, and reducing the level of the variable rate at the maturity date by concerted action.[352]

The other type of RBO consisted of exchanges of information on pricing strategies and trading positions—in particular, exchanges on mid-point prices of EIRD[353] and exchanges on trading positions, where related to a manipulation, which the EC considered to be the traders "investment portfolios". However, the EC excluded exchanges of information when banks were contracting with each other.

Third, the Court held that the EC had not shown that other exchanges of information were a restriction by object. Notably, the EC had not identified what other trading conditions were coordinated.[354]

Fourth, as regards the alleged SCI, the issue was whether the three types of conduct involved in the case were part of a "single aim" and "overall plan" to align pricing intentions and strategies. The three types of conduct being: (1) the manipulation of submissions to Euribor; (2) exchanges about EIRD trading positions; and (3) exchanges re. detailed, non-public information.

The GC found that they were. Notably, since various manipulations of reference rates could have a single aim, here to reduce the cash flows between the parties and increase the value of their EIRDs to the detriment of counterparties to these EIRDs. Equally, there was an overall plan to the extent that the manipulation was "controlled and maintained" by a stable group of individuals.[355] Exchanges of information related to such conduct were bound into it.

[349] Four banks (Barclays, Deutsche Bank, Société Générale and RBS) settled on 4 December 2013. JPMorgan and Crédit Agricole also did not settle.

[350] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [85]–[111].

[351] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [179]–[195].

[352] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [86]–[87].

[353] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [138]–[148].

[354] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [174]–[177].

[355] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [225], [228] and [233]–[235].

Fifth, on HSBC's position in the SCI, the GC distinguished between HSBC's conduct as regards the specific manipulation of 19 March 2007 and discussion of a repeat manipulation on 27 March 2007, and other unlawful conduct.

As regards the specific manipulation and a discussion about repeating it, the Court found that HSBC was aware or ought to have been aware that others were involved on the facts of the bilateral discussion which occurred (and therefore part of the SCI).[356] However the GC considered that the EC had not shown that HSBC was aware or ought to have been aware that, on other occasions, other banks were pursuing other unlawful conduct. Notably, the HSBC trader concerned was not in the group of persons controlling or directing the manipulation.[357]

Sixth, as regards the fine, HSBC raised two main arguments: (1) that the EC had insufficiently reasoned its determination of the value of sales used to calculate the fine (notably, the EC had looked at discounted cash receipts to each bank under the EIRDs as a proxy for sales)[358]; and (2) the EC had decided to reduce the reference sales for the fine by a very precise figure, 98.849%, without explaining how it arrived at that figure.[359]

The GC disagreed with HSBC as regards the discounted cash receipts, noting that the discount had taken account of the circumstances of the EIRD market, in particular "netting out" income against expenditure in derivatives trading.[360]

However, the Court agreed with HSBC that the EC had insufficiently reasoned how it arrived at the reduction factor of 98.849%, even though the EC had set out explanations.[361] In particular, since that reduction factor played an essential role in determining the level of the fine.[362] The Court therefore annulled the fine.

Seventh, HSBC also argued that, through the EC's settlement decision, the EC had infringed the presumption of innocence and the rights of the defence when it came to the decision as regards HSBC [363]

The GC agreed that there could be such a risk where there was a settlement decision and then infringement proceedings. However, the Court noted that, after a comprehensive review, certain findings as regards HSBC had been held unlawful and others had been upheld. In such circumstances, it had not been shown that any impartiality of the EC had led it to take a different decision as regards HSBC arising from the settlement decision.[364]

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

–	European Court cases on art.102 TFEU and procedure
–	Various European Commission decisions:

[356] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [248]–[262].
[357] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [266]–[274].
[358] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [298]. The EC had not applied point 37 of the EC Fining Guidelines, allowing for departure from its methodology in exceptional circumstances: see [345].
[359] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [299], [312]–[343] and [351].
[360] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [304]–[305] and [322]–[324].
[361] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [305].
[362] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [325]–[328], [347]–[353].
[363] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [283].
[364] *HSBC Holdings* EU:T:2019:675; [2019] 5 C.M.L.R. 21 at [287]–[289].

- * On cartels (including *Euribor*)
  * On vertical cases re art.101 TFEU (such as *Guess*, *Nike* and *Sanrio*)
  * On horizontal cases involving *Mastercard* and *Visa*
  * art.102 TFEU cases re. energy (such as *TenneT*), digital/hi-tech (*Google Android,Qualcomm*) and practices dividing markets (*AB Inbev*)
- Selected policy issues and reports including
  * Competition law and the Digital Era;
  * EC Interim Measures proceedings as regards *Broadcom*; and
  * an EC report on competition law and the pharmaceutical sector