OVERVIEW AND CRITICAL ANALYSIS OF THE MAIN DEVELOPMENTS IN EUROPEAN ANTITRUST PRACTICE AND CASE LAW

Mario Siragusa

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Abstract: Over the years, both the European Commission and the national competition authorities have played a crucial role in the enforcement of Articles 101 and 102 TFEU. In the last year, the network of competition authorities has become a multi-center, united network supporting innovative ideas and legal principles. In contrast, European Courts, at least during the last year, appear to have been over formalistic in their approach, all too often in line with the Commission, paying more attention to procedural rather than substantive issues. In the last year, the European Commission and the European Courts have analyzed many important cases in different economic sectors in relation to the application of Articles 101 and 102 TFEU, which have raised many complex legal and factual issues. In some cases the European Commission and the European Courts were confronted with new questions, while the outcome of other cases helped to clarify long-lasting debates. The analysis of decision-making practice and case law highlights some major issues in recent antitrust enforcement, namely: (i) the boundaries of the notion of restriction “by object”; (ii) the enhanced role of economic analysis in the assessment of unilateral exclusionary conduct, in line with the European Commission’s Guidance Paper on Article 102 TFEU; (iii) the notion of potential competition and market definition, as well as the interplay between the regulatory framework and EU competition law; and (iv) the growing importance of e-commerce, which has led the European Commission to step up its scrutiny of vertical restraints in online distribution, and the interplay between e-commerce and copyright. There have been further interesting developments at the EU level in antitrust procedure, legislation and policy.

1. THE INTRODUCTION: OVERVIEW OF ENFORCEMENT ACTIVITY

In the period from May 2016 to May 2017, the European Commission (the “Commission”) closed 13 proceedings concerning cartels and abuse of dominant position. Only 1 of the 13 decisions concerned the application of Article 102 of the Treaty on the Functioning of the European Union (the “TFEU”). The Commission mostly dealt with cartel cases following leniency applications. The Commission issued an infringement decision

1 Lawyer and Professor of the College of Europe, Bruges.
2 This paper is based on a speech given at the Fourth National Conference of the Associazione Antitrust Italiana, I Principali sviluppi nel diritto della concorrenza dell’Unione Europea e nazionale, Capri, May 25-26, 2017.
in 4 cases. In 3 cases the outcome of the proceedings was a settlement decision. In 4 cases, the Commission accepted the commitments offered by the parties. In 2 cases the Commission re-adopted a previous decision.

In the same period, the Court of Justice of the European Union (including both the General Court, the “GC”, and the European Court of Justice, the “ECJ”, together the “European Courts”) delivered a ruling in 56 cases concerning cartels and abuse of dominant position. In particular, the GC dismissed 17 actions for annulment, whereas five other actions were (at least partially) successful. The GC made use of its unlimited jurisdiction to redefine the level of the fine in 1 case. The judicial activity of the GC was less than in the previous year, likely because of the growing number of settlement decisions reached in the context of cartel cases. The ECJ rejected 30 appeals to set aside (totally or partially) the GC’s rulings, 1 of which had been brought by the Commission. The ECJ annulled (at least partially) judgments of the GC in 3 cases, in one of which the underlying Commission’s decision was also quashed. Only 1 case concerned a request for a preliminary ruling. Yet, national courts increasingly made reference to the ECJ for preliminary rulings, and a further increase can be

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3 See Commission decisions of February 8, 2017 in Case 40018 - Car battery recycling; December 7, 2016 in Case 39914 - Euro Interest Rate Derivatives; September 20, 2016 in Case 39759 - ARA Foreclosure; and May 25, 2016 in Case 39792 - Steel abrasives.

4 See Commission decisions of March 8, 2017 in Case 39960 - Thermal systems; December 12, 2016 in Case 39904 - Rechargeable batteries; and July 19, 2016 in Case 39824 - Trucks.

5 See Commission decisions of May 4, 2017 in Case 40153 - E-book MFNs and related matters; July 26, 2016 in Case 40023 - Cross-border access to pay-TV; the Commission’s investigation continues regarding five other parties involved; July 20, 2016 in Case 39745 - CDS - Information Market; and July 7, 2016 in Case 39850 - Container Shipping.


expected as a result of private enforcement. Overall, as a result of parallel proceedings brought against the same Commission’s decisions, fewer cases are pending.

These statistics reveal two important issues. First of all, that the network of competition authorities has worked well, with: (i) the Commission primarily focusing on major cartels, merger control and some innovative cases on the application of Article 102 TFEU\(^\text{13}\) and (ii) the national competition authorities (the “NCAs”) dealing with a wider and more comprehensive range of cases. Both the Commission and the NCAs have therefore played a crucial role in the enforcement of Articles 101 and 102 TFEU. More interestingly, in the last year, the network of competition authorities has become a multi-center, united network within which not only the Commission but also the NCAs have increasingly supported innovative ideas and legal principles, which may then be upheld by the European Courts. There are plenty of examples: (i) the development of new types of abuse (to which the Italian Competition Authority made a substantial contribution); (ii) the French case law on the denigration of competing products (an issue the ECJ will also deal with very soon); (iii) excessive pricing (scrutinized by the UK Competition and Markets Authority, the Italian Competition Authority and the German Bundeskartellamt); (iv) big data (that has been the subject of joint studies); and (v) the development of the case law on standard essential patents and injunctive relief (which started in Germany, and has undergone substantial development in the EU following the *Huawei* decision\(^\text{14}\) and is now having implications at national level).

### 2. Recent Developments in the Enforcement of Competition Rules

In the period under review, the Commission and the European Courts analyzed many important cases in different economic sectors in relation to the application of Articles 101 and 102 TFEU, which raised many complex legal and factual issues. In some cases the Commission and the European Courts were confronted with new questions, while the outcome of other cases helped to clarify long-lasting debates. The following sections offer an overview and critical analysis of the main EU competition law developments in the fields of restrictive agreements, abuse of dominance, and e-commerce, as well as in antitrust procedure, legislation and policy.

#### 2.1 The European Courts and the notion of restriction “by object”

The notion of restriction “by object” is still a matter of debate at the EU level. This is odd, to

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\(^{13}\) See, for instance, the Google cases; see Commission decision of June 27, 2017 in Case 39740 - *Google Search (Shopping)*. See also Commission Cases 40099 - *Android* and 40411 - *Google Search (AdSense)*.

say the least, given that the provision of Article 101 TFEU prohibiting all agreements between undertakings, decisions by associations of undertakings and concerted practices “which have as their object or effect the prevention, restriction or distortion of competition” is substantially unchanged from its original formulation. All the same, the debate on what is meant by restriction “by object” has been particularly vigorous in the last decade or so before the European Courts: the ECJ and the GC have indeed delivered important rulings on its boundaries. To mention only some of the most discussed cases, the judgments in BIDS\textsuperscript{15}, Pierre Fabre\textsuperscript{16} and T-Mobile\textsuperscript{17} cast some doubts on the applicable standard, contributing to blurring the distinction between “by object” and “by effect” restrictions and, as a result, expanding the definition of “by object” restriction. In this context of relative confusion, the ECJ decision in the Cartes Bancaires case\textsuperscript{18} – by ruling that the notion of restriction by object must be interpreted restrictively – definitely marked a turning point, or more simply re-established a certain order. Shortly after Cartes Bancaires, the ECJ upheld the Commission’s position in Dole\textsuperscript{19} that an exchange of forward-looking information – in this case, on crucial pricing factors – may have an anticompetitive object, even though it does not directly relate to consumer prices, without requiring an analysis of its effect.\textsuperscript{20} The interpretation of the notion of restriction “by object” is also one of the core questions of the request for a preliminary ruling from the Italian Council of State in the Hoffman-La Roche - Novartis case, which has recently been discussed before the ECJ.\textsuperscript{21}

(a) The end of the Cartes Bancaires saga?

The first noteworthy development in the period under review concerns the last act in the Cartes Bancaires saga, which has provided important clarifications in the interpretation of the notion of restriction “by object” and the boundaries of the “by object”-“by effect”

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\textsuperscript{17} See Judgment in Case C-8/08, T-Mobile Netherlands, June 4, 2009, EU:C:2009:343.


\textsuperscript{20} See Dole, para. 122-123.

\textsuperscript{21} See Judgment in Case C-179/16, F. Hoffmann-La Roche and Others, 23 January 2018. On September 21, 2017 Advocate General Saugmandsgaard Æ delivered his opinion in the case (see Case C-179/16, F. Hoffmann-La Roche and Others, cit., EU:C:2017:714). According to the Advocate General, collusion between two companies on allegations that one medicinal product (used off label for certain therapeutic indications) is less safe compared with another (that has been authorized for those indications) constitutes a restriction of competition by object within the meaning of Article 101(1) TFEU only where those allegations are misleading. The Advocate General added that this is a factual question to be decided by national courts.
More specifically, the French payments network Groupement des Cartes Bancaires (‘GCB’) has finally lost a long battle before the European Courts to overturn the Commission’s decision that GCB’s fee structure infringed Article 101 TFEU. On June 30, 2016 the GC delivered its second judgment on the appeal by GCB, this time concluding that it constituted a restriction by effect.  

Back in 2007, the Commission had found that GCB’s adoption of specific fees for card issuers constituted a restriction of competition by object and by effect, as these fees were applied in a way that favored large banks on GCB’s board, to the detriment of new members. The GC upheld the Commission’s decision. On appeal, the ECJ upheld GCB’s claim that the GC had erred in its assessment of whether the measures constituted a restriction by object in light of their content, objectives, and context. It found that the GC had failed to analyze the economic and legal context of the measures, and referred the case back to the GC, to determine whether the measures in question had the effect of restricting competition.

22 Equally importantly, it addressed the issue of judicial review of Commission decisions, providing helpful guidance on the standard required.
23 See Judgment in Case T-491/07, RENV - Groupement des Cartes Bancaires, cit.

In its second judgment, the GC examined whether the Commission had taken into account the actual context in which the relevant measures took place, the analysis of the state of competition in the market for payment systems absent GCB’s fees, and the determination of the geographic market. In particular, it found that, in defining a market for card payment systems, the Commission had to assess the competitive situation of the members of GCB on the issuing market. According to the GC, the Commission had rightly found that, without the measures at issue, the card payment systems would have allowed more cards to be issued at competitive prices, without jeopardizing the survival of the system.

Further, before the GC, GCB claimed that the Commission had committed various errors of law, fact, and assessment in its analysis of the effects of the measures at issue. In particular, GCB argued that the Commission should have taken into account the benefits received by new entrants in exchange for the fees imposed on them. The GC dismissed GCB’s arguments noting, inter alia, that the fees, which created anticompetitive effects, were separate from the GCB membership fees.

Finally, before the GC, GCB argued that the Commission’s decision, to the extent it required GCB to refrain from adopting any measure or behavior in the future that would have an identical or similar object or effect to the prohibited behavior, was disproportionate. The GC upheld part of this ground of appeal since the injunction not to adopt any measures with “an identical or similar object” could not be maintained as the ECJ had already considered
GCB’s measures not to be anticompetitive by object.

(b) Non-compete clauses: the Portugal Telecom and Telefónica cases

The Portugal Telecom and Telefónica cases also revolve around the notion of restriction “by object”. More specifically, the GC was required to rule on the classification of a non-compete clause as a restriction of competition by object. In 2010, Portugal Telecom SGPS (“PT”) and Telefónica SA (“Telefónica”) concluded a stock purchase agreement (“SPA”) that gave Telefónica sole control over the Brazilian mobile operator Vivo Participações SA (“Vivo”), which had previously been jointly owned by the parties. The SPA contained a non-compete clause stipulating that, to the extent permitted by law, neither PT nor Telefónica could directly or indirectly invest in any projects that would compete with the other party on the Iberian market. On January 23, 2013, the Commission adopted a decision classifying the clause in question as a market sharing agreement, infringing Article 101 TFEU. The GC rejected PT’s request to annul the Commission’s decision, but ordered the Commission to adjust the fine imposed on PT.

The GC first addressed the issue of “ancillary restraint”. According to PT, the non-compete clause related to the agreed stock purchase option or to the resignation of members of PT’s board of directors, which were elected by Telefónica at the time that Vivo was a joint venture of both parties. The GC explained that a non-compete clause can indeed be an ancillary restraint to the main transaction when: (i) the restriction is objectively necessary for the implementation of the main transaction; and (ii) it is proportionate to it. However, it found that PT had failed to explain how the non-compete clause was an ancillary restraint.

In addition, PT argued that, due to the phrase “to the extent permitted by law” in the non-compete clause, the clause could not be contrary to EU competition law as it just imposed an obligation upon the parties to assess whether it was permitted by law to refrain from competing with the other party. However, the GC rejected this argument pointing out that the wording of the clause was unclear as to whether such an assessment was a pre-requisite for its application.

Furthermore, the GC also dismissed PT’s argument that PT and Telefónica could not be regarded as potential competitors and that, therefore, the Commission was not in a position to assess whether real concrete possibilities existed for them to compete on the markets allegedly envisaged by the non-compete clause. The GC pointed out that no detailed analysis of potential competition in each specific market was required, as the non-compete clause was a typical restriction “by object”. In this respect, the GC agreed with the Commission that the following three reasons made a detailed market analysis unnecessary in this case: (i) the existence of the clause indicated that the parties considered themselves to be potential competitors; (ii) the

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clause had a very wide scope, covering both electronic communications and television services; and (iii) the validity of the clause needed to be assessed in light of the EU’s liberalization efforts in the field of electronic communications, which encourage competition among operators.

As a last resort, PT challenged the Commission’s calculation of the fine and claimed that the Commission wrongly took into account – without checking whether potential competition existed – all services offered by PT, as opposed to only the services for which PT and Telefónica were indeed potential competitors. On this point, the GC agreed with PT and drew a subtle distinction that will certainly have practical implications.29 In particular, the GC found that while it is not necessary for the Commission to investigate whether the parties are potential competitors in every relevant market covered by the agreement when dealing with a restriction of competition “by object”, such analysis must instead be carried out in order to determine the applicable fine. As a result, the GC held that the Commission erred in including sales of services that were not related to the infringement. The GC did not make use of its unlimited jurisdiction to redefine the level of the fine. Instead, it ordered the Commission to recalculate it, taking into account only the sales falling within the scope of the non-compete clause.30

(c) Reverse payments: the Lundbeck case

Reverse payments (or pay-for-delay agreements) have been severely fined by the Commission in the past years,31 and are currently being scrutinized by the European Courts. In the Lundbeck case,32 the GC was required to examine whether such agreements concluded between originators and generic producers had as their “object” the restriction of competition within the meaning of Article 101 TFEU.33

In 2002, the Commission found that Lundbeck had entered into several agreements with generic companies to delay the entry of cheaper generic versions of Lundbeck’s branded drug.34 Although Lundbeck’s patent was to expire in 2003, several generic drug producers agreed not to enter the market in exchange for Lundbeck paying them significant lump sum amounts, purchasing their stock, and offering guaranteed profits through distribution agreements. Based on these facts, the applicant to demonstrate the absence of potential competition with respect to certain services. For the GC to determine such a value would therefore amount to filling in a gap in the investigation of the file, and the exercise of unlimited jurisdiction cannot go so far as to lead it to carry out such an investigation.

29 Especially with respect to some cases pending before Italian Administrative Courts.

30 The GC held that the Commission – in determining the value of sales to be taken into account – carried out no analysis on the relevant material put forward by the


Commission concluded that such agreements constituted a restriction of competition “by object”, to the extent they had replaced the uncertainty surrounding the patent litigation with the certainty that generic producers would not enter the market. Accordingly, the Commission fined Lundbeck and the generic companies around EUR 94 and EUR 52 million, respectively. Lundbeck appealed the Commission’s decision, claiming that it had erred, inter alia, in applying the legal standard for restrictions by object. On September 8, 2016, the GC sided with the Commission. This was the first time that the GC had confirmed that pay-for-delay agreements constituted a restriction “by object” of Article 101 TFEU.35

More specifically, the GC reiterated the Commission’s position that, although not “all patent settlements” containing “reverse payments” are contrary to Article 101 TFEU, the disproportionate nature of such payments played a decisive role in establishing whether the agreements at issue constituted “by object” restrictions. In fact, according to the GC, the payments served as a “deal clincher”. Moreover, according to the GC, settlements reached with the purpose of solving an underlying patent dispute raise competition concerns to the extent that they provide for the exclusion from the market or where they delay market entry of generic products. In the GC’s view, it is not even relevant that such agreements do not contain “no-challenge clause”, as it is not necessary to prove that any incentive to enter the market has been eliminated. What is crucial, instead, is that the payments broadly corresponded to (i) the profits that the generic producers expected to make if they had entered the market or (ii) the damages that they would have obtained if they had succeeded in litigation against Lundbeck.

The GC also dismissed Lundbeck’s argument that the agreements should be assessed from a viewpoint of protecting intellectual property (“IP”) rights. According to the GC, while the protection of IP rights includes the right to oppose infringements, it does not include, however, the right to delay competitors’ market entry in exchange for significant reverse payments. Therefore, although certain restrictions would have been within the scope of patent protection, the agreements at issue needed to be assessed under Article 101 TFEU. Moreover, the GC held that the payments could not be justified on the basis of avoiding irreversible price falls or regulatory price cuts that unlawful generic entry could have caused. According to the GC, this was a characteristic of the pharmaceutical sector and constituted a “normal commercial risk.” Therefore, by means of such agreements, producers could have maintained higher prices for their products, to the detriment of consumers and the healthcare budgets of States.

As to the calculation of the fine, Lundbeck argued that the complexity and novelty of the issues raised justified a symbolic fine. The GC

disagreed, stating that agreements between competitors for the exclusion of some of them from the market – like those at issue – are clearly illegal, and the fact that they were concluded in the form of settlement agreements concerning IP rights did not render their unlawfulness novel or unforeseeable. Moreover, the fact that the Commission had previously not characterized a certain type of agreement as restrictive of competition could not prevent it from later making such a finding and imposing fines.36

The GC’s judgment will certainly have a practical impact; although its reasoning is not convincing. The outcome is, in fact, a slavish endorsement of the Commission’s reasoning. The GC totally overlooked the high number of patent infringement litigation (35) that Lundbeck was facing in 9 Member States against 20 producers of generic drugs. In this situation it was more efficient and reasonable to settle the disputes, having also in mind that the generic products did in fact infringe Lundbeck’s patents. Against this background, it might have been reasonable to conclude that such agreements would not amount to “by object” restrictions. If the ECJ upholds the GC’s conclusion that reverse payment agreements constitute restrictions “by object”, the result will be a further extension of this notion that, in some ways, would reverse the recent trend set in the Cartes Bancaires case, and in the Intel case addressed below.

2.2 Formal (or more economic) approach to abuse of dominance: the Intel case

Along with the debate on the boundaries of the notion of restriction “by object”, the discussion on the substantive criteria on the application of Article 102 TFEU is also ongoing, in light of the seesawing case law of the ECJ. In particular, case law that is sometimes more formalistic, and sometimes more in line with the Communication on the Commission’s enforcement priorities (the “Guidance Paper”).37

The recent Opinion of Advocate General (“AG”) Wahl in the Intel case38 – by providing some interesting guidance on several issues related to the enforcement of Article 102 TFEU – has enhanced such discussions, and has invited the ECJ to “refine” its case law on abuse of dominance. To this end, the AG advised the ECJ to set aside and refer back to the GC the GC’s judgment upholding a EUR 1.06 billion fine against Intel for abuse of dominance in the market for x86 central processing units (“CPUs”) by unlawfully offering rebates to computer manufacturers and retailers in exchange for exclusivity.39

36 The GC referred to the Judgment in Case C-457/10 P, AstraZeneca v. Commission, December 6, 2012, EU:C:2012:770, which also concerned the finding of an unprecedented infringement relating to the protection of IP rights in the pharmaceutical sector.


AG Wahl harshly criticized the GC’s ruling, primarily the conclusion that exclusivity rebates are a “super category” of rebates capable by their very nature of restricting competition.\textsuperscript{40} He advocated instead for an effects-based approach in line with the Commission’s Guidance Paper, as the ultimate aim of competition law is to enhance efficiency and anticompetitive effects have a “crucial importance”,\textsuperscript{41} regardless of a practice’s form or legal categorization. Referring to \textit{Hoffmann-La Roche},\textsuperscript{42} AG Wahl acknowledged the presumption of unlawfulness against loyalty-inducing rebates, as opposed to volume-based rebates. However, he noted that, despite this presumption, the ECJ has consistently engaged – even in \textit{Hoffman-La Roche} – in a thorough analysis of the terms and market coverage of loyalty rebates as well as of the competitive conditions in the relevant markets. \textit{Intel} is the first case after \textit{Hoffmann-La Roche} to deal with rebates conditional on exclusivity.

Against this background, the AG provided a re-reading of the case-law on loyalty rebates, consistent with the renewed (or at least revisited) idea that the economic, factual and legal context should be taken into account even for restrictions by object. He concluded that there are only two categories of rebates according to the case law: (i) quantity rebates; and (ii) loyalty rebates, encompassing both those conditional on the customer sourcing all or most of its requirements from the dominant undertaking and other pricing structures conditional upon the customer reaching a particular target. According to AG Wahl, the European Courts have employed an approach displaying certain similarities with the approach to restrictions by object under Article 101 TFEU, regardless of whether loyalty rebates are directly conditional upon exclusivity. That is because, in order to ascertain whether a certain conduct constitutes a restriction by object, the legal and economic context must first be examined so as to exclude any other plausible explanation for that conduct.

From AG Wahl’s point of view, assuming in the abstract that the rebates at issue are abusive purely on the basis of their form is by no means a methodologically self-evident step to take, for the following reasons: (i) an assumption of unlawfulness by virtue of form would no longer be open to rebuttal; (ii) a mechanism that induces loyalty may take different forms, and there is no objective reason why they should deserve different treatment; (iii) the difference between the rebates at issue in \textit{Tomra}\textsuperscript{43} and \textit{Post Denmark II},\textsuperscript{44} on the one hand, and in \textit{Hoffmann-La Roche}, on the other, is one of degree rather than kind, that does not justify a different treatment; and

\textsuperscript{40} See Opinion of Advocate General Wahl in Case C-413/14 P, Intel v. Commission, cit., para. 84.
\textsuperscript{41} See Opinion of Advocate General Wahl in Case C-413/14 P, Intel v. Commission, cit., para. 41-43.
\textsuperscript{42} See Judgment in Case C-85/76, Hoffmann-La Roche v. Commission, February 13, 1979, EU:C:1979:36.
\textsuperscript{44} See Judgment in Case C-23/14, Post Danmark, October 6, 2015, EU:C:2015:651.
(iv) the case-law relating to pricing and margin squeeze practices requires consideration of “all the circumstances” in order to determine whether the undertaking in question has abused its dominant position. According to AG Wahl, dismissing the relevance of that case-law would result in an unwarranted distinction between different types of pricing practices.

Moreover, AG Wahl concluded that, while the Commission and the GC had also assessed “in the alternative” whether Intel’s conduct could foreclose competition, the circumstances they considered when doing so were inconclusive and incomplete.\(^{45}\) In particular, the GC overlooked the importance of assessing the rebates’ market coverage and duration, competitors’ market performance, declining prices and the identity of the targeted customers. In the AG’s view, it must be shown that the rebates at issue “in all likelihood”\(^{46}\) have an anticompetitive foreclosure effect. It must be ascertained, namely: (i) whether competitors could compensate customers for losing the rebate (including through the “as efficient competitor” test); and (ii) whether there were legitimate explanations for customers’ loyalty.

Although outside the temporal scope of this review, it is noteworthy that on September 6, 2017 the ECJ endorsed AG Wahl’s approach, supporting a more prominent role for economic analysis in Article 102 TFEU cases,\(^{47}\) in line with the Commission’s Guidance Paper and the recent case law on pricing practices. According to the ECJ, the GC erred in failing to examine all of Intel’s arguments calling into question the anticompetitive effects of the arrangements under an “as efficient competitor” analysis. The ECJ made it clear that dominant companies can dispute the anticompetitive effects of exclusivity rebates and, if they do so, the Commission must carry out an effects-based analysis. As a result, the ECJ referred the case back to the GC.

In practical terms, exclusivity rebates still carry significant legal risks as dominant companies will have to overcome a presumption of illegality and, even then, the Commission may be able to establish anticompetitive effects.

### 2.3 Potential competition and market definition: the Lundbeck case, again

Another important aspect of the Lundbeck case is that the GC was provided with the opportunity to rule on the concept of potential competition. More specifically, the GC set out some interesting points on whether generic companies and the originator, the holder of the patent, could be considered as potential competitors.\(^{48}\)

On appeal, Lundbeck claimed that the potential launch of a product that infringes third parties’ IP rights cannot be regarded as an expression

\(^{45}\) The circumstances were that: (i) Intel was an unavoidable trading partner; (ii) original equipment manufacturers’ low operating margins made the rebates attractive; (iii) customers took Intel’s rebates into account in deciding whether to obtain all or most products from the company; and (iv) the rebates were part of a long-term strategy to exclude competitors.

\(^{46}\) See Opinion of AG Wahl in Case C-413/14 P, Intel v. Commission, cit., para. 117.


\(^{48}\) See Judgment in Case T-472/13, Lundbeck, cit.
of potential competition, as it is incompatible with the protection conferred on patents and the exclusive rights to which they give rise. In its view, Article 101 TFEU protects only lawful competition, which cannot exist where an exclusive right, like a patent, precludes market entry, in law or in fact. Lundbeck also argued that, in order to determine whether there is potential competition, the analysis cannot be based solely on the subjective assessment of the parties to the agreements at issue as to whether a patent is valid and whether a product is infringing or non-infringing.

The GC rejected Lundbeck’s arguments emphasizing that, whilst patents are indeed presumed valid until they are expressly revoked or invalidated by a competent authority or court, that presumption cannot be equated with a presumption of illegality of generic products validly placed on the market, which the patent holder deems to be infringing the patent: an “at risk” entry is not unlawful in itself. Moreover, Lundbeck’s process patents did not necessarily constitute insurmountable barriers for the generic companies willing to enter the market (and which had already made considerable investments to that end at the time the agreements at issue were concluded). In addition, generic producers did not perceive Lundbeck’s patent as a threat: the fact that they had no marketing authorizations and might not have entered the market did not exclude the existence of potential competition. In fact, according to the GC, had the agreements in question not been concluded, there would have been real and concrete possibilities or routes for entering the market. Furthermore, the GC held that the Commission – in order to evaluate the competitive situation between the parties – did not err in relying on objective documents reflecting the perception that the parties to the agreements at issue had in relation to the strength of Lundbeck’s process patents at the time those agreements were concluded. As to subsequent evidence showing whether or not generic companies had the ability to enter the market, the GC held it not to be decisive in the examination of the potential competition.

The GC also drew an interesting distinction between the European Night Services (“ENS”) case and Lundbeck. In the ENS case, the existence of exclusive rights precluded, de jure or de facto, in most Member States, both the provision of international passenger services and access to the infrastructure. According to the GC, Lundbeck’s process patents were in no way comparable to the exclusive rights enjoyed by railway undertakings.

In Lundbeck the GC considered that there was substantial uncertainty, at the time the agreements were concluded, as to whether the producers of generics actually infringed Lundbeck’s patents. The position of the GC may well have been different if it had been clear.

Most importantly, a broader issue indirectly arose in Lundbeck, namely, the definition of potential competition based on the lawfulness of the context in which a new entrant operates. In other words, the question was to what

extent an “illegal” product could be considered, at least, as a product that potentially competes, and therefore as part of the same relevant market.

The issue concerning the interplay between the regulatory framework for the placing of medicinal products on the market and EU competition law – more specifically, the relevance of the (i) content of marketing authorizations and (ii) uncertainty regarding the lawfulness of prescribing and marketing medicines, in the definition of the relevant product market – has recently been discussed before the ECJ, in the context of the abovementioned Hoffman-La Roche - Novartis case.50

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50 See Case C-179/16, F. Hoffmann-La Roche and Others, cit. The Italian Council of State asked the ECJ whether pursuant to Article 101 TFEU, for the purposes of defining the relevant market, it is important to establish, in addition to the substantive interchangeability of products on the demand side, whether or not medicinal products for off-label use have been offered on the market in accordance with the applicable regulatory framework. In his Opinion, Advocate General Saugmandsgaard Øe noted that “In the pharmaceutical sector, the content of marketing authorizations for medicinal products is not necessarily decisive in the determination of the relevant product market. In particular, the fact that the marketing authorization for a medicinal product does not cover certain therapeutic indications does not preclude that medicinal product from forming part of the market for medicinal products used for those indications, provided that it is actually used interchangeably with medicinal products whose marketing authorization covers those indications. That is true even where there is uncertainty regarding the compliance with the applicable regulatory framework for the prescribing and marketing of medicinal products with a view to their use for therapeutic indications and by methods of administration not covered by their marketing authorizations.” In other words, the Advocate General concluded that “where the competitive conditions actually observed indicate that there is effective demand-side substitutability between a medicinal product used off-label for certain therapeutic indications and another medicinal product that has received [a marketing authorization] in respect of the same therapeutic indications, the two products belong to the same product market (…). That applies even where the lawfulness of prescribing and marketing the first medicinal product with a view to off-label use is uncertain (…),” see Opinion of Advocate General Saugmandsgaard Øe, September 21, 2017, cit., para. 74 and 82-90.


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2.4 Parental liability: the Akzo case

The ECJ’s judgment in the Akzo case51 represents a further refinement of parental liability. It revolves around the concept of “undertaking” and the principle of “single economic entity”, which is strictly applied in the case, not in line with AG Wahl’s opinion.52

On April 27, 2017, the ECJ dismissed an appeal by Akzo Nobel NV (“Akzo NV”) and two of its subsidiaries, Akzo Nobel Chemicals GmbH (“Akzo GmbH”) and Akzo Nobel Chemicals BV (“Akzo BV”), to partially annul the Commission’s fine on Akzo NV for its participation in the Heat Stabilizer cartels.53

More specifically, in 2009 the Commission fined Akzo NV and several of its subsidiaries for participating in two sets of anticompetitive agreements and concerted practices in the tin stabilizer sector and the epoxidized soybean oil
and esters sector (the “ESBO/esters sector”) infringing Article 101 TFEU. The undertakings concerned were found to have participated in those infringements during various periods between February 1987 and March 2000 in relation to the tin stabilizers sector, and between September 1991 and March 2000 in relation to the ESBO/esters sector. The GC accepted the applicants’ claim that the Commission was time-barred as at June 28, 1998 and annulled the parts of the Commission’s decision relating to the subsidiaries’ fines for the infringement period before June 28, 1993 (the “First Infringement Period”). The GC found, however, that the fact that a subsidiary benefits from the expiration of the limitation period does not prevent the Commission from holding the parent company liable, even where the parent company’s liability is entirely based on the conduct of its subsidiaries.

On appeal to the ECJ, Akzo NV, Akzo GmbH, and Akzo BV unsuccessfully claimed that the GC had erred in law in upholding Akzo NV’s fine for the First Infringement Period because its liability was entirely derived from that of its subsidiaries, whose fines had been annulled.

The ECJ recalled that the fact that the Commission’s power to impose penalties is time-barred pursuant to Article 25(1)(b) of Regulation No. 1/2003 means that a penalty can no longer be imposed on the companies in respect of which the limitation period has expired. By contrast, it does not preclude another company, which is considered personally responsible and jointly and severally liable with those companies for the same anticompetitive behavior, and in respect of which the limitation period has not expired, from having proceedings instituted against it.

In the present case, Akzo NV was held individually liable for actions which it was itself deemed to have taken during the First Infringement Period, since it formed an economic unit with its subsidiaries. Its liability was in fact wholly derivative in nature, in that it was solely because of its subsidiaries’ direct participation in the infringement.

The ECJ also recalled that, in a situation in which no factor individually reflects the conduct for which the parent company is held liable, the reduction in the amount of the fine imposed on the subsidiary jointly and severally with its parent company must, in principle, be extended to the parent company. However, factors specific to the parent company may justify assessing its liability and that of its subsidiary differently. According to the ECJ, that was the case in the matter in question, since Akzo NV, unlike its subsidiaries – whose participation in the cartels ended on 28 June 28, 1993 – was involved in the infringements concerning the tin stabilizers sector and the ESBO/esters sector beyond that date, until

54 Article 25(1)(b) of Regulation No. 1/2003 provides that the Commission can only impose penalties for infringements of Article 101 TFEU up to five years after the infringement ends, which was June 28, 1993 for the First Infringement Period.

March 21 and 22, 2000, respectively, as the ultimate parent company of the Akzo undertaking the various legal entities of which, including Akzo GmbH and Akzo BV, had participated directly in the cartels.

Therefore, the ECJ sided with the GC holding that, although the Commission’s power to impose penalties on Akzo GmbH and Akzo BV was time-barred, it did not preclude Akzo NV from being held liable in respect of the First Infringement Period too.

2.5 European Commission: E-commerce in the spotlight

The Commission has focused on the growing importance of e-commerce in the last year.

(a) The E-commerce Sector Inquiry: the Final Report

The Commission has made reducing barriers in the digital market a top enforcement priority and, as part of the Digital Single Market strategy, on May 6, 2015 it launched a sector inquiry into e-commerce (the “E-commerce Sector Inquiry”) in order to identify possible competition concerns in European e-commerce markets. On September 15, 2016, the Commission published a preliminary report setting out its initial findings. The final report, published on May 10, 2017 (the “Final Report”), is divided into two separate sections: the first section covers e-commerce for consumer goods, while the second focuses on e-commerce for digital content.

The Final Report confirms that the growth of e-commerce over the last decade – and, in particular, increased online price transparency and price competition – has had a significant impact on companies’ distribution strategies and consumer behavior. However, there have been no significant developments from a legal perspective. In fact, as major competition concerns, the Final Report points to conducts that have always been identified as typical of distribution relationships and have usually been dealt with under the Vertical Block Exemption Regulation (the “VBER”). Apparently, the data gathered during the E-commerce Sector Inquiry will be used in discussions about the renewal of the VBER, which is due to expire in May 2022.

The Final Report highlighted the following major market trends in the context of consumer goods: (i) a large proportion of manufacturers deciding to sell their products directly to consumers through their own online retail shops, thereby increasingly competing with their distributors; (ii) the increased use of selective distribution systems, especially by requiring retailers to operate at least one brick and mortar shop, with the result of excluding purely online players from distribution networks; (iii) the increased use of contractual restrictions to better control product distribution, such as pricing restrictions (in terms of price recommendations and/or dual pricing); (iv) restrictions on selling through online


marketplaces (platforms); restrictions on the use of price comparison tools; and territorial restrictions, such as geo-blocking and geo-filtering. The Final Report observed that some of these practices may be justified, for example in order to improve the quality of product distribution. Others, instead, may unduly prevent consumers from benefiting from greater product choice and lower prices in e-commerce and, therefore, warrant Commission action to ensure compliance with EU competition rules.

With respect to digital content, the Final Report confirms that the availability of licenses from content copyright holders is essential for digital content providers. It acknowledges the dynamism of the sector, the development of new means to access content and the entry of new operators. However, in reaching its conclusion on competition law issues, the Final Report is merely descriptive. It points out that certain licensing practices may make it more difficult for new online business models and services to emerge. However, it only identifies an isolated concern in the “in bundling” licenses of online rights preventing licensees from using rights related to other transmission technologies (broadband and cable). As to geo-blocking in digital content, one of the key findings is that almost 60% of digital content providers who participated in the inquiry have contractually agreed with rights’ holders to “geo-block”.

Furthermore, little is said on some of the most debated topics of the last year: (i) the risk that increased transparency and ability to monitor prices, with the aid of logarithms and artificial intelligence systems, may lead to price coordination between competitors and, therefore, fall within the scope of Article 101 TFEU; (ii) the relevance of big data from a competition law standpoint, which was instead analyzed by the German Bundeskartellamt and the French Competition Authority in the context of a joint study published on May 10, 2016; and (iii) the interplay between e-commerce in digital content and copyright, which is a crucial issue in pending proceedings before the Commission.

(b) The Commission’s investigations in e-commerce and digital markets

(b.1) Google investigations

The Commission sent Google three statements of objections. In addition to the case concerning...
the Android smartphones operating system, the Commission focused on two other services: (i) the so-called shopping comparison service; and (ii) online search advertising. The Google Search (Shopping) and (AdSense) cases are intimately related to e-commerce as they concern practices likely to affect online users’ behavior, at least in view of the theory of harm of the Commission. This could perhaps explain the Commission’s choice to pursue a decision under Article 7 of Regulation No. 1/2003, with the value of precedent that would follow, rather than a commitment decision under Article 9 of Regulation No. 1/2003.

Although outside the temporal scope of this review, it is worth mentioning that on June 27, 2017 the Commission delivered its first decision in the above-mentioned investigations against Google. More specifically, the Commission fined Google for abusing its dominant position as a search engine by giving an unlawful advantage to its own comparison shopping service. According to the Commission, from 2008 Google began to implement a fundamental change in strategy to push its service. In its view, Google’s strategy was not just about attracting customers by making its product better than those of its rivals. On the contrary, Google denied other companies the chance to compete on the merits and to innovate, and most importantly, it denied European consumers as genuine and wide a choice of services as possible and the full benefits of innovation. More specifically, Google – by systematically giving prominent placement to its own comparison shopping service and demoting rival comparison shopping services in its search results – had given its own service a significant advantage over rivals.

As previously mentioned, the Commission has already come to the preliminary conclusion that Google has abused its dominant position in two other cases, which are still being investigated. First, in the AdSense case – which is closely related to e-commerce – the Commission’s preliminary view is that Google has hindered competition by limiting the ability of its competitors to place search advertisements on third party websites. A large proportion of Google’s revenue from search advertising intermediation stems from its agreements with a limited number of large third parties (so-called “Direct Partners”). The Commission has concerns that Google has protected its dominant position in online search advertising by imposing the following conditions in these agreements with Direct Partners: (i) exclusivity, by requiring third parties not to source search advertisements

59 See Commission Case 40099 - Android, cit.
60 See Commission Case 39740 - Google Search (Shopping), cit.
61 See Commission Case 40411 - Google Search (AdSense), cit.

from Google’s competitors; (ii) premium placement of a minimum number of Google search advertisements; (iii) competing search advertisements cannot be placed above or next to Google’s; and (iv) a right to pre-authorize any change to the display of competing search advertisements. According to the Commission, Google, by means of these restrictions, has prevented existing and potential competitors from entering and growing in online search advertising.

In the Android case the Commission is concerned that Google has stifled choice and innovation in a range of mobile apps and services by pursuing an overall strategy to protect and expand its dominant position in general internet search. More specifically, the Commission asserts that Google has infringed EU antitrust rules by: (i) requiring manufacturers to pre-install Google Search and Google’s Chrome browser and requiring them to set Google Search as the default search service on their devices, as a condition to license certain Google proprietary apps; (ii) preventing manufacturers from selling smartphones running on competing operating systems based on the Android open source code; and (iii) giving financial incentives to manufacturers and mobile network operators on the condition that they exclusively pre-install Google Search on their devices. The Commission asserts that these business practices may lead to a further consolidation of the dominant position of Google Search in general internet search services, and ultimately may harm consumers.

(b.2) Most Favored Nation clauses: the Amazon case

The Commission was concerned that the existence and Amazon’s enforcement of parity clauses requiring e-book publishers to give Amazon most favored nation (“MFN”) treatment constituted an abuse of dominance infringing Article 102 TFEU. On June 11, 2015 the Commission launched an investigation, in the context of which it identified seven categories of parity clauses in Amazon’s agreements with suppliers.

Two of these clauses were non-price related parity clauses, which required suppliers to offer Amazon the same or equivalent terms of distribution for e-books and the equivalent functionality for any e-books with new features offered to other retailers. According to the Commission, these clauses reduced distributors’ competitiveness by limiting their ability to differentiate on the basis of new business models regarding content, availability, format, and features, and reduced innovation, quality, and choice, weakening competition and new entry and, therefore, strengthening Amazon’s dominant position. The Commission also found that such clauses had a particularly detrimental impact on the development of e-books with innovative new features, as distributors would be unwilling to invest because Amazon could “free ride” on their efforts, and suppliers were unwilling to develop new features for a non-Amazon distributor as they would be obliged to help Amazon implement those features.

The remaining five price-related parity clauses granted Amazon the right to identical or equivalent prices, discounts and commissions, with some agreements using a “discount pool” that allowed Amazon to discount its prices to match lower priced competitor offerings. These clauses ensured retail price parity downstream, reducing competing distributors’ incentives to discount downstream or charge lower commission fees upstream. According to the Commission, absent the price-related parity clauses, competing e-book distributors selling under agency agreements would have had an incentive to compete on the commission charged to their e-book suppliers, which would have had an incentive to direct sales to those distributors by offering them better retail prices.

Amazon’s agreements also contained notification provisions, which required suppliers to inform Amazon of any distribution or pricing terms offered to other distributors.

The Commission found that each category of parity clauses individually represented an abuse of Amazon’s dominant position, and that the various clauses also had mutually reinforcing effects as they covered essentially all aspects of competition between e-book distributors. Therefore, taken together, the various clauses reduced the distributors’ and suppliers’ ability and incentive to experiment with alternative business models and pricing schemes, and prevented effective competition at the distribution level by discouraging or preventing competitors from undercutting Amazon’s prices.

On May 4, 2017 the Commission accepted commitments by Amazon, which consisted essentially of abandoning MFN clauses and not enforcing notification requirements. This is the second investigation that has led to commitments in the e-books sector, following the Commission’s Article 101 TFEU investigation into agreements between Apple Inc. and five publishers, which resulted in commitments decisions in 2012 and 2013.

(b.3) Cross-Border pay-TV Services case: Paramount’s commitments

The Commission investigation in the Cross-Border pay-TV Services case is the most interesting of the last years as it deals with the important issue of the interplay between e-commerce in digital content and copyright, although the case is not referred to in the Final Report of the E-commerce Sector Inquiry. More specifically, on July 23, 2015, the Commission sent a Statement of Objections to six major US film studios (Disney, NBCUniversal, Sony, Paramount, Twentieth Century Fox, and Warner Bros.), in which it took the preliminary view that each of them had entered into bilateral agreements with the broadcaster Sky UK (“Sky”) restricting trade between Member States through the grant of absolute territorial exclusivity.

In relation to Paramount, the Commission found that the licensing agreements between

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65 See Commission decision of May 4, 2017 in Case 40153, cit.


Paramount and Sky: (i) prohibited or limited Sky from making its retail pay-TV services available in response to unsolicited requests from consumers residing or located in the EEA but outside the UK and Ireland (the “Broadcaster Obligation”); and/or (ii) required Paramount to prohibit or limit broadcasters located within the EEA but outside the UK and Ireland from making their retail pay-TV services available in response to unsolicited requests from consumers residing or located in the UK and Ireland (the “Paramount Obligation”). The Commission asserted that these clauses had the object of restricting competition within the meaning of Article 101(1) TFEU, and that there were no circumstances to justify a finding that such clauses would not impair competition or would be exempt under Article 101(3) TFEU.

In order to address the Commission’s concerns, Paramount offered the following four commitments, applicable for a period of five years in the EEA: (i) when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re)introduce contractual obligations that would prevent or limit a broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the broadcaster’s licensed territory (i.e., no Broadcaster Obligation); (ii) when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re)introduce contractual obligations that would require it to prohibit or limit broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory (i.e., no Paramount Obligation); (iii) Paramount would not seek to bring an action before a court or tribunal for the infringement of a Broadcaster Obligation in an existing licensing agreement; and (iv) Paramount would not act upon or enforce a Paramount Obligation in an existing licensing agreement.

On July 26, 2016, the Commission accepted Paramount’s commitments.68 The case is still pending in relation to the five other studios involved and the broadcaster. The outcome of the investigation will certainly represent an important development in the relevant case law ranging from Coditel I69 to Premier League.70

More specifically, in Coditel I the ECJ held that the exhaustion doctrine may not be applied to copyright where there is no material medium (that is, cable diffusion of television). Further, in Usedsoft, the ECJ held that the exhaustion doctrine also applies to used licenses for computer programs download from the internet if the copyright holder has also conferred a right to use that copy for an unlimited period in return for a reasonable remuneration.71 Moreover, according to Article 1(2)(b) of the Satellite and

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Cable Directive,\textsuperscript{72} which sets out the principle of “country of uplink” or “country of origin” in relation to communication to the public via satellite, “the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the program-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth”. Therefore, the signal via satellite can reach the public in other Member States, without representing an act of communication to the public in such Member States and, so, without infringing copyright.

Relying on that, the ECJ in \textit{Premiere League} held that (i) the UK law prohibiting foreign decoding devices from being imported into, and sold and used in, national territory constituted a restriction on the freedom to provide services prohibited by Article 56 TFEU; and that (ii) the clauses obliging the broadcaster not to supply decoding devices outside the territory covered by the agreement infringed Article 101 TFEU.

Against this background, the \textit{Cross-Border pay-TV Services} case raises an extremely complex legal question, namely, whether or not the above-mentioned principles extend to online broadcasting. To date, however, the only useful case law is \textit{Paramount}, which, as just seen, has made binding the commitment “not to prohibit” access, via satellite or online, to cross-border pay-TV services. However, there is still uncertainty as to the effect of such commitments because broadcasters must currently abide by national copyright regimes, which may prevent them from allowing copyrighted content portability. In order to deal with this major issue – the resolution of which is proving difficult for the Commission to cope with on its own – a legislative intervention is probably needed.

\textit{C.4 The first follow-up to the Sector Inquiry}

Last, but not least, on February 2, 2017 the Commission launched three new investigations into the consumer electronics, video games and hotel accommodation sectors as a result of the preliminary findings of the E-commerce Sector Inquiry. These three investigations – two of which the Commission is carrying out on its own initiative – aim to tackle the specific issues of retail price restrictions, discrimination on the basis of location and geo-blocking, the use of which the Final Report confirms is widespread throughout the EU.\textsuperscript{73} According to the Commission, under certain circumstances, these practices may make cross-border shopping or online shopping in general more difficult and ultimately harm consumers by preventing greater choice and lower prices in e-commerce.

More specifically, the Commission is investigating whether four consumer electronics manufactures have breached EU competition rules by restricting the ability of online retailers to set their prices.


own prices for widely used products.\textsuperscript{74} The effect of these suspected price restrictions may be aggravated due to the use by many online retailers of pricing software that automatically adapts retail prices to those of leading competitors.

The Commission is also investigating bilateral agreements concluded between Valve Corporation, the owner of the Steam game distribution platform, and five PC video game publishers.\textsuperscript{75} After the purchase of certain PC video games, users need to confirm – with an “activation key” on Steam – that their copy of the game is not pirated to be able to play it. The investigation focuses on whether the agreements in question require or have required the use of such activation keys for the purpose of geo-blocking.

Following complaints from customers, the Commission opened another proceeding into hotel accommodation agreements concluded between, on the one hand, the largest European tour operators (Kuoni, REWE, Thomas Cook and TUI) and, on the other hand, Meliá Hotels.\textsuperscript{76} According to the Commission, such agreements may contain pricing clauses that discriminate against customers on the basis of their nationality or country of residence. The Commission is concerned that customers would not be able to see the full hotel availability or book hotel rooms at the best prices as a result of these restrictions.

Not much else is known about these three cases so far, but they definitely deserve attention as they will certainly contribute to shaping the Commission’s case law on the issue, along with further antitrust investigations that the Commission is clearly willing to open.\textsuperscript{77}

3. PROCEDURE AND POLICY

3.1 Judicial liability: the Gascogne case

The GC’s judgment in the Gascogne case\textsuperscript{78} is a very important precedent as it is the first time that EU judicial liability has been acknowledged and effectively quantified by the EU judiciary, even if the GC greatly limited the economic impact of its decision. More specifically, the GC partially upheld an action brought by Gascogne Sack Deutschland GmbH and Groupe Gascogne SA (together, “Gascogne”) for compensation for damages suffered due to the excessive length of the proceedings before the GC, breaching its

\textsuperscript{74} See Commission Cases 40465 - Asus; 40469 - Denon & Marantz; 40181 - Philips; and 40182 - Pioneer.

\textsuperscript{75} See Commission Cases 40413 - Focus Home; 40414 - Koch Media; 40420 - ZeniMax; 40422 - Bandai Namco; and 40424 - Capcom.

\textsuperscript{76} See Commission Case 40308 - Holiday Pricing.

\textsuperscript{77} See Commission Press Release IP/17/1261, “Antitrust: Commission publishes final report on e-commerce sector inquiry”, May 10, 2017: “The insight gained from the sector inquiry will enable the Commission to target EU antitrust enforcement in European e-commerce markets, which will include opening further antitrust investigations.”

fundamental right to a hearing within a reasonable time, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union (the “Charter”). Gascogne prevailed on the substance, but was largely unsuccessful in its claim for compensation.

Back in 2011, the GC dismissed Gascogne’s action against the 2005 Commission’s decision.\(^79\) Gascogne appealed to the ECJ, which dismissed the appeal and further held that any claim for compensation for delay by the GC should be brought before the GC itself, rather than on appeal to the ECJ.\(^80\) Gascogne then brought a separate action against the EU before the GC, alleging that the period of nearly four years (46 months) between the closing of the written proceedings and the opening of the oral proceedings before the GC constituted an unreasonable delay. The GC found that, given the general complexity of competition law cases, a period of 15 months between the written and oral proceedings is appropriate. In addition, given that multiple additional actions brought in connection with the same decision had to be considered in parallel, each action justified an additional month in the proceedings. Therefore, the total appropriate period would have been 26 months, meaning that the additional 20 months amounted to an excessive delay and infringed Gascogne’s right to be heard within a reasonable time.

Moreover, Gascogne had the burden of proving both the existence and extent of the alleged damages, as well as of establishing a causal link between the delay and such damages. The GC dismissed Gascogne’s claims of material damage for (i) losing the opportunity to find an investor sooner and (ii) the interest paid on the fine. Gascogne’s claim for losses sustained as a result of paying bank guarantee charges was instead partially upheld for the period sufficiently linked to the infringement of Article 47 of the Charter. Gascogne further claimed compensation for non-material damage suffered as a result of the breach, consisting of: (i) harm to its reputation; (ii) uncertainty in decision-making; (iii) difficulties in managing its business; and (iv) anxiety and inconvenience experienced by its executives and employees. The GC dismissed claim (iv) as inadmissible, and dismissed claim (i), holding that the finding of an infringement of Gascogne’s rights under Article 47 of the Charter would sufficiently remedy any reputational harm. The GC allowed Gascogne’s claim that the infringement of Gascogne’s rights under Article 47 of the Charter had caused difficulties in managing the business because, although court proceedings are inherently uncertain, Gascogne could not have anticipated the extent of the delay. The prolonged uncertainty affected Gascogne’s decision-making and constituted non-material damage that was not fully compensated by the finding of an infringement of the obligation to adjudicate within a reasonable time.


The GC did not award the full compensation Gascogne sought as reparation for the non-material damages suffered. First, according to the GC, Gascogne had not adduced any evidence to justify a claim in the amount requested. Secondly, the GC recalled the case law holding that an appellant cannot be allowed to reopen the question of the validity or amount of a fine imposed by a Commission decision, on the sole ground that there was a failure to adjudicate within a reasonable time, where the findings concerning the amount of that fine and the conduct that it penalizes have been upheld. The failure to adjudicate within a reasonable time cannot lead to the annulment, in whole or in part, of the fine imposed. According to the GC, awarding Gascogne the compensation claimed would have had the effect – given its extent – of reopening the question of the amount of the fine imposed on Gascogne by the Commission, even though it was not established that the failure to adjudicate within a reasonable time had any bearing on such amount.

3.2 Legislative initiatives

There have been further interesting legislative and policy developments at the EU level.

(a) Implementation of Directive 2014/104/EU on antitrust damages actions

On 26 December 2014, Directive 2014/104/EU on antitrust damages actions (the “Damages Directive”) entered into force. The deadline for Member States to implement the Damages Directive in their legal systems expired on December 27, 2016. So far, not all Member States have transposed the Damages Directive. Still, there is of course great expectation, especially with regard to the Trucks case, where the Commission imposed a record fine of almost EUR 3 billion on five truck producers (four, actually, as one of them was granted immunity as it revealed the existence of the cartel to the Commission) for participating in a cartel for 14 years. The Commission decision will be the basis for the first pan-European action for antitrust damages and, therefore, the first real test of the Damages Directive.

(b) The anonymous whistleblower tool

On another front, the Commission introduced a new tool on March 16, 2017 to make it easier for individuals to alert the Commission about


82 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU, OJ L 349, December 5, 2014, p. 1-19. The major changes brought by the Damages Directive are: (i) easier access to evidence; (ii) the binding effect of NCAs’ final decisions before civil courts in the same Member State where the infringement occurred. Before courts of other Member States, they will constitute at least prima facie evidence of the infringement; (iii) clear limitation period rules; (iv) clarified legal consequences of “passing on”; (v) the right to full compensation; (vi) a rebuttable presumption that cartels cause harm; and (vii) joint and several liability.

83 See Commission decision in Case 39824 - Trucks, cit.
cartels and other antitrust infringements, while maintaining their anonymity (the “Anonymous Whistleblower Tool”). In the words of the Commission, the new system – to the extent that it increases the likelihood of detection of anticompetitive behavior, and so stands as a further deterrent for companies – “complements and reinforces” the effectiveness of the Commission’s leniency program.\(^\text{84}\) This is certainly true. However, it cannot be concealed that the new tool will perhaps more likely serve to counterbalance the dampening effect on leniency applications that might result from the full implementation of the Damages Directive by Member States.

(c) Proposal to make NCAs more effective enforcers

Further, on March 22, 2017 the Commission published a proposal for a directive intended to empower NCAs to be more effective enforcers of EU antitrust rules (the “Proposal”).\(^\text{85}\) The Proposal follows the Commission’s Communication on Ten Years of Council Regulation 1/2003,\(^\text{86}\) which identified a number of potential areas of action to make NCAs more effective enforcers. In particular, it was noted that some NCAs still lack independence, financial and human resources, if not even fundamental powers – such as to investigate and to impose deterrent fines on undertakings – to play the key role in the application of EU competition rules, the coherent enforcement of which Regulation No. 1/2003 empowered them to ensure throughout Europe.

Although it is likely that it will take years for the Proposal to be adopted and implemented by Member States in their national legal systems, this initiative represents a further important development aimed at the completion of the EU antitrust regime, both at the EU and national level. The Proposal, once adopted, will indeed

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\(^{84}\) See Commission Press Release IP/17/591, “Antitrust: Commission introduces new anonymous whistleblower tool”, March 16, 2017: “Until now, most cartels have been detected through the Commission’s leniency programme, which allows businesses to report their own involvement in a cartel in exchange for a reduction of the fine imposed on them. The Commission’s new tool gives an opportunity also to individuals who have knowledge of the existence or functioning of a cartel or other types of antitrust violations to help end such practices. The new system increases the likelihood of detection and prosecution and so stands to further deter businesses from entering or remaining in cartels or carrying out other types of illegal anti-competitive behaviour. It therefore complements and reinforces the effectiveness of the Commission’s leniency programme.”

\(^{85}\) See Commission Press Release IP/17/685, “Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth”, March 22, 2017: “Today’s proposal by the Commission is intended to further empower the Member States’ competition authorities. It aims to ensure that when applying the same legal basis [NCAs] have the appropriate enforcement tools, in order to bring about a genuine common competition enforcement area. It should not matter where a company is based within the Single Market when it comes to competition enforcement. By ensuring that [NCAs] can act effectively, the Commission’s proposal aims to contribute to the objective of a genuine Single Market, promoting the overall goal of competitive markets, jobs and growth.” See also Marco Botta, “The draft Directive on the powers of national competition authorities: the glass half empty and half full”, in \textit{European Competition Law Review}, 10, 2017.

provide NCAs with a minimum common toolkit and the appropriate mechanisms they need to set their priorities. Among the most relevant innovations included in the Proposal, the following are noteworthy: (i) the power of NCAs to conduct unannounced inspections in any premises, including the homes of directors, managers and other members of staff of undertakings and associations of undertakings, subject to the prior authorization of a national judicial authority; (ii) important details on the calculation and level of the fine that NCAs may impose on associations of undertakings; and (iii) a harmonized system of leniency, better coordinated at the EU and national level.

(d) Public consultation on evaluation of procedural and jurisdictional aspects of EU merger control

Finally, although mergers fall outside the scope of this review, the public consultation launched by the Commission on October 7, 2016 on the evaluation of procedural and jurisdictional aspects of EU merger control deserves to be mentioned.87 The Commission sought views on whether there is a possible “enforcement gap”, in that EU merger control may not capture certain types of cross-border transactions that can potentially have an impact on the internal market or on a substantial part of it. Recently, questions have in fact been raised regarding the effectiveness of the purely turnover-based notification thresholds of the EU Merger Regulation, and there have been suggestions to complement them by introducing alternative criteria based on the value of the transaction. This may be particularly significant in certain sectors, such as digital services and pharmaceuticals, where the transactions may involve the acquisition of considerable market potential or highly-valued assets that, however, do not yet generate significant turnover and do not have, therefore, to be notified to the Commission.

The hope is that the Commission will think carefully before adopting a value-based threshold, as it would be a difficult test to apply. It would, in fact, raise a number of practical issues as both the assessment and the geographic allocation of transaction values are frequently difficult to evaluate. It seems indeed extremely difficult to address questions like “how to measure the transaction value”, “how to assess the variation of the value over time”, or “in which jurisdiction does the transaction value have to be allocated in order to consider the transaction as having an EU dimension.”

4. Final Remarks

The analysis of decision-making practice and case law in the period covered by this paper highlights some major issues in recent antitrust enforcement, namely: (i) the boundaries of the notion of restriction “by object”; (ii) the enhanced role of economic analysis in the assessment of unilateral exclusionary conduct, in line with the Commission’s Guidance Paper on Article 102 TFEU; (iii) the notion of potential competition and market definition, as well as the interplay between the regulatory framework and EU competition law; and (iv) the growing

importance of e-commerce, which has led the Commission to step up its scrutiny of vertical restraints in online distribution, and the interplay between e-commerce and copyright. Further interesting developments at the EU level concerned antitrust procedure, legislation and policy.

As to the effectiveness of antitrust enforcers, both the European Commission and the NCAs have played a crucial role in the enforcement of Articles 101 and 102 TFEU over the years. In the last year, the network of competition authorities has become a multi-center, united network supporting innovative ideas and legal principles. The role of the Commission is still crucial, at least with respect to horizontal principles covering the enforcement of EU antitrust rules. In contrast, European Courts, at least during the last year, appear to have been over formalistic in their approach, all too often in line with the Commission, paying more attention to procedural rather than substantive issues. Obviously, judicial activities must always be encouraged and improved because an effective antitrust enforcement system requires full judicial review.
5. REFERENCES
