

Nullity/Voidness : An overview of EU and national case law

Anticompetitive practices, Agreement, Nullity/Voidness

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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When we were first offered the opportunity to write the foreword to this special issue we were thankful to Nicolas Charbit and to his colleagues at Concurrences for what we regarded as an opportunity to shed light on an obscure issue. At first sight, “nullity/voidness” is certainly not something that seems particularly attractive to deal with, but we accepted the task confident that, given the scarce attention that has been paid to such a relevant topic, it would not be difficult to write a foreword outlining the legal issues that arise in connection thereto. We confess to have naively failed to appraise the difficulty of the task to which we were confronted.

When we really undertook to work on this foreword after the customary delays, we realized the reason why the theme of nullity does not rank high in the list of preferred topics of EU competition law commentators. Reflecting upon it requires an excursion into “*terra incognita*”. Making sense out of the various intellectual riddles that arise with regard to nullity/voidness requires not only a knowledge of competition law principles, but also a mastering of general principles of contract law, as well as of comparative law, that are all too rare in our narrow discipline. In other words, this is a topic that demands not a foreword but a doctoral dissertation.

Aside from the strictly legal complexity inherent to the treatment of nullity, a great part of the difficulty of dealing with this matter stems from (i) the “hands-off approach” of EU law with regard to procedural matters, that consists in leaving it up to national law and national courts to extract the consequences of the nullity mandated by EU law as they see fit in light of the principles of equivalence and effectiveness [1], and that implies that different national laws may provide for different solutions; as well as from (ii) the highly casuistic nature of the problems that may arise, which in turn requires highly factual case-by-case analysis.

It is precisely for these reasons that the formulation of any recommendation on possible unifying criteria would be impractical. We will therefore limit our contribution to pointing out some selected specific issues that we have picked up from case comments, as well as to commenting on the

particular problem associated to the nullity of the so called “fruit-agreements”.

The various case summaries included in this special edition will prove most useful to anyone interested in further researching about a topic that is complex, but at the same time challenging and of the maximum practical relevance. Indeed, these summaries provide a valuable overview of the manner in which the national courts from many different Member States have chosen to interpret and apply the sanction of nullity in a wide array of factual settings.

1. General principles on nullity/voidness

Article 101(2) TFEU provides that “*any agreements or decisions prohibited pursuant to [Article 101(1)] shall be automatically void*”.

In spite of its crucial importance – a declaration of nullity (or merely the threat thereof) can be in many cases the most important remedy imposed for a breach of the competition rules - this provision has not spurred much doctrinal interest to say the least. You can check most competition law textbooks and you will be surprised at how most of them jump from Article 101(1) to 101(3) without dedicating more than a few lines to nullity/voidness.

The European Court of Justice (“ECJ”) has essentially limited itself to establishing a set of basic general principles concerning the characteristics of the nullity envisaged in Article 101(2), but has entrusted the practical application of these principles to national courts. We will briefly touch upon such principles, for it is only against their backdrop that the national judgments commented in these special issue have to be interpreted.

In *Béguelin* the ECJ clarified the *erga omnes* nature of the nullity envisaged by Article 101(2). According to the Court, “since the nullity referred to in Article [101(2)] is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties” [2].

In *Courage v Crehan*, it went further and clarified that the remedy of nullity has an *ex tunc* effect, that is, that any given agreement would be declared void since the very moment of its inception. In the Court’s words, “this principle of nullity (...) is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned” [3] (Italics added).

In *Kerpen & Kerpen* (Cement), the Court went on to establish the principle of severability both regarding (i) the severability of a given anticompetitive clause from the wider agreement in which it may be contained; and (ii) the severability of a given anticompetitive clause or wider agreement from other related agreements or transactions [4]. As the Court put it, “[t]he automatic nullity decreed by Article [101](2) applies only to those contractual provisions which are incompatible with Article [101](1). The consequences of such nullity for other parts of the agreement are not a matter for Community law. The same applies to any orders and deliveries made on the basis of such an agreement and to the resulting financial obligations”.

In what follows, we will briefly present the solutions that the judgments commented in this special issue have given to the main questions that have arisen in relation to the interpretation of the scarce wording of the Treaty and of the above cited case law. To conclude, we will provide a cursory

overview of some of the most complex questions that remain open, regarding, in particular, “fruit agreements”; we will also sketch a possible nuance to the ECJ’s case law in this domain.

2. The extension of nullity/voidness beyond the wording of Art. 101(2): the application of nullity to concerted practices and abuses of dominance

Even though the sanction of nullity/voidness is only provided for by the Treaty with respect to agreements contravening Article 101 TFEU, the Courts have also established that nullity applies equally to breaches of Article 102. Two of the summaries included in this special issue deal precisely with this issue [*English Welsh & Scottish Railways/E.ON* [5](United Kingdom) and *CargoNet, CargoLink* case [6] (Norway)].

The extent to which concerted practices are subject to the sanction of nullity has also been debated. The letter of Article 101(2) merely refers to agreements and decisions to the exclusion of concerted practices. This is due to the idea that concerted practices constitute a sort of informal coordination that does not have any binding effect and that therefore cannot be annulled. In *Boliden Mineral* (Sweden) [7] the national court at issue concluded that concerted practices are rarely subject to nullity, which is rather reserved for agreements and decisions of undertakings. On the contrary, the concerted price fixing practices at issue in the *Nova Ljubljanska banka, Banka Celje, Nova KBM, Abaka Vipava* case [8] were declared void pursuant to Article 101(2).

3. Severability of anticompetitive clauses included in an agreement vis-à-vis the remainder of the agreement

In *Kerpen and Kerpen*, the ECJ not only established the principle of severability, but also ruled that the application of such principle fell upon national courts [9]. Many (most) of the case summaries included in this special issue are devoted to explaining how the notion of severability was interpreted by Courts of different Member States in a wide array of settings.

Since the answer to the question of whether a given clause can be removed from an agreement without distorting its essence depends on both the jurisdiction and the specificities concurring *in casu*, it can hardly be surprising to observe that national courts have arrived at divergent interpretations on severability.

In some cases, courts were of the opinion that the anticompetitive clauses at issue were core to the overall agreement, capable of distorting its very nature, and therefore not severable. That was the approach followed in a number of cases commented in the present special issue, such as *Marketing Displays International/VR* [10] and *Polar/Walstock* [11] (The Netherlands); *Prim’Co* [12] (France); or *Rafael/DISA and Prodalca España* [13] (Spain).

The debate as to the severability of anticompetitive clauses has recurrently arisen in a number of cases involving agency contracts in the petrol station market. In these cases, most courts have also ruled that the anticompetitive nature of single-branding clauses determines the nullification of the entire agency agreement (see, e.g. *Aloyas/Repsol* [14] (Spain), *El Mareny/Repsol* [15] (Spain), *La*

Safor/Campsa [16] (Spain) or *Aral/Koepfler* [17] (Luxembourg).

In other cases, national courts have ruled in favour of limiting nullity to specific clauses within a main agreement. For instance, in *The Body Shop* [18] case, the Higher Regional Court of Düsseldorf decided to annul an exclusive purchase obligation and to confirm the validity of the rest of the main franchise agreement pursuant to an extensive examination of both EU and national law. The Court of Appeal of Leeuwarden and the Danish Maritime and Commercial Court did the same, respectively, in the *Prisma* [19] and the *Pandora Production/Lise Aagaard Copenhagen* [20] cases, declaring null the obligation to offer for sale a supermarket in case of termination of a franchise agreement while at the same time allowing for the survival of the main underlying contract.

Some of the cases included in this special issue also illustrate the point made earlier about the possible adoption of contradictory solutions in different jurisdictions. That has been the case, for instance, regarding the severability of price-fixing clauses included in franchise agreements. In *Make it Easy* [21], the *Rechtbank's Gravenhage* (Dutch Court of First Instance) declared an entire franchise agreement void after finding an anticompetitive price fixing clause. By contrast, in a similar setting, also involving a price-fixing clause within a franchise agreement, the Commercial Court of Luxembourg refused to annul the entire agreement on the basis of Luxembourgish law (*Univers de Cuir Belgique/Cuir Center Luxembourg* [22]).

4. The application of nullity/voidness to related agreements

In our view, the most interesting and difficult questions regarding nullity arise with respect to “fruit” agreements, that is, agreements distinct from the one found in breach of the competition rules but that are instrumental to realise the profits sought therewith (e.g. the agreements between a company participating in a cartel and its customers).

As explained above, it is clear that a given anticompetitive clause within an agreement shall be deemed void. It is also well-established that the nullity of such given clause can possibly extend the nullity to the rest of the agreement of which it is part provided that the two are not severable, and that whether a given clause is severable from an agreement is to be decided by national courts in the light of the applicable legislation in each Member State and of the specific features of each agreement. And whereas the practical application of these principles may give rise to divergent results, the situation –at the level of EU law principles– is fairly satisfactory.

What is less satisfactory is the uncertainty surrounding the validity of agreements which do not directly breach the competition rules but which stem –and actually put into practice– another agreement that does.

As we have seen, the case law of the European Courts states, on the one hand, that the “*the nullity referred to in Article [101](2) (...) is capable of having a bearing on all the effects, either past or future, of the agreement*” [23], and, on the other hand, that “[t]he consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for community law. Those consequences are to be determined by the national court according to its own law” [24]. In other words, EU law purports to deal with the nullity of the effects of the anticompetitive agreement, but not with the vehicles (ensuing contracts) that carry out such effects. Does this make sense?

What should we imply from these apparently contradictory statements? Are effects effectively reached by nullity? Would an agreement between a cartel and its customer be void or voidable following a declaration of nullity of the primary cartel agreement? Should it be declared void as a matter of policy? And on what grounds: EU competition law, national competition law, general principles of contract law or specific rules of contract law? Does the answer change depending on whether the agreement at stake is a long-term contract, a spot contract or a contract subscribed pursuant to a rigged bid? Would the same solution apply to “related” contracts not involving a third party (e.g. side agreements entered into by some of the cartelist)?

Neither national courts nor commentators have unanimously coincided on a rule or set of rules capable of dissipating the prevailing uncertainty over these questions [25].

One of the case summaries included in this special issue deals precisely with a most interesting precedent on this particular point [26], in which the Hungarian Court of Appeal quashing a previous Judgment from the Metropolitan Court of Budapest, ruled that fruit contracts are in principle valid contracts not covered by Article 101(2), that they carry the effects of a cartel but are not a cartel in themselves, and that therefore they could only be declared void in the presence of other grounds of nullity (e.g. fraud, mistake or usura) that had not been alleged by the plaintiff. This Judgment reflects what is probably the prevalent stance; most courts seem to have sided with the idea that legal certainty requires that fruit agreements entered into with third parties not be deemed automatically void in the absence of other grounds of nullity.

We dare not delve into questions of either general or comparative contract law in order to discuss whether fruit agreements can or cannot be voidable pursuant to grounds of nullity others than those stemming directly from EU competition law. Nonetheless, we do believe that EU law has a larger role to play in this sphere.

In our view, the right interpretation of Article 101(2) is much closer to *Courage v Crehan* (the nullity referred to in that provision “is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned”) than to the strict “hands off” rule embodied in the *Kerpen & Kerpen* (Cement) judgment (“[t]he consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for community law.”) which the ECJ would perhaps do well in reconsidering.

Along the lines of some scholars [27], the nuanced interpretation we favour is one that implies holding that the automatic nullity referred to in Article 101(2) is such as to reach any direct –or even indirect but sufficiently important- effects of the infringement that the fruit agreement might carry with itself. The question of whether an effect embodied in a given clause or in the whole of the fruit agreement, as the case may be, stems from the infringement is one that should be assessed by national courts in application of their respective national laws in accordance with the principles of equivalence and effectiveness.

Once such party has been able to prove that one of the elements of the fruit contract, or the fruit contract in its entirety, constitutes a direct or indirect but sufficiently important effect of the infringement, such element shall be automatically deemed void. However, natural justice and legal certainty would require that the parties not responsible for the infringement enjoy the right to

request or not its partial or total nullity *ad libitum* – voidability as opposed to automatic nullity.

In our view, such an interpretation would foster the effectiveness of EU competition rules, it would approach the treatment of nullity to that of damage claims, and it would at the same time be compatible with national procedural autonomy.

[1] As explained in recital 5 of [Regulation 1/2003](#), the procedural rules governing EU competition law do not intend to harmonize procedural matters at the Member State level. Crucial aspects of practical enforcement (e.g. rules on standard of proof, or the application of nullity) are therefore delegated to national legislations. The latter are constrained by the principles that they must not be less favorable than those governing similar domestic actions (equivalence) and that they must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (effectiveness).

[2] CJ, 22/71 *Béguelin Import Co v SAGL Import Export* [1971] ECR 949, at 29.

[3] CJ, C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd et al*, 20 September 2001 [2001] ECR I-6297 at 22.

[4] Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG*, [1983] ECR 4173.

[5] High Court of Justice (Queen's Bench Division), 23 March 2007, *English Welsh & Scottish Railway Limited v. E. ON UK plc* ; [2007] EWHC 599 (Comm). See [Alison Jones, The UK High Court of Justice rules that, although Art. 82 EC does not contain a declaration of nullity equivalent to Art. 81 EC, the effect is the same \(English Welsh & Scottish Railway/E.ON\), 23 March 2007, e-Competitions, n°13379](#).

[6] Drammen District Court (*Drammen tingrett*), 24 June 2011, *CargoNet AS v. CargoLink AS* (See [Henrik Nordling, A Norwegian District Court dismisses a counter-claim against a subsidiary of the incumbent railway operator for abusing its dominant position \(CargoNet, CargoLink\), 24 June 2011, e-Competitions, n° 38518](#)).

[7] Swedish Supreme Court (*Högsta Domstolen*), 23 December 2004, Case n° T 2280-02, *Boliden Mineral Aktiebolag and AB Fortum Värme samägt med Stockholms stad* (See [Carl Wetter, Carl Johan Sundqvist, The Swedish Supreme Court declares that a concerted practice cannot be subject to nullity under section 7 of the former Swedish Competition Act \(Boliden Mineral Aktiebolag/AB Fortum Värme samägt med Stockholms stad\), 23 December 2004, e-Competitions, n° 21213](#)).

[8] Slovenian Competition Protection Office (*Urad Republike Slovenije za varstvo konkurence*), 26 February 2007, Decision n° 306-14/2006-100 (See [Andrej Fatur, The Slovenian Competition Authority declares null and void decisions of four major banks introducing a new ATM fee \(Nova Ljubljanska banka, Banka Celje, Nova KBM, Abaka Vipava\), 26 February 2007, e-Competitions n° 14069](#)).

[9] Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG*, [1983] ECR 4173, para. 12 (“the consequences of the nullity of anticompetitive clauses for the remainder of the agreement are governed by national law”).

[10] Gerechtshof of s-Gravenhage, 24 March 2005, Marketing Displays International v. VR, KG/RK 2002-979 and 2003-1617 (See [Tristan Baume, A Dutch Court refuses to order the execution of an award adopted by an American arbitration panel for breach of a licensing agreement, on the grounds that it violates Art. 81.1 EC and is contrary to public policy \(Marketing Displays International v. VR\), 24 March 2005, e-Competitions, n° 35](#)).

[11] See *Rechtbank Zwolle-Lelystad*, 4 April 2005, Case 106354 / KG ZA 05-92 (See [Tristan Baumé, Katelijne Lafleur, A Dutch Court hearing an application for interim relief declares a selective distribution agreement contrary to Art. 81.1 EC and void \(Polar/Walstock\), 4 April 2005, e-Competitions, n° 20](#)).

[12] Court of appeal of Pau (*Cour d'appel de Pau*), 28 August 2007, SAS Prim'Co, Case n° 06/00309. See [Juliette Goyer, Lauriane Lépine-Sarandi, A French Court of Appeal declares void a commissioning agreement containing a mutual exclusivity obligation on the basis of Art. 81 EC \(Prim'Co\), 28 August 2007, e-Competitions, n°14973](#).

[13] Spanish Civil Supreme Court (Tribunal Supremo, Sala de lo Civil), 2 June 2000, Decision n° 540/2000, D. Rafael v. DISA and Prodalca España, S.A., Case 2355/1995. See [Pablo Ibáñez Colomo, The Spanish Supreme Court holds that a single-branding agreement is null and void pursuant to Art. 81.2 EC, thus applying EC competition law for the first time \(Rafael/DISA and Prodalca España\), 2 June 2000, e-Competitions, n°1241](#).

[14] Juzgado de lo Mercantil n° 5 de Madrid, 15 April 2005, Estación de Servicio Aloyas, S.L. v. Repsol Comercial de Productos Petrolíferos, S.A., Case 1/04 (See [Pablo Ibáñez Colomo, A Spanish Court finds a distribution agreement to be null and void pursuant to Art. 81.2 EC and decides that the claimant is not entitled to recover the sums paid by virtue of the contract \(Aloyas/Repsol\), 15 April 2005, e-Competitions, n° 320](#)).

[15] Madrid Commercial Court (Juzgado de lo Mercantil n° 1 de Madrid), 7 March 2006, Estaser El Mareny, S.L. v. Repsol Comercial de Productos Petrolíferos, S.A., Case 39/04 (See [Pablo Ibáñez Colomo, A Spanish Commercial Court declares null and void an exclusive purchasing agreement on the basis of Art. 81.1 EC \(El Mareny/Repsol\), 7 March 2006, e-Competitions, n° 12440](#)).

[16] Juzgado de Primera Instancia n° 44 of Madrid, 10 June 2004, Automoción y Servicio La Safor, S.L. v. Compañía Logística de Hidrocarburos, S.A. and Repsol Comercial de Productos Petrolíferos, S.A., Case 965/2002 (See [Pablo Ibáñez Colomo, A Spanish jurisdiction holds that the application of EC law would only be pertinent in case the agreements are deemed "non-genuine" agency ones \(La Safor/Compañía Logística de Hidrocarburos\), 10 June 2004, e-Competitions, n° 317](#)).

[17] Luxembourg District Court (*Tribunal d'arrondissement de et à Luxembourg*), 24 March 2000, Commercial Case II n° 203/00, Aral Luxembourg/ Koepfler (See [Philippe-Emmanuel Partsch, Vincent Wellens, The Luxembourg District Court holds that an agreement between a petrol company and a petrol station is as an agency agreement outside the scope of the prohibition of cartels \(Aral/Koepfler\), 24 March 2000, e-Competitions, n° 20309](#)).

[18] Higher Regional Court of Düsseldorf (*Oberlandesgericht Düsseldorf*), 14 April 2007, The Body Shop, Case VI-U (Kart) 13/06 (See [Max Klasse, A German Court finds an exclusive purchase obligation in breach of Art. 81 EC and replaces a void non-compete obligation in a franchise](#)

[agreement \(The Body Shop\), 14 April 2007, e-Competitions, n°13965\).](#)

[19] Court of Appeal of Leeuwarden (*Gerechtshof Leeuwarden*), 7 November 2007, *V.O.F. and partners v. Prisma Vastgoed B.V. / Prisma Food Retail B.V.*, Case 0600049 (LJN: BB8288). See [Tristan Baumé, Sally Janssen, A Dutch Court rules on the anticompetitive effects of an obligation to offer for sale a supermarket in case of termination of a franchise agreement in the large retail distribution sector \(Prisma\), 7 November 2007, e-Competitions, n° 15166.](#)

[20] Danish Maritime and Commercial Court (*Dom afsagt af Sø- og Handelsretten*), 29 April 2010, Case n° U-3-08, *Pandora Production Co Ltd. v Lise Aagaard Copenhagen A/S* (See [Jacob Borum, A Danish Court finds royalty provision contrary to Section 6 of the Danish Competition Act and Article 101 TFEU \(Pandora Production / Lise Aagaard Copenhagen\), 29 April 2010, e-Competitions, n° 31474.](#))

[21] Court of First Instance of the Hague (*Rechtbank s-Gravenhage*), 19 February 2007, *Make It Easy Gelderland V.O.F. e.a. v. Make It Easy B.V. and Make It Easy Reality B.V.*, Case KG 06/1549 (LJN: BA0407). See [Tristan Baumé, Sally Janssen, A Dutch Court decides, in an interlocutory proceeding, that the nullity of a price-fixing clause brings along the nullity of the franchise agreement as a whole, including its non-compete clause \(Make It Easy\), 19 February 2007, e-Competitions, n°13332.](#)

[22] Commercial Court of Luxembourg (*Tribunal d'arrondissement de Luxembourg, Section commerciale, Chambre des urgences*), 26 April 1991, Commercial Judgment n° 152/91, Case n° 40112, *Univers du Cuir Belgique et Belgian Comfort Company vs Cuir Center Luxembourg and Jean-Marie Talmas*. See [Philippe-Emmanuel Partsch, Vincent Wellens, A Luxembourg Commercial Court finds several clauses in a franchising agreement to be anticompetitive and null, but upholds the rest of the agreement \(Univers du Cuir Belgique / Cuir Center Luxembourg\), 26 April 1991, e-Competitions, n°17300.](#)

[23] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd et al*, [2001] ECR I-6297 at 22.

[24] Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co. KG*, [1983] ECR 4173, para 12.

[25] For a good overview of the different theories developed by case law and by legal scholarship in countries representative of the Western European system (France, UK, Germany, Netherlands), see **C, Cauffman**, "The impact of voidness for infringements of Article 101 TFEU on related contracts", *European Competition Journal*, April 2012, pp. 95-121.

[26] Court of Appeal of Budapest (*Fővárosi Ítéltábla*), December 2010, Case n° 14.Gf.40.137/2010/5, *Fruit contracts* (See [Gabor Fejes, Zoltan Marosi, The Hungarian Metropolitan Court of Appeal rules on the validity of the agreements concluded by members of a horizontal cartel with their customers \(Fruit contracts\), December 2010, e-Competitions, n° 34056.](#))

[27] See **C, Cauffman**, "The impact of voidness for infringements of Article 101 TFEU on related contracts", *European Competition Journal*, April 2012, p. 121.

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