EU Competition Cases before the European Courts

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Selected cases

- MEO – Art. 102(c) TFEU – discrimination – competitive disadvantage
- Hoffmann-La Roche – Restriction by object - Misleading information
- Coty Germany – Online marketplace ban in selective distribution
- ICAP – Hybrid settlements – Presumption of innocence – Para. 37 Fining Guidelines
- CHEZ Elektro Bulgaria – National legislation on minimum fees and *Wouters*
- Gasorba/Repsol – Effects of a commitment decision on national proceedings
- Goldman Sachs – Power Cables – Investor liability
- Stürhk Delikatessen Import – North Sea Shrimps – Para. 37 Fining Guidelines
- Ernst & Young – Gun jumping in merger control
- Czech Railways inspections – Reasonable grounds – Scope

Main abbreviations

Art. = Article

EC = European Commission

ECJ = European Court of Justice

GC = General Court

NCA = National Competition Authority

Reg. = Regulation

SO = Statement of Objections

TFEU = Treaty on the Functioning of the European Union

VBER = EC Vertical Restraints Block Exemption

(**) = paragraph in judgment or opinion

MEO
Case C-525/16, April 2018

Issue: ***Is an abuse under Art. 102(c) TFEU shown if there is a competitive disadvantage 'in and of itself' to a dominant company's customer or must more be shown, a 'distortion' of competition between competitors?***

Answer: A distortion must be shown

- Not an actual quantifiable deterioration, but something significant amounting to an effect on the position of a competitor (27)
- Mere charging of a higher price giving an immediate disadvantage is not enough (26)
- No minimum appreciable effect threshold (29)
- Effect to be determined taking into account all the circumstances (27, 31)

Context:

- 'GDA' the Portuguese collecting society applied different prices to the two largest TV service providers in Portugal, MEO and NOS
- MEO's price was higher, having been set after failed negotiations, then arbitration, as provided for in national law (9, 33)

MEO
Case C-525/16, April 2018 (2)

Context (cont'd):

- MEO complained to the Portuguese Competition Authority ('PCA') that this was unlawful discrimination
- The PCA rejected the complaint, on the basis that the disadvantage was not significant: MEO's costs had been increased, but not by much compared to average cost and not clear that had affected its competitive position (MEO could absorb the difference) (16, 34)
- MEO's market share had increased at the expense of NOS (AG Wahl Opinion (39))
- On reference from the Portuguese courts, the ECJ supported the PCA's approach (whilst noting that it was for the referring court to verify the facts)
- Elaboration of Case C-95/04P, *British Airways* statement that for an Art. 102(c) TFEU infringement there must be (i) a 'disadvantage', (ii) 'tending to distort' competition between business partners of the dominant undertaking (25)
- Also references to Case C-23/14, *Post Danmark* and Case C-413/14P, *Intel*

Hoffmann-La Roche
Case C-179/16, January 2018

Issue: ***Can concerted practices between a licensor and licensee, allegedly involving the dissemination of misleading information to influence third parties not to buy a pharma product used off-label and to reduce the competitive pressure of that product on another product licensed by the same licensor to another licensee amount to a restriction by object?***

Answer: Yes

Context:

- Genentech licensed its parent Roche (together 'HLR') to manufacture and sell Avastin (used for cancer treatments) in Europe
- Doctors found that it was also effective against degenerative eye disease and prescribed and administered it, even though that was an off-label usage
- Genentech subsequently developed a different product, Lucentis, for use in eye treatment and licensed its manufacture and sale in Europe to Novartis
- In the period before Lucentis was launched and reimbursable, Avastin had established itself

Hoffmann-La Roche
Case C-179/16, January 2018 (2)

Context (cont'd):

- When reimbursable, Lucentis cost some 10x more than Avastin, so doctors continued to prescribe it
- The Italian Competition Authority ('AGCM') found that HLR and Novartis entered into a commercial strategy to persuade pharma regulators and the general public that Avastin's off-label usage for eye treatment was a risk; and to send the same message to doctors (through special warnings and statements re. precautions on Avastin usage)
- This was allegedly by selectively highlighting the risks of Avastin, downplaying the value of scientific evidence to the contrary and spreading allegations of the lesser safety of Avastin in comparison to Lucentis (32, 89-90)
- The AGCM considered this to be a restriction by object and fined HLR €90 million and Novartis €92 million (22)

Hoffmann-La Roche
Case C-179/16, January 2018 (3)

Context (cont'd):

- On appeal the Italian State Council referred several questions to the ECJ:
  - Was this conduct a restriction by object?
  - Could such a concerted practice between non-competitors be outside Art. 101(1) TFEU as ancillary to HLR's exclusive grant to Novartis?
  - Could Avastin and Lucentis be treated as not competing products because Avastin was not authorised for eye treatment?
- ECJ found that the conduct could amount to a restriction by object, emphasising the duty of the holder of the marketing authorisation of a product alone to provide objective and non-misleading information to the authorities
- The Court emphasised therefore that the alleged collusion between two undertakings marketing competing products might itself be evidence that the dissemination of the information pursued objectives unrelated to pharmacovigilance (91)
- Otherwise the ECJ agreed with the AGCM's approach on misleading information as a restriction by object (91-95)

Hoffmann-La Roche
Case C-179/16, January 2018 (4)

Context (cont'd):

- ECJ rejected the ancillary restriction claim
  - This situation was not analogous to a licensor undertaking not to compete with its licensee
  - The Court noted that to be ancillary, the restriction had to be objectively necessary for the implementation of the licence between Genentech and Novartis and proportionate thereto
  - This was not the case where the concerted practice involved third parties and occurred several years after the licence was entered into (72-73)
- ECJ also noted that Avastin and Lucentis were substitutable in fact; and that the Avastin off-label usage was not unlawful, so Avastin could be included in the relevant market (48-67)
- Case referred back to the Italian Courts to apply to the facts

Coty Germany
Case C-230/16, December 2017

Issue: ***Can the operator of a selective distribution system ('SDS') for luxury perfumes prohibit its selected distributors from selling on discernible third-party internet marketplaces (like Amazon), while still allowing them to sell on their own internet sites or use third-party platforms which are not discernible?***

Answer: Yes

- The key point being that not <u>all</u> internet sales were banned

Context/Reasoning:

- SDS for luxury goods is lawful, provided in line with the Case C-26/76, *Metro I,* conditions that for a SDS to comply with Art. 101(1) TFEU:
  - resellers must be chosen on an objective quality criteria;
  - the characteristics of the product necessitate a SDS to preserve quality; and
  - the criteria must not go beyond what is necessary (24)

Coty Germany
Case C-230/16, December 2017 (2)

Context/Reasoning (cont'd):

- 'Appropriate' to require that a third-party platform not be discernible in order to protect the luxury brand image; 'aura of quality' in the perfume supply (Case C-59/08, *COPAD*) (25-29)
- Had the ECJ in Case C-439/09, *Pierre Fabre* held that the objective of maintaining a prestigious brand image could not justify an SDS?
  - No. The ECJ held that *Pierre Fabre* was narrower than that; it concerned the goods in issue (cosmetic and body hygiene goods); and the clause in question (a comprehensive ban on internet sales) (34-36)
- ECJ found that the prohibition on use of discernible third-party internet platforms:
  - provided Coty with a guarantee in the context of e-commerce that the goods would be exclusively associated with its authorised distributors (44); and
  - was to preserve the quality and luxury image of the goods (46)
- Third-party platforms sold goods of all kinds, whereas a requirement of sales only through authorised distributors contributed to their luxury image (50)

Coty Germany
Case C-230/16, December 2017 (3)

Context/Reasoning (cont'd):

- ECJ also noted that the main online distribution channel according to the EC's E-commerce report was distributors' own online shops (54-55)
- A direct contractual relationship with SDS markets was necessary to allow the network member to have effective control of compliance with its quality criteria (65)
- The restriction on this kind of internet sale also did not constitute a restriction of customers or a restriction of passive sales incompatible with SDS, so that the VBER could not apply
  - Not clear that third-party platform customers were a definable customer group
  - In any event, they could find distributors online offers through search engines
- The case then went back to the referring court (which has since upheld Coty's ban) (66-69)

Coty Germany
Case C-230/16, December 2017 (4)

Comment:

- Hotly debated case; some argue that Coty's ban was not necessary and limits internet competition too much
- Bundeskartellamt ('BKA') argues that such bans should be restrictions by object because
  i. such third-party platforms are more significant in Germany;
  ii. such sales are key for SMEs; and
  iii. if not a restriction by object, the BKA/or a plaintiff would have to show effect each time, which is too burdensome
- Counterarguments for SDS as valid non-price competition
- Much debate as to whether SDS in the supply of electronic goods would be different
- EC appears to think that the rationale applies broadly so the issue is simply whether an SDS for electronic or high-tech goods meets the *Metro* criteria or not (see, EC Competition Policy Brief, April 2018)

ICAP
Case T-180/15, November 2017

Issue (1): ***Can the EC take a decision concerning certain infringers and finding that a third party had 'facilitated' the infringement; and then take another decision finding that the 'facilitator' had also infringed, consistent with the presumption of innocence?***

Answer: No

- It is contrary to the presumption of innocence, Art. 48 CFR
- Up to the EC to avoid that, e.g. the EC should take both decisions at the same time (268)
- However, EC decision was not overturned on this basis
- The Court considered whether the EC had been objectively impartial and found yes
- Where in its decision, the EC had discretion, i.e. (i) in determining ICAP's participation in infringements; and (ii) classifying the infringement as 'by object', the EC's rulings had been upheld in 5 out of 6 infringements (even if partially annulled); and the classification of the infringement was correct (270, 274, 277-279)

ICAP
Case T-180/15, November 2017 (2)

Issue (2): ***How much detail does the EC have to give in its reasons when it relies on para. 37 of the EC Fining Guidelines?***

Answer:

- Enough to allow the party concerned and the Court to understand the justification for the methodology chosen by the EC; and for the EC to review it (294)
- Not just a general assurance that the basic amounts reflected the gravity, duration and nature of the infringement, as well as reflected deterrent effect (293)
- Needs to be all the more specific, because the EC has a broad discretion to make an exceptional adjustment of the fine, departing from its general guidelines (289)
- GC found EC had not given enough detail on its alternative method and annulled the fine accordingly (297-298)

CHEZ Elektro Bulgaria
Joined Cases C-427/16 and C-428/16, Nov. 2017

Issue: ***Is national legislation which does not allow a lawyer to agree remuneration below a minimum amount set out in a regulation issued by a lawyers professional organisation restrictive of competition and contrary to Arts 101(1) TFEU and 4(3) TEU?***

Answer: Maybe

- Since neither the legislation, nor the body setting the minimum fee scale reflected public interest criteria, this amounted to a decision by an association of undertakings (43-44, 49)
- Only review was by the Bulgarian Supreme Administrative Court and limited to compatibility with the Bulgarian Constitution and Bulgarian Law (48)
- So the Case C-184/13, *API* case-law did not apply
- However, the Case C-309/99, *Wouters* case-law might (54)
- The referring court therefore had to review the overall context:
  - whether the rules actually meet legitimate objectives; and
  - whether the restrictions involved (disciplinary proceedings and non-reimbursement of fees below the minimum) are limited to what is necessary to ensure that those legitimate objectives are given effect (55-57)

Gasorba/Repsol
Case C-547/16, November 2017

Issue: ***Does an EC commitment decision under Art. 9(1) of Reg. 1/2003 prevent a national court ('NC') from ruling on whether certain agreements covered by that decision are contrary to Arts 101(1) and 102 TFEU? Notably, in so far as Art. 16 of Reg. 1/2003 requires NCs not to take decisions that 'run counter' to EC decisions?***

Answer: No

- An Art. 9(1) decision makes binding commitments given to the EC; it does not certify that the practice in issue complies with Art. 101 TFEU (25)
- EC only carries out a preliminary assessment and does not establish if there is an infringement or not; so a national court is not precluded from ruling on that issue (26)
- Under Reg. 1/2003 commitment decisions are without prejudice to the powers of NCAs and NCs to decide on cases (27)
- A commitment decision cannot 'legalise' the market behaviour of the undertaking concerned and certainly not retroactively (28)

Gasorba/Repsol
Case C-547/16, November 2017 (2)

Answer (cont'd):

- However, NCs cannot overlook such a decision and should take it into account as an indication, if not *prima facie* evidence of the anti-competitive nature of the infringement (29)

Context:

- Gasorba had entered into lease and exclusive supply agreements with Repsol for 25 years
- EC commitment decision involved a settlement whereby Repsol was to allow lessees to terminate early with financial incentives
- Gasorba went to court to go a step further and have its agreements ruled invalid

Goldman Sachs – Power Cables
Case T-419/14, July 2018

Issue (1): ***Should Goldman Sachs ('GS'), which held 100% of Prysmian ('P') initially, but then between 84% and 91% of P and subsequently reduced its stake further, be liable for the participation of P in the Power Cables cartel?***

Answer: Yes

- The key point was that GS had 100% of the voting rights over P, even though GS had reduced its shareholding; that put GS in a similar situation to a sole owner (with the related presumption of control) (48-50, 66)
- The GC upheld findings by the EC that, even when GS had sold off parts of its stake (i) to a third party and (ii) to P's management team, it had maintained decisive control over P (the latter having pure passive investor rights) (53, 57, 61-64)
- GC reviewed EC's evidence that GS had maintained control over P's business e.g. through the appointment of directors and informal links between the entities concerned (107), etc.
- All was accepted as indicative of control over the commercial strategy of P, save GS' participation in two committees (122-124)

Goldman Sachs – Power Cables
Case T-419/14, July 2018 (2)

Issue (2): ***Should GS be treated as a pure financial investor?***

Answer: No

- To be such an investor (and therefore not liable), it had to be shown that the presumption of actual exercise of decisive influence had been rebutted
- A pure financial investor is a shareholder, who has no involvement in the management or control of a company (151, 156)
- Not so here

Context:

- GS argued that it was concerned with the strategy of P, but it was P's management that were involved in the cartel
- The EU position is that it did not have to be shown that GS was involved in the infringement, just that GS had control of the business concerned, so formed a single undertaking with P (83, 152)

Goldman Sachs – Power Cables
Case T-419/14, July 2018 (3)

Issue (3): ***Should the EC have determined the degree of GS' joint and several liability for the fine (some €37 million) with P since, at the time of the EC's decision, GS no longer owned P?***

Answer: No

- GS and P shown to be a single undertaking for the whole period of the infringement
- EC does not have to allocate the fine in the 'internal relationship' in an undertaking; EC is only focussed on ensuring effective recovery of the fine
- The fact that GS and P were no longer in the same undertaking on the date of the EC decision did not change this; the allocation of responsibility then was not a matter for the EC (203-207)

Stürhk Delikatessen Import
Case T-58/14, July 2018

Issue: ***GC overturned the fine of €1.1 million imposed on Stürhk Delikatessen Import ('SDI') for participation in the North Sea Shrimps cartel. The EC had not adequately reasoned the adjustment that it had made to SDI's fine under para. 37 of the EC Fining Guidelines.***

Context:

- SDI admitted involvement in the cartel in Germany, re. supply to Aldi-Nord
- The EC found that SDI had done more than that, including coordination re. supply to Metro, but still only in Germany
- Nevertheless, EC found that SDI was part of the wider North Sea Shrimps cartel; the GC upheld that view
- However, the EC reduced the fine
  i. by considering only SDI's German turnover (177);
  ii. by 15% as a mitigating circumstance since its involvement had been limited to and different to the conduct of other participants (176, 178); and
  iii. by 18% because it had admitted the infringement in its reply to the SO, giving the EC corroborative evidence to support the immunity applicant's statement (210), i.e. cooperation outside leniency (para. 29 of the EC Fining Guidelines)

Stürhk Delikatessen Import
Case T-58/14, July 2018 (2)

Context (cont'd):

- The EC then reduced SDI's fine further by 70% under para. 37 of the EC Fining Guidelines and the fines of two other cartel participants by greater amounts, 75% and 80% (298)
- The EC stated that this was necessary because:
  i. the majority of the cartelists' turnover was focussed on North Sea shrimp sales (a 'mono-product' argument); and
  ii. the infringement was quite long
- So application of the 10% ceiling rule in Art. 23(2) of Reg. 1/2003 could lead to unequal treatment through a failure to differentiate between offenders (295-296) (Cf. – Case T-211/08, *Putter International*)
- The EC stated that the variations reflected:
  i. the relative % of North Sea shrimps sales to total turnover in each undertaking;
  ii. the differences in the individual participation of each undertaking; and
  iii. the need still to have a deterrent effect (297)

Stürhk Delikatessen Import
Case T-58/14, July 2018 (3)

GC findings/Reasoning:

- Before the GC, it turned out that the cartelists' relative %s were different and that, generally they were not 'mono-product' producers; the % figures were:
  - For Heiploeg: 25-35%; for Klaas Paul: 35-45 %
  - For KOK Seafood: 90-100%; for SDI: 22% (301)
- Part of the EC's reasoning here (i.e. assessing the degree of participation of each undertaking in the infringement) also appeared to duplicate other grounds for reduction (308)
- Further, it appeared that those with greater involvement in the cartel had received the larger reductions (305)
- The GC found all this not clear (299, 303)
  - The Court considered the 'mono-product' reasoning to be erroneous (302), even if mixed with equitable considerations (310)
  - Citing Case T-95/15, *Printeos*, the GC therefore ruled that neither SDI, not the court could understand whether the principle of equality of treatment had been complied with (309-310)
  - So the Court found that the EC's decision was flawed for lack of reasoning (311-333)

Ernst & Young
Case C-633/16, May 2018

Issue: ***If a firm enters into an agreement by which it will leave one accountancy group and join another, does it act in breach of its standstill obligation pending merger control approval, if it simply gives notice to leave its current group, leading to some market effects (clients switching to other firms/groups)?***

Answer: No

- The firm only 'jumps the gun' if it enters into a transaction which contributes to the implementation of the suspended merger (59)
- The transaction here, giving notice to KPMG International that the firm was leaving its group, might be a conditional link to the concentration and ancillary and preparatory to the merger, but it did not implement the transaction, in the sense of contributing to a lasting change of control of the firm to E&Y (46, 49, 60, 62)

Ernst & Young
Case C-633/16, May 2018 (2)

Context/Reasoning:

- Danish accountancy firm switching from KPMG to E&Y
- Notification to the Danish Competition Authority, which considered the giving of notice as 'jumping the gun', because it was merger-specific; irreversible and likely to have market effects (23)
- Danish law based on EU Merger Regulation ('EUMR')
- Art. 7(1) EUMR requires the parties not 'to implement' a concentration before it is notified or cleared
- 'Implementation' not defined, but to be read with Art. 3 EUMR, which defines a concentration as a change of control (43-46)
- Partial implementations may be caught (if they contribute to such a change)
- Transactions which are not necessary to achieve a change of control are not caught, because they do not have a 'direct functional link' with the implementation (49)
- Fact that the transaction may have market effects is irrelevant; acts which do not have such effects may still contribute to a change of control of an undertaking (50-51)

Ernst & Young
Case C-633/16, May 2018 (3)

Context/Reasoning (cont'd):

- Related transitional agreements may still fall under Art. 101(1) TFEU if they involve coordination between undertakings (57)
- AG Wahl took a similar line, considering that measures which 'precede' and are 'severable' from an acquisition of control should not be considered to be 'gun jumping'

Czech Railways inspections
Cases T-325/16 and T-621/16, June 2018

Case T-325/16 – Falcon Inspection

Issue: ***Could the EC lawfully carry out an onsite inspection of Ceske drahy ('CD'), the Czech railways incumbent, as regards alleged predatory pricing on a major route in the Czech Republic (Prague-Ostrava), casting its net also to inspect for other infringements of Art. 102 TFEU, on other routes and before 2011 (when a rival railway operator started services)?***

Answer: Yes and no (partial annulment)

- The EC could inspect for evidence of predatory practices on the route in question, including before 2011 (67, 70, 97)
- However, the EC could not lawfully do so as regards other infringements on other routes (89)
- The GC considered the evidence which the EC had, including documents from previous Czech inspections in parallel proceedings and notably an economic report
- The Court found that the EC had reasonable grounds to investigate predatory pricing, but could not inspect beyond that (67, 70, 79-80, 89, 91)

Czech Railways inspections
Cases T-325/16 and T-621/16, June 2018 (2)

Answer (cont'd):

- It appears that the EC sought evidence on the fixed and variable costs of CD and their allocation (60-65); and on the strategy of CD (11, 74-78)

Comment:

- Builds on Case T-135/09, *Nexans* and Case C-583/13 P, *Deutsche Bahn* in suggesting that the EC is only entitled to inspect in order to check for evidence related to a possible infringement which it has reasonable grounds to suspect

Czech Railways inspections
Cases T-325/16 and T-621/16, June 2018 (3)

Case T-621/16 – Twins Inspection

Issue: ***Was a further inspection by the EC related to another possible infringement unlawful, in so far as based on documents found in the Falcon inspection? Notably, a possible infringement of Art. 101(1) TFEU, in so far as operators in the Czech, Slovak and Austrian Republics would have concerted to deny the sale to new rail operators of second-hand rolling stock?***

Answer: No

- The EC's first inspection decision was not unlawful even if its scope had been partially annulled (41-42)
- The EC was entitled to rely on evidence of an infringement found incidentally while investigating another infringement (Case C-583/13P, *Deutsche Bahn*) (37)
- Here the EC had taken three documents which could be relevant to establishing the alleged predatory pricing infringement, in so far as they related to the structure of CD's costs and its strategy, the costs of the applicant and its profits (31-34, 66-71, 74, 77-78)

Czech Railways Inspections
Cases T-325/16 and T-621/16, June 2018 (4)

Answer (cont'd):

- The EC was entitled to rely on suggestions of another infringement in the Falcon inspection documents (even if investigating a possible infringement contrary to Art. 101, not Art. 102 TFEU) (44-47)

Comment:

- Compulsory reading for those likely to be managing dawn raids
- Beware/watch: 'in particular, including' type language!