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EU Competition Law Newsletter

Highlights

— *Bulgarian Energy Holding v. Commission* (Case T-136/19): Revamped *Energy* To Overturn Abuse of Dominance Decisions on Account of Errors of Fact and Assessment

— *EDP – Energias de Portugal and Others* (Case C-331/21): Court of Justice Clarifies the Treatment of Non-compete Clauses Between Potential Competitors Under Article 101 TFEU

Bulgarian Energy Holding v. Commission (Case T-136/19): Revamped *Energy* To Overturn Abuse of Dominance Decisions on Account of Errors of Fact and Assessment

On October 25, 2023, the General Court delivered its judgment in *Bulgarian Energy Holding and Others v. Commission*.[1] In a shift in the case law that signals an increased focus on effects in Article 102 cases, the General Court concluded that the Commission failed to establish that the examined conduct constituted a refusal to supply, let alone an abuse of dominance by Bulgarian Energy Holding, Bulgartransgaz, and Bulgargaz (together, "the BEH Group"). The judgment clarifies the evidentiary standard required to establish causality between purportedly abusive practices and their resulting potential anticompetitive effects. It also concludes that the Commission infringed the BEH Group's rights of defense during the administrative procedure. The judgment signals the General Court's willingness to scrutinize technical factual assessments that are often heavily contested by companies in competition law investigations.

Background

In 2018, the Commission imposed a €77 million fine on the BEH Group[2] for having abused its dominant position through practices that were deemed to foreclose potential entrants to the Bulgarian gas supply market by obstructing

[1] *Bulgarian Energy Holding and Others v. Commission* ("BEH v. Commission") (Case T-136/19) EU:T:2023:669.

[2] Bulgarian Energy Holding ("BEH") is a state-owned entity active at all levels of the energy supply chain in Bulgaria. The Commission decision also addresses two of BEH's subsidiaries: (i) Bulgartransgaz–the only licensed gas Transmission System Operator ("TSO") in Bulgaria; and (ii) Bulgargaz–the main supplier of gas at the downstream wholesale level in Bulgaria (together "the BEH Group").

potential entrants' access to crucial infrastructure.[3] Specifically, the BEH Group refused to grant third parties access to the following infrastructure operated by Bulgartransgaz: (i) Romanian Pipeline 1, which is the only viable import pipeline bringing gas through Romania into Bulgaria; (ii) the domestic Bulgarian transmission network; and (iii) the only gas storage facility in Bulgaria. The Commission found that the conduct constituted a single and continuous infringement, which lasted from July 30, 2010 to January 1, 2015.

During the infringement period, the supply of gas in Bulgaria depended on imports of Russian gas through the Romanian Pipeline 1, which was managed by Transgaz, the Romanian TSO. Under an agreement between Transgaz and Bulgargaz concluded in 2005, Bulgargaz was granted exclusive use of Romanian Pipeline 1 throughout the infringement period, in return for a fixed annual fee. According to the Commission, Bulgargaz hoarded capacity on the only viable import pipeline so that potential rivals could not import gas into Bulgaria.

The BEH Group appealed the decision, claiming, among other things, that the Commission had failed to establish a refusal to provide access to the infrastructure in question, let alone an overarching anticompetitive strategy by the BEH Group. Siding with the applicants, the General Court found that the Commission had failed to establish that the BEH Group's conduct was capable of restricting competition on the Bulgarian gas supply markets and, in particular, of producing exclusionary effects that were not purely hypothetical.

First, the General Court found that the BEH Group did not abuse its dominant position on Romanian Pipeline 1 by means of a refusal to supply. Second, the General Court found that BEH's conduct in renegotiating capacity on Romanian Pipeline 1 was exempt from Article 102. Third, the General Court found that the BEH Group's restrictive *modus operandi*, which temporarily hindered rivals' access to gas infrastructure, was incapable of restricting competition. Finally, the General Court found that the Commission infringed the BEH Group's rights of defense by failing to provide access to all potentially relevant information during the administrative procedure.

Judgment

The judgment places a significant evidentiary burden on the Commission to demonstrate the precise sequence of events leading to actual foreclosure of rivals.

— ***Refusal to supply.*** The General Court accepted that Romanian Pipeline 1 was an essential facility under the *Bronner* criteria, as it was the only viable route for transporting gas into Bulgaria during the infringement period.[4] The General Court also rejected the BEH Group's argument that it could not be liable for a refusal to supply as it did not own the facility. The judgment thus clarifies that ownership of the essential facility is not required for a refusal to supply to arise; rather, a "situation of control" is sufficient to invoke the essential facilities doctrine.[5] Even though Bulgargaz was not the owner of the pipeline, it was in a "situation of control" as it benefited from exclusive use of the pipeline under the 2005 agreement with the Romanian TSO. Consequently, the General Court upheld the Commission's finding of dominance.

However, the General Court rejected the Commission's finding of an abuse. The General Court emphasized that the Commission bears the burden of proving that a refusal of access is capable of producing exclusionary effects that are not purely hypothetical.[6] This requires proof that the requesting party is an actual

[3] *BEH Gas* (Case COMP/AT.39849), Commission decision of December 17, 2018.

[4] *Bronner* (Case C-7/97) EU:C:1998:569. Under *Bronner*, a refusal to supply by a dominant undertaking constitutes an infringement of Article 102 TFEU if the following three cumulative conditions are met: (i) refusal of the service is likely to eliminate all competition on the part of the party requesting the service in a neighboring market; (ii) the service in question is indispensable for carrying on that party's business, as there is no actual or potential substitute for that service; and (iii) that refusal cannot be objectively justified.

[5] *BEH v. Commission*, paras. 261–263 and 268.

[6] *Ibid.*, para. 287.

or potential competitor with a "sufficiently advanced project to enter the market."[7] To ensure respect for the principle of freedom of contract, the request for access must also be "sufficiently precise" for the dominant firm to be able to assess whether it is required to respond to avoid a finding of an abusive refusal.[8] "Purely exploratory" questions do not amount to a request for access, and dominant firms are not required to respond to them.

The judgment clarifies further points relevant to proving an abusive refusal to supply. First, the existence of Bulgargaz's exclusive right to use the pipeline cannot itself constitute an abuse. Second, it is for the Commission to establish that the conduct in question is actually capable of foreclosing (potential) competitors. Third, Bulgargaz could not be criticized for "refusing access" by not replying to requests for access that were never sent to it: if there is no request for access, there can be no refusal to supply. Fourth, to the extent that access is actually requested, the dominant firm must respond within a reasonable period of time and may impose reasonable conditions for providing access. On the facts, the Commission failed to establish that Bulgargaz's conduct amounted to a *de facto* refusal to supply, *e.g.*, as a result of unduly delaying or hampering rivals' access.

— ***Causation and attributability.*** The General Court also emphasized that not all restrictive actions constitute restrictions of competition under Article 102 TFEU. The General Court concluded that the BEH Group's *modus operandi* of hindering rivals' access to the transmission network and storage facility during a certain period did not restrict competition.[9] This is because rivals lacked access to the only pipeline available to import gas into Bulgaria to begin with, "for reasons which are not attributable to proven abusive conduct."[10] In other words, the General Court concluded that there was no restriction of competition because absent the BEH Group's conduct, third parties would not have been able to compete anyway.[11]

This line of reasoning appears to endorse a counterfactual assessment: restrictive conduct can escape Article 102 TFEU if it is not capable of producing anticompetitive effects on the market compared to the counterfactual scenario without that conduct. This position contrasts with the Commission's stance that "abusive conduct does not need to be successful, *i.e.*, to have actual anticompetitive effects" to be unlawful.[12] The rule still remains that establishing an abuse requires that the conduct is "capable of restricting competition," taking into account all relevant facts and circumstances. This final element now seems to include a counterfactual assessment of the market competition that would exist absent the conduct.

The General Court also focused on the BEH Group's public service obligations aimed at ensuring the security of gas supply in Bulgaria,[13] finding that it was legitimate and reasonable for the BEH Group to take measures to guarantee a minimum capacity reflecting its needs as the only public gas supplier in Bulgaria. Accordingly, the General Court applied the "state action defense" to exempt the BEH Group from liability for its conduct, including the imposition of conditions and safeguards, in the context of renegotiating its right to (exclusive) use of capacity on the Romanian pipeline.[14]

— ***Single and continuous infringement.*** The General Court annulled the Commission's finding of an abuse in its entirety, despite

[7] *Ibid.*, para. 281.

[8] *Ibid.*, para. 282.

[9] *Ibid.*, paras. 949–950, 953, and 1089–1100.

[10] *Ibid.*, para. 951.

[11] *Ibid.*, paras. 953–954.

[12] Commission Policy Brief 1/2023, "A dynamic and workable effects-based approach to abuse of dominance," March 2023, p. 4.

[13] *BEH v. Commission*, paras. 571–572.

[14] *Ibid.*, paras. 548, 572, and 616. The "state action defence" excludes from the scope of Article 102 TFEU conduct required by: (i) national legislation; (ii) a legal framework created by that legislation; or (iii) irresistible pressure imposed by the national authorities.

upholding the Commission's finding of an isolated instance of exclusionary conduct during part of the infringement period. According to the General Court, that instance of anticompetitive conduct could not, on its own, substantiate the alleged abuse, having regard to the factual and legal deficiencies in other aspects of the alleged infringement.[15] This is because the Commission's decision defined a single and continuous infringement "based on the complementarity and interdependence of [all]… forms of [alleged] conduct," instead of separate forms of self-standing abusive conduct.

— ***Procedural defects.*** The General Court found that the Commission infringed the BEH Group's rights of defense by failing to provide BEH with sufficient access to the file covering all potentially inculpatory and exculpatory evidence, including information which "clearly has a bearing on the starting date of the alleged abuse, […], the duration of the infringement and, therefore, the level of the fine."

Conclusion

This judgment brings welcome clarification of the evidentiary standard for establishing an abusive refusal to supply under Article 102 TFEU. In particular, it provides helpful guidance on the causation test for establishing exclusionary effects that are "not purely hypothetical." While the judgment is fact-heavy and contextually nuanced, the principles it sets forth are likely to have a far-reaching impact on the future of competition law enforcement and practice. For one, the judgment signals the General Court's increasing willingness to engage closely with the facts and scrutinize the Commission's technical factual assessment. It remains to be seen whether, and to what extent, the Court of Justice will follow this judgment when reviewing pending appeals from the General Court that may have been less demanding on the Commission's need to establish the causality between practices and anticompetitive effects in Article 102 cases.

EDP – Energias de Portugal and Others (Case C-331/21): Court of Justice Clarifies the Treatment of Non-compete Clauses Between Potential Competitors Under Article 101 TFEU

On October 26, 2023, the European Court of Justice issued a preliminary ruling in *EDP – Energias de Portugal and Others*,[16] upon request from the Lisbon Court of Appeals, which had asked for clarification on how to assess non-compete clauses under Article 101(1) and (3) TFEU and whether these could constitute "by object" restrictions. The Court of Justice clarified the standard of assessment of such non-compete clauses, confirming that they can be categorized as restrictions by object if they display a sufficient degree of harm to competition.

Background

On May 4, 2017, the Autoridade da Concorrência ("AdC") fined Energias de Portugal ("EDP"), part of EDP Group, a large Portuguese electricity producer and distributor, and Modelo Continente ("MC", together the "Parties"), a Portuguese food and consumer products distributor and part of Sonae Group, a Portuguese conglomerate that was previously part of a joint venture active in electricity production and supply, for infringing the national law equivalent of Article 101 TFEU.[17] The Parties had concluded an association

[15] *Ibid.*, para. 1114.

[16] *EDP – Energias de Portugal and Others* (Case C-331/21) EU:C:2023:812.

[17] *Ibid.*, paras. 11–12, 30, 27, and 73.

agreement under which MC issued discount cards to its customers under a loyalty programme, entitling them to a price reduction for electricity provided by EDP.[18] The agreement included an exclusivity clause under which both undertakings agreed to refrain from: (i) entering the other's market in mainland Portugal; and (ii) concluding an association agreement to create a discount program with a third party.[19]

According to the AdC, the non-compete clause could be equated to a market-sharing arrangement, the illegal nature of which was strengthened by the fact that it was implemented at a crucial time of the liberalization of the national electricity market. Importantly, the AdC considered the association agreement neither as an agency agreement nor as a vertical agreement. Instead, it classified it as horizontal cooperation, assessing the non-compete clause as a restriction by object.[20]

Upon appeal from the Parties, the Portuguese Competition, Regulation and Supervision Court confirmed the AdC's findings.[21] The Parties appealed that judgment to the Lisbon Court of Appeals, which referred the matter to the Court of Justice for a preliminary ruling.

Judgment

Following the approach suggested by Advocate General Rantos,[22] the Court of Justice examined the 11 questions referred by grouping them into four categories:[23] (i) the assessment of whether undertakings present on separate product markets are potential competitors; (ii) the legal characterization of an association agreement aimed at promoting the activities of the contracting parties, and in particular whether it can be considered a vertical or agency agreement; (iii) whether a non-compete clause in such an agreement is ancillary in nature; and (iv) whether such a clause can be characterized as a restriction of competition by object.[24]

— ***The Parties can be considered potential competitors if there are "real and concrete" possibilities for market entry.*** Regarding the first issue, the Court of Justice held that undertakings that are a party to an association agreement are potential competitors if there are "real and concrete possibilities" for them to enter each other's markets and compete with the other.[25] This means that the prospect of market entry could not be "purely hypothetical" or a "mere wish."[26] On the other hand, it is not necessary to establish that an undertaking has a "firm intention" to enter the market or that it has taken concrete preparatory steps to enter. This distinguishes the general case from the specific requirements set out in the *Generics* judgment, which the Court of Justice clarified is confined to the specific context of the pharmaceutical industry.[27] The fact that Sonae Group was active on the same market as EDP prior to the conclusion of the association agreement, as well as the mere fact that the Parties had desired a non-compete clause, could be taken into account by the evaluating court.[28] The Court of Justice left it to the referring court to establish whether the "real and concrete" standard was met, stressing the importance of accounting for "the structure of the market, and the economic and legal context within which it operates."[29]

[18] *Ibid.*, para. 14.

[19] *Ibid.*, paras. 18–19.

[20] *Ibid.*, paras. 31–32.

[21] *Ibid.*, para. 33.

[22] *EDP – Energias de Portugal and Others* (Case C-331/21), opinion of Advocate General Rantos, EU:C:2023:153, paras. 2, and 33–34.

[23] *EDP – Energias de Portugal and Others* (Case C-331/21) EU:C:2023:812, Court of Justice judgment, paras. 57–58.

[24] *Ibid.*, para. 57.

[25] *Ibid.*, para. 77.

[26] *Ibid.*, para. 62.

[27] *Generics (UK) and Others* (Case C-307/18) EU:C:2020:52, paras. 43 and 58. In confining the necessity for identifying concrete preparatory steps to the pharmaceutical industry, the Court of Justice, at paras. 64, 69, and 75–76 of *EDP – Energias de Portgual and Others* confirmed the approach suggested by Advocate General Rantos in para. 69 of his opinion, *supra*, n 22.

[28] *Ibid.*, paras. 71 and 74.

[29] *Ibid.*, paras. 63 and 69.

— ***Association agreements promoting the activities of contracting parties are unlikely agency agreements if the parties share implementation costs.*** Regarding the second issue, the characterization of the agreement as both a vertical and an agency agreement—as opposed to a horizontal agreement—could bring it into the scope of the Vertical Block Exemption Regulation[30] and the Vertical Guidelines,[31] and therefore Article 101(3) TFEU. The Court of Justice held that the agreement could only be categorized as a vertical agreement if the parties operate within the same distribution chain for the purposes of the agreement or concerted practice. Moreover, an association agreement where each party bears part of the costs, and thereby the risk, required for its implementation could not be considered as an agency agreement under the Vertical Block Exemption Regulation.[32]

— ***Non-compete clauses between potential competitors can be considered ancillary only if they are objectively necessary and proportionate for achieving the objectives of the overall agreement.*** The third issue regarding the analysis of the ancillary nature of the restriction was left to the national court under the standard that the restriction must be objectively necessary for the implementation of the association agreement and proportionate to its objectives. The Court of Justice identified factors that speak against the standard being met: (i) the restriction period exceeded the length of the agreement; and (ii) the restriction covered industrial customer segments which were outside the scope of the rebate scheme.[33]

— ***Non-compete clauses between potential competitors can constitute by-object restrictions if they display a sufficient harm to competition.*** Finally, regarding the fourth issue the Court of Justice held that non-compete clauses could constitute restrictions by object even if they provide consumers with a benefit and are limited in time.[34] The Court recalled the judgment in *Super Bock Bebidas*, in which it had held that once it is established that an agreement pursues an anticompetitive object, it is not necessary to examine its effects on competition.[35] The Court of Justice specified in the present case that procompetitive effects would have to be taken into consideration for the purposes of categorizing the agreement as restrictive by object. However, once the analysis of the content of the clause—and its economic and legal context—display a sufficient harm to competition, the referring court would not have to assess the precise effects on competition.[36]

Discussion

The ruling of the Court of Justice was anticipated for its implications on the definition of potential competition between entities bound by a non-compete clause when they are not active in the same market, and for the clarification on whether proof of anticompetitive effects is needed for declaring a non-compete agreement between potential competitors illegal under Article 101(1) TFEU.[37] The preliminary ruling confirms that companies should not only carefully review contracts entered into with current competitors, but they need to be equally vigilant when reviewing non-compete clauses in agreements with potential competitors. Agreeing with the argument of Advocate General Rantos, the Court of Justice

[30] Commission Regulation No. 2022/720 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2022 L 134/4. The case was analyzed under the old regulation (Commission Regulation No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1) and guidelines.

[31] Commission notice regarding guidelines on vertical restraints, OJ 2010 C 130/1, para. 18: "[a]ll obligations imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal fall outside Article 101(1)."

[32] *EDP – Energias de Portugal and Others*, *supra*, paras. 84–86.

[33] *Ibid.*, paras. 91, 93, and 105.

[34] *Ibid.*, para. 106.

[35] *Ibid.*, para. 97. *See also Super Bock Bebidas* (C-211/22 P) EU:C:2023:529, para. 31.

[36] *EDP – Energias de Portugal and Others, supra*, paras. 104–106.

[37] *See also* our Cleary Antitrust Watch Blog post, Advocate General Rantos' Opinion In Autoridade Da Concorrência and ECP (Case C-331/21) On The Notion Of Potential Competition And The Distinction Between Restrictions "By Object" And "By Effect", April 14, 2023, available here.

even held that the mere existence of a non-compete clause constitutes "a strong indication that there is potential competition."[38] This will not, however, give rise to a presumption on its own. The assessment has to be context-specific and take into account the economic and legal context of the market in question.

News

Commission Updates

Commission Gets Active Again In The Pharmaceutical Sector: First-Ever Cartel Decision In Relation To An Active Pharmaceutical Ingredient

On October 19, 2023, the Commission imposed fines totalling €13.4 million on five pharmaceutical companies (Alkaloids of Australia, Alkaloids Corporation, Boehringer, Linnea, and Transo-Pharm) for their participation in a cartel in relation to an active pharmaceutical ingredient.[39] This is the Commission's first-ever cartel decision in the pharmaceutical sector, adding to the Commission's extensive enforcement action against pharmaceutical companies.

The decision involves the companies listed above and immunity recipient C2 PHARMA, all of which are producers and/or distributors of N-Butylbromide Scopolamine/ Hyoscine ("SNBB"), an input for the production of abdominal antispasmodic drugs. The Commission found that the six firms exchanged commercially sensitive information and agreed to: (i) fix the minimum sales price of SNBB to distributors and generic drug manufacturers; and (ii) allocate sales quotas. The Commission found that the conduct constituted a single and continuous infringement, which lasted from November 1, 2005, to September 17, 2019.

The decision was adopted under the Commission's settlement procedure:[40] all six firms acknowledged their participation in the cartel and ensuing liability, in order to qualify for a 10% fine reduction. Three of the participants benefitted from further fine reductions under the Commission's leniency program:[41] C2 PHARMA received full immunity for revealing the cartel, while Transo-Pharm and Linnea benefitted from fine reductions of 50% and 30% respectively for their cooperation with the Commission.

The Commission had also opened proceedings against a seventh company, Alchem, but this company decided not to participate in the settlement. The Commission will therefore continue its investigation against Alchem under the standard procedure. The Commission's use of such hybrid settlements has repeatedly raised concerns around the presumption of innocence of non-settling parties.[42] The Commission's confidence in proceeding with a "staggered" hybrid settlement—meaning that the Commission settles with some parties to an infringement, while continuing to investigate other parties under the standard procedure[43]—will have been bolstered by the Court of Justice's recent endorsement of this procedure, subject to thoughtful drafting on the part of the Commission so as to protect the rights of non-settling parties.[44]

[38] *EDP – Energias de Portugal and Others*, para. 71.

[39] Commission Press Release IP/23/5104, "Commission fines pharma companies €13,4 million in antitrust cartel settlement," October 19, 2023.

[40] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C 167/01.

[41] Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/11.

[42] This line of case law began with the judgment in *Icap v. Commission* (Case T-180/15) EU:T:2017:795, which was subsequently confirmed and refined in a series of judgments, including: *Pometon SpA v. Commission* (Case C-440/19 P) EU:C:2021:214; *Scania and Others v. Commission* (Case T-799/17) EU:T:2022:48; and *HSBC Holdings and Others v. Commission* (Case C-883/19) EU:C:2023:11.

[43] In contrast, "simultaneous" hybrid settlements occur where, as a result of the same investigation, the Commission simultaneously adopts a settlement decision and a standard infringement decision in relation to the same conduct.

[44] *HSBC Holdings and Others v. Commission* (Case C-883/19) EU:C:2023:11. For an analysis of the *HSBC Holdings* judgment, *see* our January 2023 EU Competition Law Newsletter, pp. 1–4.

Court Updates

Banco BPN v. BIC Português and Others: Banks Caught Again In The Two Steps Between "By Object" And "By Effect"

On October 5, 2023, Advocate General Rantos delivered his opinion on two questions referred to the Court of Justice by the Portuguese Competition, Regulation and Supervision Court (the "referring court").[45] The referring court seeks clarification on whether a 'standalone'[46] exchange of information between competitors can be classified as a restriction by object under Article 101 TFEU, and whether that classification is permitted where it has not been possible to establish any uncertain or procompetitive effect on competition resulting from the exchange. The case gives the Court of Justice an opportunity to clarify its recent evolution from a broad and formalistic interpretation of the concept of a restriction by object to a narrower, more pragmatic interpretation of that concept.[47]

Background

On September 9, 2019, the Portuguese Competition Authority (*Autoridade da Concorrência*, "AdC") imposed fines totalling €225 million on the fourteen largest credit institutions in Portugal for having participated in a standalone exchange of information in violation of Article 101 TFEU.[48] The alleged exchange took place between May 2002 and March 2013, and concerned two types of non-publicly available information: (i) current and future commercial conditions (*e.g.*, charts of credit spreads); and (ii) production volumes (*i.e.*, the amount of loans granted by the respective bank in the preceding month).

The AdC did not allege that the banks in question participated in any other practice restrictive of competition to which the exchange of information could be linked. It considered that such a 'standalone' exchange of information constitutes a restriction of competition by object, which relieves the authority of the obligation to investigate its possible effects on the market.[49] The banks appealed the AdC's decision on these points before the referring court, which submitted questions to the Court of Justice on the delineation between restrictions "by object" and "by effect" in the context of exchange of information between competitors.[50]

Clarification of the concept of a restriction of competition by object

A practice can be classified as a restriction of competition by object only if the conduct in question reveals "a sufficient degree of harm to competition" and, accordingly, can be regarded as being by its very nature harmful to the proper functioning of competition.[51] Advocate General Rantos endorses and clarifies the two-step analysis for a by-object classification, which was initially proposed by Advocate General Bobek in the *Budapest Bank* case.[52]

As a first step, competition authorities must determine whether a practice, given its content and objectives, falls within a category which is detrimental to competition in light of a "reliable and robust wealth of experience" or, failing that, is clearly detrimental to competition. While the existence of "reliable and robust experience" regarding the harmful nature of an anticompetitive practice increases the likelihood that the same or similar practices would also be found to restrict

[45] *Banco BPN v. BIC Português and Others* (Case C-298/22), opinion of Advocate General Rantos, EU:C:2023:738. The request for a preliminary ruling was made in proceedings between banking institutions in Portugal, including *Banco BPN/BIC Português AS, Banco Bilbao Vizcaya Argentaria SA, Portuguese branch, Banco Português de Investimento SA (BPI)*, and the *Autoridade da Concorrência*.

[46] The term 'standalone' means that the information exchange in question constitutes the examined conduct in itself and is not ancillary to any other conduct.

[47] That evolution began with the Court of Justice's judgment in *Groupement des cartes bancaires v. Commission* (Case C-67/13 P) EU:C:2014:2204, which was subsequently confirmed and refined in a serious of judgments, including *Maxima Latvija v. Konkurences padome* (Case C-345/14) EU:C:2015:784, *Budapest Bank and Others* (Case C-228/18) EU:C:2020:265, *Generics (UK) and Others* (Case C-307/18) EU:C:2020:52, and *Super Bock Bebidas* (Case C-211/22) EU:C:2023:529.

[48] Autoridade da Concorrência, Case PRC/2012/9, decision of September 9, 2019 (case summary, in English, available here).

[49] *Banco BPN v. BIC Português and Others* (Case C-298/22), opinion of Advocate General Rantos, EU:C:2023:738, paras. 6–7.

[50] *Ibid.*, para. 16.

[51] *See, e.g., Visma Enterprise v. Konkurences padome* (Case C-306/20), EU:C2021:935, para 57.

[52] *Budapest Bank and Others* (Case C-228/18), EU:C:2020:265, para. 76. For an analysis of the *Budapest Bank* case, *see* our April 2020 European Competition Law Newsletter, pp. 1–4.

competition by object, it is not a "precondition."[53] According to Advocate General Rantos, the absence of precedents does not prevent competition authorities from finding a restriction by object where: (i) the anticompetitive nature of a conduct is "obvious"; or (ii) the practice has "no credible explanation other than to restrict competition on the market."[54]

As a second step, the authority must carry out a "basic reality check" to verify whether specific circumstances of the legal and economic context of the practice "may cast doubt on [its] harmful nature."[55] The purpose of this second step is to avoid false positives: where the anticompetitive object is "easy to perceive," the analysis of the economic and legal context in which a practice occurs must be limited to what is "strictly necessary to confirm or cast doubt on [its] harmful nature."[56] Here procompetitive effects could move the needle only if they are: (i) demonstrated; (ii) relevant; and (iii) sufficiently significant to justify a reasonable doubt as to whether the practice caused a sufficient degree of harm to competition.[57] Indeed, competition authorities must switch to an effects analysis only if it is "impossible to establish that the practice is capable of restricting competition" under the two-step object analysis.[58]

Application of the concept of a restriction by object to exchanges of information

Not every exchange of information falls foul of Article 101 TFEU: only exchanges of strategic or commercially sensitive information which "reduce or remove the degree of uncertainty as to operation of the market" can be found to restrict competition.[59] For information exchanges between competitors, the decisive criterion for establishing an infringement is the "reduction or removal of uncertainty as to the strategic conduct of a competitor on the market."[60]

Even when an information exchange falls within the scope of Article 101 TFEU, this does "not automatically mean that it is classified as a restriction of competition by object."[61] Advocate General Rantos clarifies that a standalone information exchange practice can constitute a restriction by object of competition only where the analysis of its content, objectives, and legal and economic context reveals a sufficient degree of harm to competition. In other words, a by object classification requires that "it is clear and unambiguous" that an information exchange can, by its nature, "influence directly the commercial strategy of competitors."[62] According to Advocate General Rantos, this test would be met where the information exchanged relates to key elements of competition, such as future capacities and pricing.

Advocate General Rantos explains that the exchange between competitors of forward-looking strategic information (*e.g.*, credit spreads) is far more likely to constitute a restriction by object than the exchange of historic data (*e.g.*, product volumes). While a by object classification cannot be ruled out either way, the exchange of aggregated historic data alone is unlikely to be indicative of competitors' future conduct, or to provide a common understanding of the market.[63] Accordingly, companies should be conscious of the risks of disclosing non-publicly available strategic data, in particular if it is forward-looking and/or disaggregated.

[53] *Banco BPN v. BIC Português and Others* (Case C-298/22), opinion of Advocate General Rantos, EU:C:2023:738, paras. 36–39.

[54] *Ibid.*, paras. 36, 38, and 40.

[55] *Ibid.*, para. 43.

[56] *Ibid.*, para. 44.

[57] *Ibid.*, paras. 49–50.

[58] *Ibid.*, para. 48.

[59] *Ibid.*, paras. 54 and 59.

[60] *Ibid.*, paras. 62–64.

[61] *Ibid.*, paras. 58–63.

[62] *Ibid.*, paras. 63–64.

[63] *Ibid.*, paras. 69–75, and 101–104.

Conclusion

Advocate General Rantos' opinion brings welcome clarification of the *Budapest Bank* two-step object analysis and the need for a restrictive application of the by object classification. In particular, it provides helpful guidance on the conditions under which an information exchange can be classified as a restriction of competition by object. It remains to be seen whether and to what extent the Court of Justice will follow the opinion.

Teva And Cephalon v. Commission (Case T-74/21): The General Court Continues To Uphold Pay-For-Delay Infringement Decisions

On October 18, 2023, the General Court dismissed[64] the appeals of Teva Pharmaceutical Industries Ltd ("Teva") and Cephalon Inc. ("Cephalon") against the Commission's decision imposing a €60.5 million fine on both pharmaceutical companies for pay-for-delay agreements.[65] The General Court confirmed the Commission's conclusion that Teva and Cephalon's patent settlement agreement was aimed at preventing Teva from entering the market with its generic modafinil drug, and therefore restricted competition by object and by effect.

Background

Modafinil, marketed under the brand name Provigil, is a medication for the treatment of excessive daytime sleepiness linked to narcolepsy. The sales of this product constituted over 40% of Cephalon's global revenue in the years immediately prior to the settlement agreement.[66] In 2003 Provigil lost patent exclusivity in the EU for its primary patents. Teva launched a generic modafinil product in the United Kingdom in 2005. Cephalon responded by filing a lawsuit, alleging infringement of its secondary patents still in force related to modafinil's pharmaceutical composition.[67] Teva filed a counterclaim for revocation.

This legal dispute culminated on December 8, 2005, with Teva and Cephalon entering into a worldwide patent settlement agreement effective on December 4, 2005. Teva committed to refrain from selling its generic modafinil products in Europe until 2012 and agreed not to contest Cephalon's patents. In return, Cephalon provided Teva with financial compensation and a suite of commercial arrangements including: (i) an agreement for the distribution of Cephalon products by Teva in the UK; (ii) acquiring a license for a number of Teva's modafinil patents; (iii) procuring modafinil raw materials from Teva; (iv) payment to Teva for litigation costs; and (v) access to clinical data for an unrelated treatment. Ultimately, in October 2011, Teva acquired Cephalon.[68]

In 2020, the Commission issued a decision finding that this patent settlement agreement restricted competition by object and by effect within the meaning of Article 101 TFEU, and was aimed at delaying the entry of cheaper generic versions of Provigil. The Commission fined Teva and Cephalon a total of almost €60.5 million.[69] Both companies appealed the Commission decision.

Judgment

The General Court ruled that the Commission rightly applied the two-step test set out by the Court of Justice in *Generics (UK)*[70] to determine when a reverse patent settlement agreement amounts to an infringement. According to this test, an agreement constitutes a by-object infringement if: (i) the only plausible explanation for the settlement was to refrain from competition on

[64] *Teva and Cephalon v. Commission* (Case T-74/21) EU:T:2023:651.

[65] Cephalon (Case COMP/AT.39686), Commission decision of November 26, 2020.

[66] Cephalon (Case COMP/AT.39686), Commission decision of November 26, 2020, para 14.

[67] *Teva and Cephalon v. Commission* (Case T-74/21) EU:T:2023:651, paras. 8, 12 and 13.

[68] *Ibid.*, paras. 16–19, and 107.

[69] The Commission imposed a €30.5 million fine on Cephalon and a €30 million fine on Teva.

[70] *Generics (UK) Ltd and Others* (Case C-307/18) EU:C:2020:52.

the merits; and (ii) the agreement does not entail proven pro-competitive effects capable of giving rise to a reasonable doubt that it causes a sufficient degree of harm to competition.[71]

As to the first prong, the General Court noted that the analysis of an agreement's objective must be an "overall assessment" including whether any of the agreed commercial terms would not be expected under "normal market conditions." It noted that non-compete and non-challenge obligations do not qualify as "normal market conditions" unless the benefits granted to the generic supplier under these agreements would have been equally favorable in the absence of those obligations.[72] This overall assessment allows the Commission to analyze the counterfactual as part of the first limb of the *Generics (UK)* test, but does not amount to an effects analysis.[73] The General Court also noted that the net value of any "side deal" agreements other than the restrictive non-marketing and non-challenge clauses must be considered separately. If the net value of the side deal is positive for the generic manufacturer, those agreements will be considered to have influenced the generic supplier's acceptance of the other conditions.[74]

For the second prong of the by-object test, there must be no reasonable doubt that the agreement caused a sufficient degree of harm to competition. The Commission had rejected the parties' claims that the settlement had pro-competitive effects, including allowing Teva to enter the market earlier than it would have been able to, had it lost its court proceedings against Cephalon. The General Court agreed with the Commission, noting that Teva was Cephalon's most advanced potential competitor and had concrete possibilities to enter the modafinil market as early as 2005 – seven years before the settlement agreement allowed it to enter – and finding that the Commission was not required to consider scenarios such as alternative outcomes of the patent litigation in assessing potential pro-competitive effects of the settlement.[75] Moreover, even after its entry, under the settlement agreement Teva had to pay significant royalties to Cephalon, limiting the possibility for strong price competition between them.[76] The parties therefore failed to demonstrate pro-competitive effects sufficient to rebut a by-object finding.

Although the agreement was found to constitute a by-object infringement, the General Court also examined its effects. First, the Court upheld the Commission's conclusion that the settlement agreement had restrictive effects on competition based on the agreement's *potential* effects, so long as the anticipated developments were realistic and sufficiently appreciable.[77] Second, the Commission was not required to determine that the generic medicine supplier would "probably have been successful" in the patent proceedings or that the parties would "probably have concluded" a less restrictive settlement agreement as a result of that litigation.[78]

Conclusion

The judgment of the General Court follows the precedents set in *Lundbeck v. Commission*,[79]

[71] *Teva and Cephalon v. Commission* (Case T-74/21) EU:T:2023:651, para. 28.

[72] *Ibid.*, paras. 43–45.

[73] *Ibid.*, paras. 46–47.

[74] *Ibid.*, para. 56. The net value of the additional agreements was deemed to be positive for Teva, among others, because: (i) Cephalon had shown no interest in licensing Teva's IP before the settlement (paras. 72 and 86); (ii) Cephalon did not need Teva's supply of raw materials, because its existing capacity for the agreed period was sufficient (para. 105); (iii) the arrangement to provide data on an unrelated treatment was of large value to Teva and the conclusion of the settlement was conditioned upon the provision of this data (paras. 115 and 117); (iv) because of the Cephalon UK distribution agreement, Teva withdrew its own product and committed not to bring it back until 2015 (paras. 128 and 135); and (v) some parts of the compensation for litigation costs were not linked to costs incurred by Teva (para. 152).

[75] *Ibid.*, paras. 177–178.

[76] *Ibid.*, para. 180.

[77] Ibid., paras. 223–224.

[78] Ibid., paras. 232–236.

[79] *Lundbeck v. Commission* (Case C-591/16 P) EU:C:2021:243.

Generics (UK) Ltd and Others, and *Commission v. Servier and Others*,[80] the last of which is pending before the Court of Justice. It noted that non-compete and non-challenge obligations agreed between actual or potential competitors will be presumed to restrict competition by object where they are in consideration for the benefits granted to the restricted party. In connection with the by-effect analysis, the Commission does not have to assess the chances of success of such litigation as long as the likely negative outcomes of the settlement are realistic and sufficiently large.

Clariant v. Commission (Case T-590/20): The General Court Endorses A Systematic Increase Of The Basic Amount Of The Fine For Purchasing Cartels And Assimilates These Types Of Cartels To Sales Cartels For The Purpose Of Analyzing Recidivism, But Does Not Punish Clariant For Appealing A Settlement Decision

On October 18, 2023, the General Court delivered its judgment in *Clariant v. Commission*.[81] It upheld the Commission's settlement decision in the *Ethylene* case,[82] following an appeal by Clariant, who argued that the Commission erred in: (i) applying a 50% recidivism multiplier to Clariant in circumstances where the previous infringement in which it had participated was not a purchasing cartel, but rather a sales cartel; and (ii) applying a 10% fine increase (to all participants) on account of the infringement being a purchasing cartel, to ensure adequate deterrence. The General Court also rejected a counterclaim lodged by the Commission, in which the Commission sought to increase the fine imposed on Clariant by removing its 10% settlement discount, on the basis that Clariant had accepted to be fined in the context of settlement proceedings.

Background and Legal Framework

On July 14, 2020, the Commission issued a decision finding that Clariant, together with three other undertakings, had violated Article 101 TFEU by participating in a purchasing cartel that aimed to keep ethylene merchant prices as low as possible. The Commission found that the cartel participants shared information and coordinated their actions to influence the 'Monthly Contract Price', a benchmark measure in the ethylene market that is created by bilateral transactions between sellers and buyers and is reported by independent reporting agencies.[83] In the settlement proceedings leading up to the decision, Clariant acknowledged liability for participating in the infringement.[84]

The Commission imposed a fine of €155.8 million on Clariant on the basis of the Fining Guidelines.[85] The fine was calculated by taking 15% of the value of affected purchases as the basic amount.[86] Clariant's appeal focused on two main aggravating factors applied by the Commission:

— a 50% increase for recidivism on the basis of paragraph 28 of the Fining Guidelines, which provides that the basic amount of a fine can be increased by up to 100% when an undertaking continues or repeats "a similar infringement." The Commission had previously sanctioned Clariant for its participation in a sales cartel almost seven years before the 'new' conduct at issue in *Ethylene* commenced;[87] and

— a 10% increase based on paragraph 37 of the Fining Guidelines, according to which the Commission may depart from its guidance where "the particularities of a given case or the need to achieve deterrence" justifies

[80] *Servier v. Commission* (Case T-691/14) EU:T:2018:922, which has been appealed and is pending before the Court of Justice. *See Commission v. Servier and Others* (Case C-176/19 P).

[81] *Clariant and Clariant International v. Commission* ("Clariant v. Commission") (Case T-590/20) EU:T:2023:650.

[82] *Ethylene* (Case COMP/AT.40410), Commission Decision of July 14, 2020.

[83] *Ibid.*, para. 6.

[84] *Ibid.*, paras. 96–97.

[85] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2 ("Fining Guidelines").

[86] The Commission also calculated an additional amount ("entry fee") of 15% of affected purchases, and the infringement's duration was more than five years. Clariant received a 30% fine reduction under the leniency regime and a 10% reduction for cooperating in the settlement procedure. *Ethylene*, paras. 127–131, 157–160, 165–166.

[87] *Clariant v. Commission*, para. 81, citing MCAA (Case No COMP/E-1/.37.773), Commission Decision of January 19, 2005.

it.[88] According to the Commission, this adjustment was appropriate given the nature of a purchasing cartel, the purpose of which is to reduce prices (and thus, to the extent the cartel is effective, to reduce the basis on which any eventual fine for the conduct is calculated). Using the unadjusted value of purchases for the basic amount of the fine would therefore have an insufficient deterrent effect.[89]

Judgment

The General Court dismissed Clariant's appeal and the Commission's counterclaim, finding in particular that:

— **The Commission was permitted to apply a recidivism multiplier even though Clariant's previous Article 101 infringement was not a purchasing cartel.** Clariant argued that the Commission was wrong to apply a 50% recidivism multiplier, since: (i) the previous cartel infringement it had committed was a sell-side cartel that was not "similar" to the purchasing cartel at issue; and (ii) the first infringement had ended more than 12 years before the purchasing cartel came into effect. The General Court rejected both arguments. The Court recalled the Commission's "particularly wide discretion as regards the choice of factors" used for determining fines,[90] including with respect to assessing the specific characteristics of repeat infringements.[91] It held that the buy-side and sell-side cartels were similar enough to count for recidivism purposes because both were violations of Article 101 TFEU and the infringing conduct in each case shared some characteristics, including being agreements to fix a price element and exchanging commercially sensitive information that was relevant to pricing.[92] The Court further held that the relevant period for this purpose is the time between the Commission's first infringement decision – not the end of the first infringement – and the beginning of the second infringement. In this case that period was slightly less than seven years, and the Court endorsed the Commission's finding that this constituted a "limited period" that was short enough to count for recidivism purposes.[93]

— **The Commission was permitted to apply a 10% fine uplift to ensure suitable deterrence given the nature of a purchasing cartel.** Clariant argued that the Commission's 10% uplift was incorrect, principally because the Commission failed to take into account evidence that the infringing conduct was incapable of having any effect on the ethylene market price. The General Court rejected this claim, noting first that while the Commission must adhere to rules imposed on itself, paragraph 37 of the Fining Guidelines specifically entails a possibility for departing from the general fine calculation method if necessary to ensure deterrence in a particular case.[94] The Court found that the Commission did not have to show that the conduct had any effect in the market in order to apply an increase for deterrence.[95] It also endorsed the Commission's view that, in case of a purchasing cartel, the value of purchases is not a good proxy for the economic importance of the infringement, as such an approach would result in a situation where "the amount of the fine is inversely proportional to the objective of the cartel."[96] Given the nature of a purchasing cartel, it was therefore appropriate and within the Commission's discretion to apply a 10% deterrence multiplier.

[88] *See* the Fining Guidelines, *supra*, para. 37.

[89] *Ethylene*, paras. 141–148.

[90] *Clariant v. Commission*, para. 48.

[91] *See Groupe Danone v. Commission* (Case C-3/06 P) EU:C:2007:88, paras. 37–38, and *Nec v Commission* (Case T-341/18) EU:T:2021:634, paras. 103–104.

[92] *Ibid.*, paras. 71–73.

[93] *Clariant v. Commission*, paras. 80, 86–89.

[94] *Ibid.*, paras. 118–119.

[95] *Ibid.*, paras. 121, 125–127.

[96] *Clariant v. Commission*, para. 140.

— **Clariant's settlement discount should not be withdrawn for appealing the Commission's fine calculation methodology.** The Commission noted that Clariant had agreed in the settlement proceeding to pay a fine in excess of the amount eventually applied and argued that by appealing the settlement decision Clariant's 10% settlement discount should be withdrawn, since the appeal negated the settlement procedure's efficiency benefits that are the basis for the discount.[97] The General Court rejected the Commission's proposed fine increase. The Court noted that in its appeal Clariant had not challenged facts it had recognized in its settlement submission or accepted during the settlement procedure. Although Clariant had agreed to pay a certain maximum fine amount, which (at least implicitly) took into account the disputed 50% and 10% multipliers discussed above, there had been no "common understanding" on the Commission's calculation methodology: while the Commission had indicated its intention to apply the disputed multipliers in bilateral settlement discussions, the multipliers were not referenced in the Commission's statement of objections or in Clariant's settlement submission in which it accepted the maximum fine.[98] In addition, despite the appeal, the settlement process had still afforded the Commission some procedural efficiencies. The Court held that it was therefore not justified to withdraw Clariant's 10% settlement discount.[99]

Discussion

This judgment is significant for two reasons. First, it illustrates the Commission's wide discretion in imposing fines for Article 101 TFEU infringements, which allows it to consider a variety of factors for the purposes of punishing recidivism or ensuring deterrence given the specific characteristics of a case. Second, it shows that cartel participants will not necessarily be punished for appealing settlement decisions, so long as they do not contest items to which they have specifically agreed in the context of the settlement. It will be interesting to see whether the Commission uses the judgment as a basis for tightening the requirements it imposes on settlement submissions—and what effect such tightening might have on the attractiveness of settlement proceedings—in an effort to avoid appeals in future cases.

[97] *Clariant v. Commission*, paras. 195–206.

[98] *Ibid.*, paras. 217–219.

[99] *Ibid.*, para. 230.

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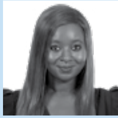

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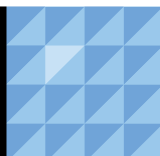

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