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EU Competition Law Newsletter

Highlights

— The Court of Justice Reiterates that "Staggered Hybrid Settlements" Are In Principle Compatible With The Presumption of Innocence And The Principle of Impartiality: *HSBC v. Commission* (Case C-883/19)

The Court of Justice Reiterates that "Staggered Hybrid Settlements" Are In Principle Compatible With The Presumption of Innocence And The Principle of Impartiality: *HSBC v. Commission* (Case C-883/19)

On January 12, 2023, the Court of Justice partially upheld HSBC's appeal[1] against the General Court's judgment of September 24, 2019.[2] In that earlier judgment, the General Court had itself largely upheld the Commission decision fining HSBC for infringing Article 101 TFEU by participating in the *Euro Interest Rate Derivates* ("EIRDs") cartel.[3] In its appeal to the Court of Justice, HSBC advanced two key claims. First, HSBC claimed that the "hybrid" settlement procedure, under which the Commission settles with some parties implicated in a cartel while continuing to pursue an adversarial case against others, had pre-judged the case against HSBC. Second, HSBC argued that statements made by Mr. Almunia as Commissioner for Competition while the case was ongoing called into question the "subjective impartiality" of the Commission. Subjective impartiality requires that no member of the institution that is responsible for the matter may show bias or personal prejudice.

The Court of Justice ruled that the General Court: (i) had failed to distinguish between the presumption of innocence and the right to an impartial administration; and hence (ii) had not assessed whether Mr. Almunia's statements complied with the right to subjective impartiality. However, the Court of Justice, giving final judgment in the case, found that: (i) the Commission had taken sufficient drafting precautions to avoid any premature expression of liability in the settlement decision; and (ii) that Mr. Almunia's statements, even if objectionable, were ultimately immaterial. The Court of Justice

[1] *HSBC Holdings and Others v. Commission* (Case C-883/19) EU:C:2023:11.

[2] *HSBC Holdings and Others v. Commission* (Case T-105/17) EU:T:2019:675.

[3] *Euro Interest Rates Derivatives* (Case COMP/AT. 39914), Commission decision of December 7, 2016.

thus set aside the judgment of the General Court but nonetheless dismissed HSBC's action for annulment of the Commission decision, putting an end to the protracted proceedings.

Background: The EIRDs Cartel

In June 2011, Barclays informed the Commission of the existence of a cartel relating to EIRDs linked to the Euribor and EONIA benchmarks as part of an immunity plea. Following inspections at the premises of a number of financial institutions, the Commission initiated infringement proceedings against Barclays, HSBC, Crédit Agricole, Deutsche Bank, JPMorgan Chase, Royal Bank of Scotland and Société Générale. Shortly after, the Commission settled with Barclays, Deutsche Bank, Société Générale and Royal Bank of Scotland, fining them €1.042 billion (later reduced to €824 million)[4] for breaching Article 101 TFEU.[5] HSBC, Crédit Agricole and JPMorgan Chase, however, decided not to settle. In December 2016, the Commission fined the three financial institutions a total of €485 million, of which €37 million were imposed on HSBC.[6]

This scenario, where the Commission settles with some parties to an infringement while continuing with the standard infringement procedure against others, is called a "staggered hybrid settlement" procedure.

The General Court Dismisses HSBC's Action, But Reduces The Fine

In February 2017, HSBC challenged the Commission decision before the General Court. HSBC notably claimed that the Commission had breached the presumption of innocence and the right to an impartial administration by adopting a position on HSBC's participation in the cartel in the 2013 settlement decision, to which HSBC was not a party. HSBC also asked for the annulment of the Commission decision, or otherwise the reduction of the fine, on the ground that the Commission had failed to state reasons when calculating the fine.

In September 2019, the General Court largely dismissed HSBC's appeal, but annulled the Commission's fine.[7] In particular, the General Court upheld HSBC's argument that the Commission had not given sufficient reasons as to the determination of the 98.849% reduction factor that the Commission had applied to the value of sales when calculating the amount of the fine.[8] As a result, the Commission amended and re-adopted the infringement decision, reducing HSBC's fine to €32 million.[9]

In December 2019, HSBC appealed the judgment to the Court of Justice.

The Court of Justice Confirms the Commission's Decision Despite Partially Upholding HSBC's Appeal

The Court of Justice found that the General Court made two errors of law:

— First, the General Court failed to distinguish between the presumption of innocence and the right to an impartial administration, insofar as the General Court had not assessed whether Mr. Almunia's statements, made as Commissioner for Competition while the case was ongoing,[10] complied with the right to subjective impartiality.[11] According to the Court of Justice,

[4] Société Générale's initial fine of €446 million was later reduced to €228 million following Société Générale's amended reply to the Commission's request for information on the values of its sales.

[5] *See* Commission settlement decision of December 4, 2013, and Commission amending decision of April 6, 2016, (Case AT.39914). The financial institutions concerned received reductions from 5-100% under the Leniency Notice based on the degree of their collaboration in revealing and establishing the infringement.

[6] *Euro Interest Rate Derivatives* (Case COMP/AT. 39914), Commission decision of December 7, 2016.

[7] *HSBC Holdings and Others v. Commission* (Case T-105/17), *supra.*, paras. 336 *et seq.*

[8] *Ibid.*

[9] *See* Commission Press Release MEX/21/3283, "Antitrust: Commission amends and re-adopts decisions in the Euro Interest Rate Derivatives cartel," June 28, 2021.

[10] In January 2014, Mr. Almunia said, when addressing the French senate, that "[the case] *is not the most difficult in the world*." On other occasions, Mr. Almunia had also promised results and suggested that he would probably finalize the case before the end of his term. *See* Christian Oliver, "'Maladministration' found in Euribor probe of Crédit Agricole," Financial Times, March 12, 2015, available here.

[11] *HSBC Holdings and Others v. Commission* (Case C-883/19), *supra.*, para. 86.

therefore, while the presumption of innocence and the right to an impartial administration overlap in their "objective dimension," the right to an impartial administration includes an additional layer, covering "subjective impartiality," which the General Court failed to review.[12]

— Second, the General Court erred in holding that irregularities affecting the presumption of innocence could only lead to the annulment of the decision if it were established that, without those irregularities, the content of the decision would have been different.[13] The Court of Justice clarified that the infringement of the principle of impartiality and the presumption of innocence constitutes a sufficiently serious breach that, in itself, is capable of justifying the annulment of the contested decision.[14]

The Court of Justice therefore partially upheld HSBC's appeal.[15] But in giving final judgment in the long-running case, it nonetheless dismissed HSBC's action and upheld the Commission's decision.[16] In particular, the Court of Justice found that, while HSBC had been correct as to the procedural framework that was relevant to assess the case, the application of this framework did not evidence that HSBC's rights had been breached:

— First, the Court of Justice concluded that the Commission had not breached the presumption of innocence because the Commission: (i) had taken sufficient drafting precautions in the 2013 settlement decision in order to avoid premature judgment as to HSBC's liability; and (ii) the references made to HSBC in the settlement decision were strictly necessary to understand the facts of the settlement.[17]

— Second, the Court of Justice concluded that the Commission had not breached HSBC's right to impartial administration.[18] HSBC had argued that the Commission had violated its right to subjective impartiality based on a series of statements made by then Commissioner for Competition, Mr. Almunia, while the case was ongoing. The Court of Justice acknowledged that "some of those statements are couched in language which does not reflect the caution which would have been expected of the member of the Commission in charge of competition policy in the context of an ongoing case."[19] But the Court of Justice concluded that Mr. Almunia's statements did not cast a doubt on the impartiality of the Commission's investigation, leading to the adoption of the contested decision, which therefore remained valid.

The Court of Justice's Judgment Endorses Staggered Hybrid Settlements

In *Icap*, the General Court had suggested that it may be appropriate for the Commission to simultaneously adopt both the settlement and the prohibition decisions in order to safeguard the presumption of innocence *vis-à-vis* non-settling parties.[20] In *Pometon*, however, the Court of Justice held that the Commission's staggered hybrid settlement did not, as a matter of principle, breach Pometon's presumption of innocence insofar as the Commission had taken sufficient precautions in drafting the settlement decision.[21] These two approaches triggered a debate as to which path would be the most appropriate: either simultaneous or staggered hybrid settlements.[22] Over the last year, the Courts have twice confirmed that a staggered approach can be appropriate. In *Scania*, the General Court endorsed staggered

[12] The principle of impartiality, enshrined within the right to good administration, encompasses: (i) subjective impartiality, *i.e.*, no member of the institution concerned who is responsible for the matter may show bias or personal prejudice; and (ii) objective impartiality, *i.e.*, there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned (*see HSBC Holdings and Others v. Commission* (Case C-883/19), *supra.*, para. 77).

[13] *Ibid.*, paras. 87 and 91-96.

[14] *Ibid.*, para. 95.

[15] *Ibid.*, para. 186.

[16] *Ibid.*, paras. 190 *et seq.*

[17] *Ibid.*, paras. 217-233.

[18] *Ibid.*, paras. 234-247.

[19] *Ibid.*, para. 242.

[20] *Icap v. Commission* (Case T-180/15) EU:T:2017:795, para. 268.

[21] *Pometon SpA v. Commission* (Case C-440/19 P) EU:C:2021:214.

[22] *See* our March 2021 EU Competition Law Newsletter.

hybrid settlements, and the Court of Justice has now done the same in *HSCB*, with both judgments referencing the *Pometon* ruling.[23] This endorsement of the staggered approach comes with the qualifier that the settlement decision must be drafted thoughtfully so as to protect the rights of the non-settling parties.

News

Commission Updates

Commission Extends Whistleblower Tool to Merger and State Aid Infringements

On January 9, 2023, the Commission announced that it is expanding the scope of the whistleblower tool to cover not only possible antitrust infringements, but also breaches relating to the rules around merger control and State aid.[24]

Recognizing that inside knowledge can be a powerful tool to uncover competition infringements, in 2017, the Commission introduced a tool allowing individuals to secretly reach out to the Commission with information on cartels and other antitrust violations without risking retaliation.[25] To ensure the whistleblowers' anonymity, the Commission provides an encrypted messaging system, run by a specialized external service provider. The intermediary makes sure the messages sent to the Commission do not contain any metadata that could be used to identify the individual providing the information.

The whistleblower tool was designed to complement and reinforce the effectiveness of the Commission's leniency program, which allows entities participating in cartels and other antitrust breaches to confess their involvement in the infringement in exchange for either immunity from, or reduction of, fines.[26]

The Commission reports that it has received approximately 100 messages per year via the whistleblower tool, which has contributed to enabling prompter detection and investigation of unlawful practices. In light of this success, the Commission has now decided to expand the tool's scope. Up until now, individuals could only report on possible cartels and other antitrust infringements (*e.g.*, price-fixing and bid-rigging agreements and attempts to unfairly exclude rivals). Going forward, individuals may also anonymously inform the Commission of possible merger control and State aid breaches, notably "gun-jumping" infringements (*i.e.*, implementation of mergers with a Union dimension before the Commission clears them) and unlawful aid (*i.e.*, aid measure granted by a Member State to a company without prior Commission approval).

With the expansion of this tool's scope, the Commission expects to deter merger control and State aid wrongdoing and to strengthen the Commission's detection and investigation in these two areas.

Commission Consults on Notification Requirements and Process for EU Foreign Subsidies Regulation

On February 6, 2023, the Commission launched a public consultation on its proposed rules and procedures for merger and public procurement notifications under the EU Foreign Subsidies Regulation ("FSR"). These notification obligations come into effect on October 12, 2023.[27]

[23] *Scania and Others v. Commission* (Case T-799/17) EU:T:2022:48, paras. 127-128; and *HSBC Holdings and Others v. Commission* (Case C-883/19) EU:C:2023:11, paras. 76-80, 88-90 and 224-225.

[24] Commission Press Release MEX/23/104, "Competition: Commission extends scope of anonymous whistleblower tool," January 9, 2023.

[25] Commission Press Release IP/17/591, "Antitrust: Commission introduces new anonymous whistleblower tool," March 16, 2017.

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

[27] For a summary of the Commission's proposed rules and procedures published in the form of a Draft Implementing Regulation, *see* our Alert Memo, "*Commission Consults on Notification Requirements and Process for EU Foreign Subsidies Regulation*," February 9, 2023, available here. Interested parties may provide feedback on the Commission's proposal until March 6, 2023.

The FSR, which entered into force on January 12, 2023, establishes a mandatory notification regime for certain large mergers or public tenders for companies that have received substantial financial contributions from non-EU governments.

Court Updates

Unilever: Imputing a Distributor's Conduct to its Supplier and Applying the "Intel" Principle to Exclusivity Clauses

On January 19, 2023, the Court of Justice ruled on two questions referred to it by the Italian *Consiglio di Stato* (Council of State) in *Unilever*:[28] (a) whether autonomous and independent companies linked by contractual ties can constitute a "single economic unit"; and (b) whether the Court of Justice's ruling in *Intel*,[29] namely that antitrust authorities must examine evidence put forward by the defendant that conduct is not capable of foreclosing equally efficient competitors, applies to practices beyond the exclusivity rebates.

In October 2017, the Italian Competition Authority ("AGCM") fined Unilever Italia Mkt. Operations Srl ("Unilever IT") €60.7 million for abuse of dominance in relation to the wholesale supply of so-called "impulse" ice creams in Italy. The alleged strategy involved exclusivity obligations that required retailers to source all their impulse ice cream from Unilever, as well as a range of loyalty rebates in the form of discounts and sales bonuses for retailers to incentivize this exclusivity. The AGCM concluded that the exclusivity obligation and loyalty rebates, which were largely implemented by Unilever IT's network of 150 independent distributors, could be imputed to Unilever IT as a single economic unit, which would include its distributors. Unilever IT appealed this decision to the *Consiglio di Stato*, which sought a preliminary ruling on both this issue and Unilever IT's claim that the AGCM had wrongly refused to analyze economic studies it had submitted during the investigation.

On the first question, the Court of Justice ruled that actions of distributors can be imputed to a dominant undertaking if those actions were not adopted independently by those distributors, but formed part of a policy that was unilaterally decided by the producer and implemented through those distributors.[30] The Court of Justice started its reasoning by referring to the special responsibility that dominant undertakings have to not impair competition. It explained that this obligation not only aims to prevent infringements directly caused by dominant undertakings, but also those caused by conduct delegated by the dominant undertaking to independent operators (*e.g.*, distributors).[31] In the latter situation, the conduct implemented by the distributor can be imputed to the dominant undertaking if the conduct was in line with the dominant undertaking's specific instructions and part of a unilaterally decided policy with which the distributor was obliged to comply.[32] This is particularly the case when the conduct is based on standard contracts with exclusivity clauses, drawn up by the dominant producer and without the possibility for the distributors to amend them. In such circumstances, the conduct can be imputed to the dominant undertaking because it is aware that the distributor will implement its instructions and commercial policy, and is thereby prepared to bear the risk for such conduct.[33]

On the second question, the Court of Justice ruled that when undertakings provide antitrust authorities with economic analyses showing that the exclusivity clauses at issue are not capable of excluding equally efficient competitors, competition authorities cannot disregard this evidence without examining its probative value.[34]

[28] *Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato* (Case C-680/20) EU:C:2023:33.

[29] *Intel Corporation Inc v. Commission* (Case C-413/14 P) EU:C:2017:632.

[30] *Unilever Italia Mkt. Operations Srl v. Autorità Garante della Concorrenza e del Mercato* (Case C-680/20) EU:C:2023:33, para. 33.

[31] *Ibid.*, paras. 28-29.

[32] *Ibid.*, para. 29.

[33] *Ibid.*, para. 31.

[34] *Ibid.*, para. 60.

The Court of Justice explained that exclusivity clauses by their nature give rise to legitimate competition concerns, but that their ability to exclude as efficient competitors cannot be automatically assumed.[35] In line with its ruling in *Intel* concerning rebate schemes, the Court of Justice found that in relation to exclusivity clauses competition authorities have to: (i) show that the clauses are actually capable of excluding as efficient competitors when the undertaking disputes this with supporting evidence; and (ii) assess the ability of the clauses to restrict competition when the undertaking argues that there are justifications for its conduct.[36]

Heat Stabilisers Litigation Saga Nears Its End, as General Court Dismisses All of GEA Group's Pleas

On January 25, 2023, 23 years after the infringement in the *Heat Stabilisers* cartels ceased, the General Court adopted a judgment dismissing GEA Group AG ("GEA")'s claim that the Commission infringed the principle of equal treatment when setting the amount of the fines, thereby contradicting its own 2018 ruling on the same facts.[37]

Background

In 2009, the Commission fined a number of companies for their participation in the *Heat Stabilisers* price-fixing and market-sharing cartels during most of the '90s and ending in 2000.[38] Four of the addressees of the decision were the predecessors of GEA, ACW,[39] and CPA,[40] which at the time formed part of the same economic group. GEA challenged this decision, but, in 2015, the General Court upheld it.[41]

In 2010, the Commission adopted a decision amending the 2009 decision ("the 2010 Decision"),[42] after ACW drew its attention to the fact that the fines imposed exceeded the statutory 10% turnover ceiling.[43] In the 2010 Decision, the Commission reduced the total amount of the fines imposed on ACW by: (i) reducing by 100% ACW's part of the fine for which it was jointly and severally liable with GEA; and (ii) reducing by 43% the part of ACW's fine for which it was jointly and severally liable with GEA and CPA. This decision was annulled by the General Court on procedural grounds[44] and re-adopted with similar terms by the Commission in 2016 (the "Contested Decision").[45] GEA appealed, arguing that the way in which the Commission had reduced ACW's fine benefitted CPA, breaching the principle of equal treatment.[46] In 2018, the General Court annulled the Contested Decision.[47] The Commission contested this judgment successfully, as the Court of Justice annulled it and referred the case back to the first instance.[48]

General Court

Ruling for a second time on the same facts, the General Court concluded that the Contested Decision did not infringe the principle of equal treatment. The Commission has the power to

[35] *Ibid.*, para. 51.

[36] *Ibid.*, paras. 52-53.

[37] *GEA Group AG v. Commission* (Case T-640/16 RENV) EU:T:2023:18.

[38] *Heat Stabilisers* (Case COMP/38589), Commission decision of November 11, 2009.

[39] Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH.

[40] Chemson Polymer-Additive AG.

[41] *GEA Group AG v. Commission* (Case T-45/10) EU:T:2015:507. No appeal was brought against this judgment, meaning that the attribution of the infringement to GEA has become final.

[42] *Heat Stabilisers* (Case COMP/AT.38589), Commission decision of February 8, 2010.

[43] Council Regulation (EC) No 1/2003 of 16 December, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, Article 23(2).

[44] *GEA Group AG v. Commission* (Case T-189/10) EU:T:2015:504. The General Court annulled the 2010 Decision insofar as it concerned GEA, finding that, by adopting the 2010 Decision without first hearing GEA or giving it access to the file, the Commission had infringed that company's rights of defense. No appeal was brought against this judgment.

[45] *Heat Stabilisers* (Case COMP/AT.38589), Commission decision of June 29, 2016.

[46] As a result of the Contested Decision, GEA became: (i) solely liable for one of the fines; and (ii) liable for a higher fine severally and jointly with CPA. GEA argued that the Commission should have applied the 10% ceiling proportionately to both fines.

[47] *GEA Group AG v. Commission* (Case T-640/16) EU:T:2018:700.

[48] *Commission v. GEA Group AG* (Case C-823/18 P) EU:C:2020:955.

impose a fine jointly and severally on several legal persons belonging to a single undertaking (which the predecessors of GEA, ACW and CPA formed at the time of the infringement), and is entitled to determine its maximum amount. The fact that GEA remained solely liable for one of the fines is purely an automatic result of the reduction applied to the fine imposed on ACW. Since the two companies no longer constituted a single undertaking on the date of the adoption of the Contested Decision, the reduction could not be extended to GEA. As such, no unequal treatment occurred.

The General Court also dismissed GEA's claim that the Commission infringed the rules on limitation periods. While limitation periods under EU competition law are relatively complex,[49] the period essentially expires 10 years following the end of the infringement. According to the applicant, the Contested Decision was adopted after the expiration of the 10-year period. In its new judgment, the General Court stresses that, for the purposes of applying the rules on limitation periods, account should be taken of the date on which the Commission decided to impose the fine, not the date on which an amending decision was adopted.[50] In line with the judgment on appeal, the General Court found that the relevant decision is the 2009 fining decision, not the Contested Decision, because neither the 2010 Decision nor the Contested Decision altered the Commission's 2009 decision to fine GEA.

Dismissing all other pleas as unfounded, the General Court dismissed GEA's action in its entirety, reverting its prior judgment on the same facts. GEA could still appeal again to the Court of Justice.

[49] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, Articles 23(2)(a) and 25(2), (3), (5), and (6).

[50] *Corporación Empresarial de Materiales de Construcción v. Commission* (Case T-250/12) EU:T:2015:749, paras. 74-77.

AUTHORS

Conor Opdebeeck-Wilson
T: +32 22872211
copdebeeckwilson@cgsh.com

Camilla Cozzani
T: +32 2 287 2035
ccozzani@cgsh.com

David Pérez de Lamo
T: +32 2 287 2067
dperezdelamo@cgsh.com

Andrea Chong
T: +32 2 287 2196
anchong@cgsh.com

Fahira Hasic
T: +32 2 287 2303
fhasic@cgsh.com

Solenn Dietrich-Urien
T: +33 1 40 74 84 13
sdietrichurien@cgsh.com

João Francisco Barreiros
T: +32 2 287 2352
jbarreiros@cgsh.com

PARTNERS AND COUNSEL, BRUSSELS

Antoine Winckler
awinckler@cgsh.com

Patrick Bock
pbock@cgsh.com

Maurits Dolmans
mdolmans@cgsh.com

Christopher Cook
ccook@cgsh.com

Romano Subiotto KC
rsubiotto@cgsh.com

Mario Siragusa
msiragusa@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Stephan Barthelmess
sbarthelmess@cgsh.com

Nicholas Levy
nlevy@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

F. Enrique González-Díaz
fgonzalez-diaz@cgsh.com

François-Charles Laprévote
fclaprevote@cgsh.com

Robbert Snelders
rsnelders@cgsh.com

Isabel Rooms
irooms@cgsh.com

Thomas Graf
tgraf@cgsh.com

Andris Rimsa
arimsa@cgsh.com

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