



International Comparative Jurisprudence



RECENT CJEU CASE LAW TRENDS IN COMPETITION LAW¹

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Received 11 July 2017, accepted 16 October 2017

Abstract. The objective of this article is to present the most significant recent case law of the Court of Justice of the European Union (CJEU) related to the competition law. Firstly, focus is given to some recent CJEU case law in the antitrust area, i.e. the judgments dealing with the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). A special attention is paid to the most recent CJEU case law analyzing the distinction between the object and effect of the prevention, restriction or distortion of competition. Secondly, some significant State aid cases are dealt with, i.e. the cases related to the application of Article 107 TFEU. Although the CJEU case law has not recently undergone major changes in the competition law field, the article reflects the main trends towards the current jurisprudence and what challenges may be expected in the future.

Keywords: European Union law, Competition law, Cartels, Anticompetitive object and effect, State aid.

Introduction

Europe has just marked the 60th anniversary of the signing of the Treaty of Rome (1957). An efficient and strong competition law policy has always been one of the keystones of the European Economic Community and later – of the European Union (hereinafter referred to as the ‘EU’, ‘Union’). It is undisputable that the latter rules help to maintain a better competition between enterprises in the EU. It *inter alia* leads to better quality and wider choice of products and services, lower prices, more innovations and stronger EU competitors in global markets.

European Union institutions act closely towards the goal that all these aforementioned issues were properly achieved. While the European Parliament, the EU Council or the European Council work in the legislative field of competition law and play an important role in forming the competition law policy in general, the ensuring of due application and interpretation of EU competition law rules is designated for the European Commission (hereinafter referred to as the ‘Commission’), and – in case of a legal dispute before it – for the Court of Justice of the European Union³.

In fact, the CJEU is the main actor in developing the uniform practice of the interpretation of the EU law, not excluding the competition field. As neither the courts of the Member States, nor other international courts are entitled to officially interpret the EU legal norms, the CJEU role becomes extremely important in the EU legal structure. Since its establishment in 1952⁴, the CJEU mission has always been to ensure that the law is observed ‘in the interpretation

¹ This article is based on the presentation at the Forum for EU-US Legal-Economic Affaires held in Brussels on 4 April 2017 which was prepared with precious assistance of Ieva Jasinauskaitė and Maxime Hauviller. The present remarks in no way reflect the view of the Court or other judges.

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³ According to the Section 5 of the Treaty on the Functioning of the European Union (hereinafter referred to as ‘TFEU’), the Court of Justice of the European Union (CJEU) consists of the Court of Justice and the General Court. While talking about two jurisdictions I am using the ‘Court of Justice’ or simply ‘ECJ’ and ‘General Court’. Meanwhile the term ‘CJEU’ is used to reflect the both Union judicial bodies as EU judicature in general.

⁴ At the time called as Court of Justice of the European Coal and Steel Communities.

and application' of the Treaties. In the field of competition law, the role of the CJEU is schematically twofold: firstly, to ensure the effective and uniform application of the Union legislation and to avoid any divergent interpretation. That is mainly ensured by means of the preliminary rulings on the questions referred by the courts of the Member States. Secondly, the CJEU is entitled to review the legality of the Commission activities: the Commission decisions to impose, for instance, liability for EU competition law infringements may be challenged to the General Court. The Court of Justice – if appropriate – hears the appeals on the judgments of the General Court and further develops the CJEU jurisprudence.

It should not be forgotten that the importance of the CJEU jurisprudence has two sides. On the one hand, the CJEU renders judgments which are important for particular cases and cause consequences for the parties of these cases. On the other hand, while rendering judgments the CJEU provides interpretations which are significant for other cases: the CJEU rulings are later followed by national competition authorities, national courts, the Commission and the CJEU itself in its case law.

The development and application of competition rules within the EU is subject to review by the Union judge. This paper examines the latest CJEU case law, which resulted in drawing up, clarifying, affirming or reaffirming certain issues of competition law throughout the EU.

Some statistical data on the basis of the number of cases brought before the General Court might be helpful. In case of the Court of Justice, such statistical analysis would be less relevant. As the statistical data of the General Court better represents the actual situation and the news in the field of competition law, the focus on the latter is more relevant.

It is worth noting that regulation in the competition area underwent numerous developments during the last decade. Nowadays due to some objective reasons CJEU receives much fewer competition disputes than before. It certainly reflects to the case law developments within the EU judiciary⁵.

Since 2010, the number of antitrust cases (cases related to the application of the rules set in Articles 101 and 102 TFEU) brought before the General Court has decreased 4 times. This is, on the one hand, a direct consequence of the Commission's increasing use of the EU cartel Settlement procedure adopted in 2008 (Commission regulation No 622, 2008, p. 3-5). To be more precise, this procedure was used in 60% of the cases between May 2010 and May 2015 (Hauviller and Perret, 2015, p. 232). In 2010, antitrust cases still constituted around 12.5% of appeals before the General Court (79 cases out of 636 cases), whereas in 2016 such cases represented only 2% of all the appeals before the General Court (18 cases out of 974). On the other hand, the length of judicial procedure in competition cases before the 2016 reform of the CJEU could satisfy neither undertakings involved in competition disputes, nor the EU policy makers⁶.

⁵ One could reasonably argue that limitation of the CJEU intervention due to settlement procedure, commitment decisions etc. although has a positive effect on the duration of the legal dispute does not play a positive role on further development of the case law in the competition area.

⁶ One of the main reasons for reforming the Court of Justice of the European Union was the growing caseload and unsatisfactory length of proceedings before the General Court, in particular in competition cases. Recently for the first time several applicants have been granted material and non-material damages as a result of excessive length of proceedings in *Gascogne* (see judgment of the General Court of 10 January 2017, *Gascogne Sack Deutschland GmbH and Gascogne / European Union*, case T-577/14). Further developments in the case law regarding damages because of excessive length of proceedings are reflected in *Kendrion* (judgment of the General Court of 1 February 2017, *Kendrion NV / European Union*, represented by the Court of Justice of the European Union, case T-479/14), in *Aalberts Industries* (judgment of the General Court of 1 February 2017, *Aalberts Industries NV v European Union*, represented by the Court of Justice of the European Union, case T-725/14) and in *Plásticos Espanoles* (judgment of the General Court of 17 February 2017, *Plásticos Españoles, SA (ASPLA) and Armando Alvarez, SA / European Union*, represented by the Court of Justice of the European Union, case T-40/15). The most recent General Court judgment in this category of cases was delivered on 7 June 2017 in *Guardian* case (judgment of the General Court of 7 June 2017, *Guardian Europe Sàrl / European Union*, case T-673/15). The General Court found that in this case the length of the proceedings, which took four years and seven months, could not be justified. *Guardian* was awarded the compensation of EUR 654 523.43, which was adjusted for compensatory interest. However, the General Court has not awarded the non-material damages as it was not proved that the infringement was such as to damage its reputation.

Although appeals are still pending before the Court of Justice one could realize that Article 340 TFEU ('<...> In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused

However talking about the proceedings in the field of State aid, the situation is somewhat different. Notwithstanding the notable exception in 2014, when the State aid cases constituted more than 16% of all the appeals before the General Court (148 out of 912 cases), their proportion normally is relatively stable, *i.e.* around 6–8% of all the appeals. It should be noted however that despite the percentage stability, the number of appeals brought in this area rose from 42 in 2010 to 76 in 2016 (CJEU Annual report, 2016, p. 206). The ‘exception of 2014’ was due to numerous appeals made by German companies against the Commission decision in the so called *EEG*⁷ case.

Moreover, in addition to receiving fewer competition disputes than before, the main competition law issues dealt by the General Court have significantly changed since the beginning of 2010. Currently the issues concerned are mainly related to sanctions, that is, for example, imputability of infringements or amount of fines but this is not a subject of my intervention.

The legal order imposed in TFEU⁸ serves as a background to structure my paper on a few axes: (1) some recent CJEU case law in the antitrust law field, with particular interest of distinction between *object* and *effect* of the prevention, restriction or distortion of competition, *i.e.* the cases related to the application of Articles 101 and 102 TFEU; (2) some significant State aid cases are dealt with, *i.e.* the cases related to the application of Article 107 TFEU.

1. Some CJEU case law developments in the field of Antitrust

1.1. Article 101 TFEU

In recent years the CJEU has rendered several important judgments concerning what should (or should not) be treated as prohibited concerted practices of undertakings in terms of Article 101 TFEU. Under the said Article, all agreements between undertakings, decisions by associations of undertakings and concerted practices having as their *object or effect* the prevention, restriction or distortion of competition within the internal market are prohibited as incompatible within the internal market. Although the CJEU jurisprudence is well established in this area, every year both the General Court and the Court of Justice face new issues which are more or less different from the previously resolved. I will shortly mention and comment some judgments in which the CJEU further developed its case law and gave new insights about the understanding of prohibited concerted practices in EU law.

1.1.1. Distinction between anti-competitive object and effect

The issue of distinction between the *object* and *effect*⁹ on the prevention, restriction or distortion of competition has been quite widely discussed and one could indeed consider that this distinction has recently dominated in the debates at the EU judicature.

by its institutions or by its servants in the performance of their duties <...>’ has reached the CJEU as well. It is expected that the reform which has just been implemented at the EU judicature would drastically decrease the length of proceedings and let to avoid the situations indicated above.

⁷ The latter General Court judgment is dealt with below.

⁸ The basic EU competition rules are laid down in the TFEU. The competition rules provided in this legal document are classified into two sections – ‘Rules applying to undertakings’ (Title VII, chapter 1, section 1 of the TFEU – articles 101–102) and ‘Aids granted by states’ (section 2 of the previously mentioned chapter of the TFEU, articles 107–109). Thus, Article 101 TFEU prohibits agreements and concerted practices which restrict competition (cartels), whereas Article 102 TFEU prohibits abuse of a dominant position. These provisions have never been changed, and have stayed unmodified since the Treaty of Rome came into force (1 January 1958). Thus, Article 85 of the Treaty of Rome became Article 81 of the Amsterdam Treaty (1999), currently Article 101 of the Treaty of Lisbon (2009). Article 86 of the Treaty of Rome became Article 82 of the Treaty of Amsterdam and then Article 102 of the current TFEU. As regards State aids, their incompatibility with the internal market was originally provided in Article 92 of the Treaty of Rome, which was slightly amended by the Single European Act of 1986 (came into force in 1987), then it became Article 87 of the Treaty of Amsterdam, and finally Article 107 TFEU. It is worth noting that only the numeration of the mentioned articles has been changed, however the text of the legal provisions remained the same.

⁹ Both ‘object’ and ‘effect’ in the whole text are usually put in italics.

There are some recent cases in which the CJEU has provided meaningful rulings in the given area. Two issues are of particular interest – the general interpretations provided by the CJEU and particular examples what agreements, decisions or concerted practices were (or were not) treated as having anti-competitive object or effect.

The CJEU has recently brought more clarity on the subject matter with the *Cartes Bancaires* (2014, 2016): the two judgments of the General Court and the ECJ in this case could be considered as the key judgments for EU competition law as they have provided much awaited clarifications on the notion of restriction by *object*. The General Court following the interpretation provided by the ECJ has ruled that the concept of restriction by *object* shall be interpreted restrictively.

The latter case deserves more detailed presentation. The Groupement des Cartes Bancaires (hereinafter referred to as ‘the Grouping’) was established and led by a group of main French banks in order to manage a system for payments and withdrawals by bank cards issued by its members (around 150 French banks). The disputed Commission decision concluded that three pricing measures¹⁰ adopted by the Grouping had both the *object and effect* of restricting competition and therefore Article 101 TFEU was infringed. In Commission’s view, the purpose of these measures was to keep the price of payment cards artificially high thus giving an advantage to the major banks and causing harm to new market entrants. Moreover, speaking about the effect of restricting competition, the measures resulted in a reduction in issue plans for bank cards of new entrants and the prevention of a price reduction for bank cards, both for new entrants and for main members of the Grouping.

The General Court upheld the Commission decision, qualifying the measures at issue as restrictions of competition by *object*. The General Court, however, did not examine whether the qualification of restriction by *effect* was well founded, stating it was not necessary. The Court of Justice (2014) had a different view and was in favor of a full and detailed examination of the arguments of the parties. Therefore, the General Court (2016) had to verify whether the agreements of the Grouping had the *effect* of restricting competition.

The General Court then effectively upheld the Commission decision for the second time¹¹, ruling that these measures had the *effect* of restricting competition. As regards the notion of the restrictions of competition by *object*, the ECJ ruled (2014) in this case that the latter shall be limited to those which by their very nature and on the basis of the experience reveal a sufficient degree of harm to competition.

However, it should be noted that the interpretation of a restriction by *object* was not something brand new in the CJEU case law. For example, the Court of Justice has held that a restriction of competition could be qualified as by *object* only if it revealed ‘the effect on competition to be sufficiently deleterious’ already in 1966. The interpretations in the *Cartes Bancaires* however were of high importance as bringing more clarity into the subject at issue because in last years the ECJ case law on the subject matter was not consistent enough. Contrary to the interpretations given in *Societe Technique Miniere* (1966), the case law developed afterwards provided a wider understanding and extension of the conduct that shall be classified as restrictive by *object*, *i.e.* restriction by *object* was no longer interpreted restrictively as including only ‘sufficiently deleterious’ conduct but covered also other anti-competitive practices¹².

¹⁰ The pricing measures were the following: 1) a measure, known as ‘mechanism for regulating the acquiring function’ (MERFA), which required to pay a particular fee per issued card by banks that were not sufficiently active in acquiring activities (operating payments systems and ATMs) compared to their issuance activities (issuing bank cards to card holders); 2) three-year membership fee per active card issued; 3) a measure, known as ‘dormant member wake-up mechanism’ which constituted a fee per bank card issued to members that were inactive or not very active before the entry into force of the measures.

¹¹ The General Court has in essence upheld the Commission decision concluding in the enacting terms that Article 101 TFEU was infringed and obliging the Grouping to bring to an end this infringement. However it should be noted that the General Court partly annulled the order of this decision, insofar as the Grouping was obliged to ‘refrain in the future, from adopting any measure or behavior having an identical or similar object’, because the Grouping could not be refrained from adopting a measure that did not qualify as a restriction by *object*.

¹² For example, in the judgment in *T-Mobile* case (judgment of 4 June 2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV / Raad van bestuur van de Nederlandse Mededingingsautoriteit*, case C-8/08), the Court of Justice has held that ‘for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market’ (paragraph 31). This

Moreover it was not clear anymore how the boundaries between restriction by *object* and by *effect* should be set as the Court of Justice had previously applied in essence the same test both for determining restriction by *object* and by *effect* that is an effect examination was in fact required to apply also to determine restrictions by *object*¹³. Thus, the judgments in *Cartes Bancaires* clearly held that the concept of a restriction of competition by *object* must be interpreted restrictively and therefore limited to the restrictions which by their very nature harm competition.

The notion of restriction by *object* provided in this case could be illustrated by the comparison used in one of the Advocate General's (hereinafter referred to as 'AG') opinions – let me put her words in this way – drunk driving is bad as such and the punishment for it does not depend on the fact whether the drunk driver caused an accident (Case C-8/08, paragraph 47). The same could be said about the most detrimental agreements or concerted practices in competition law – even if they did not have any effect, they are so harmful by their essence that their object gives a justification for the punishment.

Following the 2014 judgment of the Court of Justice in *Cartes Bancaires*, the General Court assessment was limited to the possible anti-competitive effects of the measures at issue. Regarding this examination, the General Court followed some of its earlier case law by pointing out that in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute (paragraph 108). This does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason¹⁴, which the EU judicature has not deemed to have its place under Article 101(1) TFEU (paragraph 109). On the contrary, the examination required under Article 101(1) TFEU essentially consists of taking account of the impact of the agreement on existing and potential competition and the competition situation in the absence of the agreement (paragraph 110). This meant a need of an in-depth examination of the measures of different characteristics at issue.

In *Cartes Bancaires* the examination of the possible anti-competitive effects led to the outcome that the pricing measures at issue were qualified as restrictions of competition by *effect*. The General Court has finally reasoned that the measures at issue would result in additional costs for new entrants issuing bank cards and these costs would have actual or potential effect of requiring new entrants to increase the price of the cards or to issue fewer cards (paragraph 356).

Recently the ECJ had an opportunity to analyze a contractual clause that from the very first sight could seem as restricting competition by *object* and therefore being in non-conformity with Article 101 TFEU. However the mere wording of a clause letting for a commercial tenant to veto certain future agreements between the lessor and another tenant in a lease contract in *Maxima Latvija* (2015) was treated as not enough to constitute restriction of competition by *object*.

Few aspects are worth mentioning here: first, some essential interpretations that were provided in this case regarding the concept of restriction of competition by *object*. Secondly, some factual circumstances of the case as they provide an illustrative example of a contractual clause which cannot be qualified as a restriction of competition by *object*.

interpretation was later followed in the *Allianz Hungaria* case (judgment of 13 March 2013, *Allianz Hungária Biztosító Zrt. and Others / Gazdasági Versenyhivatal*, case C-32/11). Also, in the judgment in *Pierre Fabre* case (judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique SAS / Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, case C-439/09), the Court of Justice has held that 'As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market <...>. Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object' (paragraph 39).

¹³ For example, judgment of the Court of Justice of 13 March 2013, *Allianz Hungária Biztosító Zrt. and Others / Gazdasági Versenyhivatal*, case C-32/11, paragraphs 36–38.

¹⁴ The 'rule of reason' is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited (source of definition: Glossary of Industrial Organisation economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, Organisation for Economic Co-operation and Development (OECD), 1993, <<http://www.oecd.org/dataoecd/8/61/2376087.pdf>>).

In *Maxima Latvija* the Court of Justice has reiterated and confirmed that the concept of restriction of competition *by object* must be interpreted restrictively and can be applied only to certain types of economic conduct and coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (paragraph 18). According to the ECJ, essential legal criterion for ascertaining whether an agreement involves a restriction of competition *by object* is therefore the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects (paragraph 20).

Thus, by this judgment the Court of Justice has continued its approach on restrictive interpretation of the concept of restriction of competition *by object*. It is known that certain national competition authorities have used this concept almost systematically in the presence of concerted practices between undertakings, in order to avoid taking a more delicate look at the existence of the anticompetitive effect. Although in case of cartels the concept of a restriction of competition *by object* seems to be unquestionably applicable, the so called 'business-to-business' contracts between firms, which are frequent, raise many questions and uncertainty regarding the application of the mentioned concept. The referred preliminary request in *Maxima Latvija* reflects it.

In general, in *Maxima Latvija* the Court of Justice has provided another example of a contractual clause between undertakings which cannot be qualified as a restriction of competition *by object*. The case at issue concerned a commercial tenant who had included a clause in the lease contracts signed with his lessors that allowed him (the tenant) to refuse to let the landlords enter into other leases with potential competitors of the tenant¹⁵. In doing so, the lessee could prevent its competitors from locating themselves in commercial premises close to its own.

Answering the preliminary question referred to it, the Court of Justice has ruled that TFEU must be interpreted as meaning that the mere fact that a commercial lease agreement contains a clause as described above does not mean that the *object* of that agreement is to restrict competition within the meaning of that provision.

However, notwithstanding the non-existence of an anti-competitive *object* in the latter case, the Court of Justice has also ruled that such agreements may be considered to be an integral part of an agreement having the *effect* of preventing, restricting or distorting competition within the meaning of Article 101(1) TFEU, from which it is found, after a thorough analysis of the economic and legal context in which the agreements occur and the specificities of the relevant market, that they make an appreciable contribution to the closing-off of that market (*Maxima Latvija*, paragraph 31).

This affirmation regarding the closing-off of the market refers to the cumulative effect theory (a theory which had been developed for the 'brewery agreements' already in 1991 (Case C-234/89)), which has now directly been extended by the ECJ to lease contracts. This means, that if the totality of all similar contracts makes access to the market difficult, then these contracts, taken together, will have a restrictive effect on competition.

The preliminary references related to patent law in connection with Article 101 TFEU are not often received by the ECJ. In *Genentech* (2016) the referring court raised an issue whether an obligation to pay royalties under a patent license could constitute restriction of competition *by object*. The issue in question concerned a license agreement which required the licensee to pay royalties for the sole use of the rights attached to the licensed patent. The Court of Justice *inter alia* focused on the treatment of license agreements under Article 101 TFEU which is, as mentioned, quite rare in the CJEU case law on competition law issues.

The license agreement at issue which concerned some pharmaceutical technology (the use of an enhancer required for the production of certain medicines) included (i) a one-off fee, (ii) a fixed annual fee and (iii) a running royalty

¹⁵ More precisely, this was a clause granting *Maxima Latvija*, as the 'anchor tenant', the right to disagree other commercial premises of the shopping centre to be let to the third parties. *Maxima Latvija*, as a large shop or hypermarket offering everyday consumer goods, usually was occupying within a shopping centre the largest or main area of it.

equivalent to a percentage of the licensee's sales of the mentioned medicines. The licensee has never paid a running royalty what caused an arbitration proceedings followed by the proceedings at the Paris Court of Appeal.

The referring court was unsure whether the license agreement at issue contravened the provisions of Article 101 TFEU in so far as it required the licensee to pay royalties which no longer served any purpose because of the revocation of the patents attached to the rights granted and placed the licensee at a 'competitive disadvantage'. Having regard to the factual circumstances of the case and the reasoning of the licensee¹⁶, the Court of Justice held that the raised question must be understood as asking, in essence, whether Article 101 TFEU must be interpreted as precluding, under a license agreement such as that at issue, the imposition on the licensee of an obligation to pay a royalty for the use of a patented technology for the entire period during which that agreement was in effect, in the event of the revocation or non-infringement of patents protecting that technology.

The ECJ underlined that since the licensee was free to terminate the agreement at any time, the obligation to pay the royalty during the period when that agreement was in effect, during which the rights derived from the licensed patents which had been granted were in force, does not constitute a restriction of competition within the meaning of Article 101(1) TFEU (*Genentech*, paragraph 42). The royalty was treated as the price to be paid for commercial exploitation of the patented technology with the guarantee that the licensor will not bring legal proceedings for infringement against the licensee¹⁷.

Therefore the Court of Justice replied to the referred question that Article 101(1) TFEU must be interpreted as not precluding the imposition on the licensee, under a license agreement such as that at issue in the main proceedings, of a requirement to pay a royalty for the use of a patented technology for the entire period in which that agreement was in effect, in the event of the revocation or non-infringement of a licensed patent, provided that the licensee was able to terminate freely that agreement by giving reasonable notice (*Genentech*, paragraph 43).

Thus, since the right to terminate the agreement at issue by the licensee exists, there is no restriction of competition by *object*¹⁸. The fact that the agreement may be freely terminated by the licensee makes it possible to reject the contention that payment of the royalty undermines competition by restricting the licensee's freedom of action or by giving rise to market foreclosure effects.

Unlike *Maxima Latvija* where the mere wording of a clause letting for a commercial tenant to veto certain agreements between the lessor and another potential tenant in a lease contract was treated as not restricting competition by *object*, in *Portugal Telecom* (2016) the situation was somewhat different and provides an example of the ECJ jurisprudence when a non-compete clause in a transfer agreement was treated as restricting competition by *object*. The latter case concerned the inclusion of a non-compete clause in a transfer agreement. This issue is of high importance as such clauses are frequent in the cases of concentrations between undertakings.

To be more precise the disputed Commission decision sanctioned Telefonica and Portugal Telecom – Spanish and Portuguese telecommunications operators – for having included a clause under which both parties committed as it was written in the latter clause 'to the extent permitted by law' not to compete with each other in the Iberian market in any new projects or activities in the telecommunications sector during a certain period. This was a part of the agreement of the sale of Portugal Telecom's stake in a Brazilian mobile operator to Telefonica.

The telecom operators had argued *inter alia* that the contract provision did not prevent competition because the companies were not potential competitors in that market anyway; moreover, because of the phrase 'to the extent

¹⁶ The licensee argued that it was obliged to pay the running royalty only in the case of an infringement of the rights attached to the licensed patents. In its view, requiring paying the running royalty in the absence of any infringement imposes on it unjustified expenses, in breach of competition law.

¹⁷ Avoiding patent litigation was treated as one of the commercial purposes of the license agreement in this case.

¹⁸ The Court of Justice has not separately analyzed the possible restriction of competition 'by object' or 'by effect', but its conclusions in this case let us consider, first of all, that the clause of a license agreement at issue could not be treated as restricting competition 'by object'.

permitted by law' any obligation not to compete was secondary to an obligation to make a self-assessment of the legality.

The General Court however ruled that the Commission rightfully qualified a non-compete clause as an *object* restriction in spite of the fact that the contract provided that the stipulation was valid only 'to the extent permitted by law'. In the view of the General Court, the conclusion of such a non-compete agreement is at least a strong indication of the existence of a potential competition relationship between the parties (*Portugal Telecom*, paragraph 180). The General Court took the view that the Commission was not obliged, as Portugal Telecom and Telefonica asserted, to undertake a detailed analysis of the structure of the markets concerned and of potential competition between companies on those markets in order to conclude that the clause constituted a restriction of competition by *object*. Consequently, according to the General Court, such a clause that lead to a sharing of markets between potential competitors, constituted a restriction of competition by *object*.

The 'pay-for-delay' agreements constitute violations of competition. It was concluded in *Lundbeck* (2016) concerning the reverse payment settlement agreements, which are also known as pharma 'pay-for-delay' agreements. The judgment is important as the General Court has for the first time issued a ruling concerning the agreements that are intended to delay the market entry of generic manufacturers with generic drugs in exchange for payments made by original pharmaceutical producers whose patent had expired.

In the view of the General Court, the Commission has rightly established that the agreements at issue were akin to market exclusion agreements between competitors and that they were liable to have negative effects on competition, without it being necessary, for the purpose of Article 101(1) TFEU, to demonstrate that they had had such effects (*Lundbeck*, paragraph 476). The General Court has ruled that it is not acceptable that the patent holders could protect themselves from an irreversible price decline by concluding the agreements with the generic manufacturers who would accept the limitations on the market access of their products and agree not to sell generic medicines the whole period of the agreements in exchange for a significant amount of money. Since an appeal is pending before the ECJ it is worth waiting for a final consideration.

1.1.2. Other developments in the field of cartels

The increasing significance of information technologies is also reflected in competition cases. Changing forms of cooperation which are implemented with the information technologies raise various questions, for example – as in *Eturas* (2016), one of the landmark cases of the subject matter – how online platforms and their technical parameters might comply with competition law requirements. The usage of various platforms also means a new, more sophisticated level of cartels and therefore there are new challenges for the competition authorities to find appropriate evidence and prove the existence of a prohibited anti-competitive conduct. If previously usual communication forms for making prohibited agreements (such as meetings, letters or e-mails) are replaced with an online booking system with automatic restriction of discounts, how should it be treated in terms of competition law requirements? This case received much attention of lawyers in Europe as one of the first cases raising issues of this kind¹⁹.

The reference for a preliminary ruling was submitted by the Supreme Administrative Court of Lithuania (hereinafter referred to as 'SACL') seeking clarification as to the correct interpretation of Article 101(1) TFEU and, in particular, as to the allocation of the burden of proof for the purposes of applying that provision. It entertained doubts as to the existence of sufficient factors capable of establishing, in the present case, the participation of the travel agencies concerned in a horizontal concerted practice²⁰. The attention was paid to the facts that some of the travel agencies

¹⁹ In *Eturas* the Lithuanian competition authority had fined several tour operators for concerted practices related to the usage of a common online travel reservation system. The administrator of the reservation platform had sent the travel agencies participating in the system an electronic message capping the rebates that could be granted for products sold via the system and had technically adapted the system so as to implement this cap. The national competition authority found this to constitute an illegal information exchange.

²⁰ Precisely, the national court referred the following questions for a preliminary ruling:

1) Should Article 101(1) TFEU be interpreted as meaning that, in a situation in which economic operators participate in a common computerized information system of the type described in this case and the Competition Council has proved that a system notice on the

claimed even not having known about the restriction, some did not change the actual discount rates applied and others did not sell any travel packages at all via such a platform during the relevant period.

The Court of Justice, in essence, had to answer whether Article 101(1) TFEU must be interpreted as meaning that a mere sending of a message concerning a restriction of the discount rate followed by the technical system modification necessary to implement that measure, could constitute sufficient evidence to presume that the travel agencies were aware or ought to have been aware of that message and, in the absence of any opposition on their part to such a practice, it may be considered that those travel agencies participated in a concerted practice.

In so far as the referring court had doubts as to the possibility, in view of the presumption of innocence, of finding that the travel agencies were aware, or ought to have been aware, of the message at issue in the main proceedings, the Court of Justice recalled that the presumption of innocence constitutes a general principle of EU law, enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union, which the Member States are required to observe when they implement EU competition law.

The ECJ held that the presumption of innocence precluded the referring court from inferring from the mere dispatch of the message at issue in the main proceedings that the travel agencies concerned ought to have been aware of the content of that message. However, according to the Court of Justice, the presumption of innocence did not preclude the referring court from considering that the dispatch of the message at issue in the main proceedings may, in the light of other objective and consistent indicia, justify the presumption that the travel agencies concerned were aware of the content of that message as from the date of its dispatch, provided that those agencies still have the opportunity to rebut it. The Court of Justice stressed therefore that it is for the referring court to examine if, in view of all the circumstances before it, the dispatch of a message may constitute sufficient evidence to establish that the addressees ought to have been aware of its content (*Eturas*, paragraphs 39–40, 50).

According to its established jurisprudence, the ECJ reminded that passive participation in the infringement, without the undertaking clearly opposing them, are indicative of collusion that would make the undertaking liable under Article 101 of TFEU. Therefore it was held that travel agents which knew the content of the message could be presumed to have participated in an illegal concerted practice, unless they had distanced themselves from the message, challenged its imposition or adduced other evidence to rebut the presumption, for example, systematically granting higher rebates than the ones set under the cap²¹.

The message sent by the Court of Justice via this ruling is that the enterprises should be very careful when starting to use any online platforms. To avoid any problems which might occur due to possible competition law infringements,

restriction of discounts and a technical restriction on discount rate entry were introduced into that system, it can be presumed that those economic operators were aware, or ought to have been aware, of the system notice introduced into the computerized information system and, by failing to oppose the application of such a discount restriction, expressed their tacit approval of the price discount restriction and for that reason may be held liable for engaging in concerted practices under Article 101(1) TFEU?

2) If the first question is answered in the negative, what factors should be taken into account in the determination as to whether economic operators participating in a common computerized information system, in circumstances such as those in the main proceedings, have engaged in concerted practices within the meaning of Article 101(1) TFEU?

²¹ The Court of Justice ruled in this case as follows:

Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system, intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators may — if they were aware of that message — be presumed to have participated in a concerted practice within the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of the systematic application of a discount exceeding the cap in question.

It is for the referring court to examine — on the basis of the national rules governing the assessment of evidence and the standard of proof — whether, in view of all the circumstances before it, the dispatch of a message, such as that at issue in the main proceedings, may constitute sufficient evidence to establish that the addressees of that message were aware of its content. The presumption of innocence precludes the referring court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content.

the systems shall be technically adapted to reflect the details how active the competitors are while using them. As it is seen from the latter case, distribution or exchange of any information related with pricing or similar issues might be dangerous to the users of the platform on which that information was distributed.

Following the preliminary ruling of the ECJ, the Supreme Administrative Court of Lithuania (Case No A-97-858/2016) considered whether each travel agency had known about the discount restriction imposed in the reservation platform and whether it had objected to the restriction or not²². The SACL has decided that the national competition authority had no grounds for recognizing that those travel agencies which did not know about the restriction or which opposed it had violated the provisions of the national Law on Competition and the TFEU, and has lifted the fines imposed on such travel agencies.

The final adjudication of this case in the Lithuanian court once more illustrates the proper functioning of the cooperation model between EU national courts and the CJEU. The national court followed the preliminary ruling and rendered the final judgment in conformity with EU law as it has been interpreted by the ECJ.

As mentioned before, since the Settlement procedure was adopted in 2008, more than a half of the Commission decisions adopted were concluded following the settlement procedure. It is worth mentioning the *Timab* (2017) which was the first so called ‘hybrid’ cartel case, in so far as the *settlement* procedure took place in parallel with the *standard* procedure, that is when some parties settle and others do not. This caused the main issue of the case – to answer the question whether there was no discrimination for the undertaking which decided not to settle the case.

In 2010 the Commission had imposed fines amounting to EUR 175 million on six groups of producers who had participated in a price-fixing cartel and shared the phosphate market for animal feed for more than 30 years. Unlike the other groups involved in the cartel, the Roullier group did not wish to settle with the Commission after it had become aware of the approximate amount of fine that the Commission intended to impose on it. The Commission therefore applied the standard procedure against the Roullier group and imposed a certain fine.

The Roullier group appealed the Commission decision to the General Court criticizing the Commission for imposing on it a fine higher than the maximum in the range envisaged during the settlement procedure²³. The General Court dismissed the action (2015) finding that the Commission had not penalized the Roullier group on account of its withdrawal from the settlement procedure and was not bound by the range of fines communicated during the settlement procedure.

The Court of Justice upheld the judgment of the General Court. It was held that the imposed fine reflected the gravity and duration of the infringement and was an accurate application of the rules concerning the calculation of fines. Thus the ECJ confirmed the Commission’s approach to take into account new information during the standard procedure²⁴. This was also a confirmation that the Commission can depart from ranges of fines discussed during settlement discussions with a company that in the end chooses not to settle.

²² To be more precise, upon evaluation of evidence gathered with respect to each applicant, the travel agencies were grouped as follows: firstly, the travel agencies that knew about the imposed restriction and did not oppose it; secondly, the travel agencies that knew about and opposed the imposed restriction; and thirdly, the travel agencies with respect to which the national competition authority had failed to gather sufficient evidence for asserting that they knew about the restriction imposed in the reservation system.

²³ The range of potential fines communicated by the Commission during negotiations was EUR 41–44 million for the Roullier group. However, in the final Commission decision the Roullier group received a fine of almost EUR 60 million.

²⁴ More precisely, the Court of Justice found (as did the General Court) that the Commission had to take into account, in the course of the standard procedure, new information which obliged it to review the file, to redefine the duration of the cartel and adjust the fine by not applying reductions it had proposed during the settlement procedure. During the settlement procedure, the Roullier group did not dispute the duration of the cartel taken into consideration by the Commission (1978 to 2004), whereas, during the standard procedure, the group argued (successfully) that its participation in the cartel was limited to the years 1993–2004. That paradox, which resulted in a higher fine for a shorter period of infringement, is explained by the fact that the Commission had been willing, during the settlement procedure, to grant further reductions to the Roullier group for the information provided by that group in respect of the period 1978–1993. Since the Roullier group subsequently disputed its participation in the cartel during that period, the Commission considered that most of the proposed reductions were no longer appropriate for the period 1993–2004.

The Court of Justice has held that the two procedures – the settlement procedure and the standard one – are completely separate and the parties cannot rely during the standard procedure on the range of fines received by the Commission in the context of settlement discussions. In other words, the cherries shall be not picked from the pie – you choose either to settle or not to settle with all the regarded consequences.

1.2. Article 102 TFEU

The CJEU activity is extremely poor in the field of application of Article 102 TFEU²⁵, since the cases of abusive practices are particularly suitable for the commitments procedure under Article 9 of Regulation 1/2003²⁶ and the commitment decisions are quite seldom appealed to the CJEU. The mechanism of commitments allows the Commission to close an investigation into a suspected infringement of the antitrust prohibitions contained in Articles 101 and 102 TFEU (except in a case of cartels) by making commitments offered by the companies concerned which become binding on those companies.

There is some case law, however, on this issue as well. I have in mind the *Morningstar* (2016) where the limited CJEU review in the case of a commitment procedure was underlined. By the said judgment the General Court has dismissed the action brought against the Commission decision to accept commitments. The action was brought by a third party, a competitor of the dominant undertaking which had taken the commitments²⁷. This was the first time when a third party appealed a decision adopted under the commitments procedure.

According to the General Court, a criticism of the appropriateness of the commitments accepted by the Commission did not concern the infringement of essential procedural requirements which may render the contested decision illegal. That criticism was rather aimed at the Commission's assessment regarding the commitments offered by the dominant undertaking. The General Court held that its review was limited to verifying whether the Commission's assessment was manifestly wrong. It was also stressed that as regards the acceptance or rejection of the commitments, the Commission enjoys a wide discretion (*Morningstar*, paragraph 40).

Moreover, the General Court noted that it is not essential for the court's review of the legality of the Commission decision whether the commitments produced effects on the market since their implementation. The General Court gave the higher importance to the circumstance that at the point in time at which the contested decision was adopted, the commitments were in themselves sufficient to remove the competition concerns which had been identified (*Morningstar*, paragraphs 73-74).

Did the exclusive discounts scheme require an analysis of likely effects on competition in order to be treated as an abuse of dominant position? This is one of the issues of *Intel* (2017), recently dealt with by the Court of Justice²⁸. The

²⁵ Under Article 102 TFEU, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

²⁶ Article 9 ('Commitments') of the Regulation 1/2003 provides: '1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. 2. The Commission may, upon request or on its own initiative, reopen the proceedings: (a) where there has been a material change in any of the facts on which the decision was based; (b) where the undertakings concerned act contrary to their commitments; or (c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.'

²⁷ According to that third party, despite the commitments taken by the dominant undertaking in order to remedy the abuse of a dominant position, competing providers remained unable to offer a fully comparable and competing service.

²⁸ To be more precise about factual circumstances of the case, the Commission imposed on Intel a fine of EUR 1.06 billion for having abused its dominant position on the market of central processing units by a decision of 13 May 2009. The Commission, in the decision at issue, described two types of conduct by Intel vis-à-vis its trading partners, namely conditional rebates and so-called 'naked restrictions', intended to exclude a competitor, Advanced Micro Devices, Inc. ('AMD'), from the market. The first type of conduct consisted in the grant of rebates to four major computer manufacturers provided they bought from Intel all or almost all of their processors. The second type of conduct consisted in making payments to those manufacturers so that they would delay, cancel or restrict the marketing of certain products equipped with AMD

judgment in this case was highly awaited because of the position of the Court of Justice in relation to the legal treatment of exclusive dealing and loyalty rebates. However, the proceedings are not finished yet as the case was referred back to the General Court.

The General Court (Case T-286/09) had previously rejected Intel's appeal against the Commission decision in this case. It held that 'exclusivity rebates' constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish an abuse of dominant position. The General Court thus denied the need to consider the possibility of the existence of anticompetitive effects of the conduct in question. As it was later stressed in the AG opinion (Case C-413/14 P), the General Court judgment seemed to adopt the starting point that an 'exclusivity rebate', when offered by a dominant undertaking, can under no circumstances have beneficial effects on competition (paragraph 87). Nevertheless, for the sake of completeness, the General Court made the analysis of the capability of the rebates to restrict competition and, according to the circumstances of the case, affirmed this capability²⁹.

In his opinion, AG provided a view that an analysis of the likely effects of the said practices is necessary to apply Article 102 TFEU³⁰. According to AG, such a failure could determine that conduct which might simply be not capable of restricting competition would be caught by a blanket prohibition. Such a blanket prohibition would also risk catching and penalizing pro-competitive conduct (paragraph 78). Moreover, in its alternative assessment of capability the General Court has failed to establish, on the basis of all the circumstances, that the rebates and payments offered by the appellant had, in all likelihood, an anticompetitive foreclosure effect (paragraph 173). Therefore, according to AG, the General Court judgment had to be set aside and the case referred back to the General Court in order to carry out a full assessment of the actual or potential effect on competition of Intel's conduct (paragraphs 344–348).

This position of AG was followed by the Court of Justice as it has set aside the General Court judgment and referred the case back to it. The Court of Justice ruled that in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission in the as efficient competitor test showing capability of the rebates to foreclose an as efficient competitor (hereinafter referred to as 'the AEC test') (*Intel*, paragraph 147). According to the Court of Justice, if the Commission carries out an analysis of the AEC test, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the related Commission's findings. It was explained that the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors³¹. Therefore the General Court was required to examine all of Intel's arguments concerning that test (paragraphs 141, 143-144, 147).

central processing units. The Commission found that Intel had committed a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), from October 2002 until December 2007.

²⁹ The General AG concluded that, in the contested decision, the Commission demonstrated to the requisite legal standard and according to an analysis of the circumstances of the case that the exclusivity rebates and payments granted by the applicant were capable of restricting competition (paragraphs 172–197 of the judgment of the General Court in *Intel*).

³⁰ It shall be noted that in this regard, AG has provided an illustrative comparison of the restrictions of competition 'by object' under Article 101 TFEU and the practices presumed to be unlawful and treated as abuse of a dominant position under Article 102 TFEU. Although the wording and terminology of these two articles is different, some parallels might be done and be useful to better understand the system of EU competition rules. For example, AG noted in his opinion: 'For the purposes of Article 102 TFEU, loyalty rebates constitute — as I see it — a near-equivalent to a restriction by object under Article 101 TFEU. This is because loyalty rebates, like restrictions by object, are presumptively unlawful.' The AG also explained that '<...> in a somewhat similar fashion to the enforcement shortcut concerning restrictions by object under Article 101 TFEU, the assessment of all the circumstances under Article 102 TFEU involves examining the context of the impugned conduct to ascertain whether it can be confirmed to have an anticompetitive effect. If any of the circumstances thus examined casts doubt on the anticompetitive nature of the behavior, a more thorough effects analysis becomes necessary' (paragraphs 80, 135 of the Opinion of AG Wahl in *Intel*).

³¹ In this case, while the Commission emphasized, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test were not necessary in order to find an abuse of a dominant position, it nevertheless carried out an in-depth examination of those circumstances, setting out a very detailed analysis of the AEC test, which led it to conclude that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor (paragraph 142 of the judgment of the Court of Justice in *Intel*).

This might show intentions of the Court of Justice to further develop its earlier jurisprudence towards a more effects-based analysis in the competition law cases related with pricing practices. Moreover, it seems that once the Commission makes an analysis of some particular circumstances in order to assess the capability of a conduct to restrict competition, the latter shall be reviewed during the judicial proceedings, particularly if the parties present their arguments concerning that issue. In *Intel*, the Court of Justice especially stressed to this regard the importance of the circumstance that the undertaking concerned submitted that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. Consequently, it implied the obligation to fully examine the related Intel's arguments during the judicial proceedings.

2. Some CJEU case law developments in the field of State aid

Article 107 TFEU essentially provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall be incompatible with the internal market. This article must be read as obliging to verify four conditions before determining this incompatibility. First, there must be State intervention or usage of State resources. Secondly, that intervention must be capable of affecting trade between Member States. Third, it must give an advantage to its beneficiary. Fourth, it must distort or threaten to distort competition. The issues of interpretation and application of the first and third conditions constitute the essential part of the disputes related with this TFEU Article in the General Court.

In order for a measure to be classified as State aid within the meaning of Article 107 TFEU, it must first of all involve an advantage which might be of various forms (aid granted 'in any form') and, secondly, this benefit must derive directly or indirectly from public resources (aid granted 'by States or through State resources'). I shall therefore focus, firstly, on cases in which there have been important developments concerning the notion of 'advantage'. Secondly, some observations on recent developments concerning the concept of 'State resources' will be made. However, it should be pointed out that the case law in the field of State aid has not undergone any major recent developments as the disputes mainly concern factual circumstances of cases.

2.1. On the notion of 'advantage'

The advantage in terms of State aid is an economic advantage which the recipient undertaking would not have obtained under normal market conditions. This advantage may take various forms and must be selective – this means that only certain (*i.e.* not all) undertakings must benefit from the advantage in order it to be prohibited. The condition of 'selectivity' of an aid measure within the meaning of Article 107(1) TFEU is probably the most problematic condition, in particular as regards certain tax measures.

A recent interpretation of the notion of the said advantage was provided by the Court of Justice in *Ryanair*³². It is important to note that the Court of Justice rejected the notion of 'economic passing on' used in this case by the General Court. That means, under given circumstances, there was no need to assess whether and to what extent the airlines actually utilized the economic advantage, for example, whether it enabled them to offer more competitive ticket prices. The Court of Justice rather made a clear distinction between the restitution of *advantage* and the restitution of the *economic benefit*, which (the latter) is irrelevant to the recovery of the aid.

³² Judgment of the Court of Justice of 21 December 2016, *European Commission / Aer Lingus Ltd and Ryanair Designated Activity Company*, case C-164/15 P. This case concerned the Irish air travel tax, an excise duty on air passenger transport, which was applied at different rates depending on the distance between the departure and the arrival airports. This fee was 2 euros per passenger for destinations within 300 kilometers of Dublin Airport and 10 euros per passenger for other flights. Ryanair, although being a beneficiary of this 'reduced' tax on some of the flights, essentially considered that its competitors had financially benefited from the fact that they operated many flights to destinations located less than 300 kilometers from Dublin Airport. Thus, according to the Court of Justice, the application of a reduced rate for short-haul flights shall be treated as illegal State aid. It was confirmed that airlines which had been able to take advantage of the reduced rate enjoyed a competitive advantage of 8 euros compared to the companies which paid the standard rate. This led to a conclusion that the sum of 8 euros per passenger has to be returned regarding all the relevant flights.

In December 2016, has appeared the *World Duty Free Group*, a long awaited judgment rendered by the ECJ in the so called Spanish goodwill amortization state aid cases³³. This judgment shall be treated as a significant development of the law on State aid as it gives a clarification on the interpretation of the selectivity criterion. It could also be called as one of the recent landmark cases in EU competition law.

Setting aside two judgments and referring case back to the General Court the ECJ stated that the only relevant criterion in order to establish the selectivity of a national tax measure consists in determining whether that measure is such as to favour certain undertakings over other undertakings which, in the light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory.

Contrary to the previous position of the General Court, the ECJ held that, in determining whether a national fiscal measure can be classified as ‘selective’ for purposes of the State aid rules, it is not necessary to identify a specific category of undertakings that benefit exclusively from the measure. On the contrary, a measure such as the measure at issue, designed to facilitate exports, may be regarded as selective if it benefits undertakings carrying out cross-border transactions, in particular investment transactions, and is to the disadvantage of other undertakings which, while in a comparable factual and legal situation, in the light of the objective pursued by the tax system concerned, carry out other transactions of the same kind within the national territory (*World Duty Free Group*, paragraph 119). The Court of Justice has not treated as a valid reason for annulment of the Commission decisions the fact that the Commission had not identified a particular category of undertakings that benefitted from the financial goodwill amortization regime. Thus the Court of Justice supported the broad interpretation of selectivity criterion which was proposed by the Commission and rejected the more qualifiicator interpretation given by the General Court. Although the case is not finally decided yet, the mentioned clarification gives impression that the scope of the rules of selectivity criterion were widened and at the same time the Commission’s burden of proof was facilitated.

2.2. On the notion of ‘the resources of the State’

The distinction between aid granted by the State and aid granted through State resources in the TFEU is intended to include in the concept of aid not only the aid granted directly by the State but also those aids granted by public or private bodies designated or established by the State. When there is a case of the second situation, sometimes it is difficult to determine the existence of the State aid. Indeed, EU law would not permit that the mere fact of creating autonomous institutions responsible for the distribution of aid would let to circumvent the rules of State aid. The General Court has expressed its view in *EEG 2012* (Case T-47/15) and qualified certain measures to support green electricity as a State aid.

The EEG Act³⁴ is a German statutory law which laid down a scheme to support undertakings producing electricity from renewable energy sources and mine gas (‘EEG electricity’). That law thus guaranteed those producers a price higher than the market price. In order to finance that support measure, it imposed an ‘EEG surcharge’ on the suppliers to the final customers, which in practice was passed on to the final customers. However, certain undertakings, such as electricity-intensive undertakings in the manufacturing sector, were eligible for a cap on that (passed on) surcharge in order to maintain their international competitiveness. The EEG surcharge was payable to the interregional operators of high and very-high-voltage transmission systems (hereinafter referred to as ‘TSOs’), which were obliged to sell EEG electricity. The subtlety of this system lied in the fact that the State did not intervene as such in the mechanism,

³³ According to the Spanish law on corporate tax, it was allowed for the companies which are tax resident in Spain to amortize the goodwill resulting from the acquisition of certain shareholdings in foreign companies. In other words, if a Spanish company arranged for a takeover of a domestic company it would not be allowed to write off any payment of goodwill for tax purposes. In case it acquired a foreign company, the Spanish company would be allowed to deduct such costs and lower its taxable base accordingly. The main issue in these cases was to answer the question whether these Spanish provisions were in breach of the EU State aid rules, that is whether the mentioned amortization rule was of ‘selective nature’.

³⁴ German statutory Act (2012) revising the legal framework for the promotion of electricity production from renewable energy (the abbreviation ‘EEG’ stems from the German version of the title of this law).

but had envisaged a series of ‘bolts’ which obliged the whole sector to act according to the conditions set in the EEG Act.

Following the analysis of the mentioned mechanisms, the General Court concluded that they resulted, principally, from implementation of a public policy, laid down through the EEG Act by the State, to support producers of EEG electricity. It was underlined that, firstly, the funds generated by the EEG surcharge and administered collectively by the TSOs remained under the dominant influence of the public authorities. Secondly, the amounts in question, generated by the EEG surcharge, were funds which involved a State resource and could be assimilated to a levy. Thirdly, it might be concluded referring to the powers and tasks given to the TSOs that they did not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds (*EEG 2012*, paragraph 127).

The General Court has also pointed out that the EEG Act is substantially different from the mechanism established by the previous German law, which was the subject matter of the judgment of the Court of Justice in the *PreussenElektra* case (2001) – a judgment in which the existence of State aid has been denied. The funds at issue in that case could not be considered to be a State resource since they were not at any time under public control and there was no mechanism (such as that at issue in the present case), established and regulated by the State, for offsetting the additional costs arising from the obligation to purchase and through which the State offered the private operators concerned the certain prospect that the additional costs would be covered in full.

There is an appeal pending before the Court of Justice in *EEG 2012*, as well as a reference for a preliminary ruling submitted by a German court in the context of a dispute relating to the recovery of the unlawfully received aid from a beneficiary. Judgments are expected to be rendered in the coming months.

Conclusions

The recent CJEU case law leads to the conclusion that the main trend in the competition law field remains basically to the, let me put it in this way: ‘good news is no news’. On the other hand one could notice the trend of the CJEU to keep the continuity with the prudent polishing of its jurisprudence.

The decreasing number of the appeals before the EU judicature in the competition field directly influences the decreasing number of legal issues solved as well as of important interpretations and new perceptions. Although the competition law has recently not undergone any major clashes or big changes in its case law, each case gives however the possibility for the CJEU to provide at least tiny developments, express its position by following previous case law and to enrich its jurisprudence.

In the field of cartels, the distinction between the restriction of competition by *object* and by *effect* has recently returned as one of the top issues in the CJEU jurisprudence. The lack of clarity determined by the CJEU judgments in the last years gave enough space for discussions and the reconsidering of certain notions and concepts. The latest case law indicates that the CJEU has chosen the restrictive approach in this regard which means a less flexible determination of the restriction of competition by *object*. The relevant case law has also shown that the treatment of a conduct as restricting competition by *object* has nowadays become more an exception than commonness.

The increasing significance of information technologies cannot be overestimated in competition law as well. The CJEU already receives first cases in this area. No doubt, in the future such type of legal disputes will give an opportunity for the CJEU to provide new interpretations and develop its jurisprudence in some areas, not only in the competition field. Moreover, one of the issues related to new economy industries and IT markets, for instance, the *Uber* (Case C-434/15) has received a lot of attention all over the world as the Court of Justice is expected to decide *inter alia* whether Uber is an application at the electronic platform providing a link between the driver and passenger or a transport company. It is linked not only to the freedom of services, labour law, taxation etc. but to the competition area as well. The Court of Justice ruling is expected in the near future.

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