2021 ECJ ANTITRUST HORIZONS – SELECTED KEY EVOLUTIONS AND DEVELOPMENTS

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Foto: Ortner

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2021 ECJ Antitrust Horizons – Selected Key Evolutions and Developments

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In 2021, EU antitrust horizons will be wide and enthralling: EU competition law and the jurisprudence of the Court of Justice of the European Union in this matter have seen many interesting developments in the course of the last years, and there are many exciting developments yet to come. This paper singles out particularly relevant and trendsetting evolutions in three fields that will occupy the Court of Justice and the General Court in 2021 and beyond: private enforcement of EU competition law; the per-object/per-effect-distinction as regards infringements of Article 101 TFEU; and new challenges brought about by the development of new digital markets and distribution channels and the digitalization of commercial practices.

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I. INTRODUCTION

In 2021, EU antitrust horizons will be wide and enthralling: EU competition law has indeed seen many interesting developments in the course of the last years, and there are many exciting developments yet to come in 2021. The EU Court of Justice ("ECJ"), in particular, will soon again be called upon to decide on fundamental issues, be it, for instance, the inspection powers of the European Commission and the corresponding rights of the parties to judicial review[2] or the application of the *ne bis in idem* principle in the field of competition law,[3] to name just two outstanding topics currently pending before the ECJ.

As regards current evolutions inscribing in long term continuing trends, recent and ongoing developments in EU jurisprudence in competition law in three fields seem particularly relevant at the moment and shall therefore be addressed in this paper. They are:

- First, the interplay between EU law and national law in the field of private enforcement of EU competition law;
- Second, the per-object/per-effect-distinction as regards infringements of Article 101 TFEU; and
- Third, new challenges brought about by the development of new digital markets and distribution channels and the digitalization of commercial practices.

II. THE INTERPLAY BETWEEN EU LAW AND NATIONAL LAW IN THE FIELD OF PRIVATE ENFORCEMENT OF EU COMPETITION LAW

Actions for damages caused by the infringement of the EU competition rules brought before the courts of the Member States, the so-called private enforcement of EU competition law, are, in addition to public enforcement, the second pillar of the implementation of EU competition law.

Private enforcement is a good example for the complex interplay between EU law and national law, because the right to compensation for cartel damages results directly from the treaty provisions, whereas the enforcement of such actions before the national courts takes place according to national law.

Consequently, the Court has already found in earlier cases such as *Manfredi*[4] that only the question of *how* compensation has to be granted is a matter of national law in combination with the principle of effectiveness. This concerns, in particular, jurisdiction, procedure, time-limits and the furnishing of proof. On the other hand, the upstream question of *whether* compensation actually has to be granted remains one of EU law, because the principle that any individual is entitled to claim compensation for the harm suffered due to an infringement of the competition rules follows from EU law itself.[5]

However, drawing the distinction between questions that are governed by national law in combination with the principle of effectiveness and questions that are governed directly by EU law is never a simple task. Thus, the fine-tuning of the founding principles established by the Court is an ongoing process.

When it comes to compensation for harm suffered due to infringements of EU competition law, the main questions are: *Who* has to compensate *whom* for *what* and *how*?

2 See pending cases C-682/20 P, *Les Mousquetaires et ITM Entreprises v. Commission and Council*, C-690/20 P, *Casino, Guichard-Perrachon and Achats Marchandises Casino v. Commission and Council*, and C-693/20 P, *Intermarché Casino Achats v. Commission and Council.*

3 See pending cases C-117/20, *bpost*, and C-151/20, *Nordzucker e.a.*

4 Judgment of July 13, 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 60 and 61); see also judgments of September 20, 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraphs 25 and 26); of November 6, 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraphs 41 and 43) and of June 5, 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 24).

5 See opinions of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 24), and in *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651, points 44 et seq.), and the case law cited therein.

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The question of *who* has to compensate for harm caused by a competition law infringement was at the very heart of the *Skanska* case. In that case, the Court made clear that a parent company who has taken over a company fined for the participation in a cartel can be held liable for damages caused by the latter even if the two companies are, according to national law, distinct legal entities. This follows from the principle of economic continuity and the concept of an "undertaking" under EU competition law.[6] The determination of the persons who have to pay compensation for cartel damages relates indeed to the question of whether such compensation is actually granted and not to its technical implementation. Thus, this question is directly governed by EU law. Accordingly, the parent company can be held liable for damages caused by the competition law infringement committed by the overtaken company.

In *Sumal*,[7] currently pending before the Grand Chamber of the Court, the question is whether the doctrine of the single economic unit can, in the context of intra-group relationships, not only lead to the extension of liability from subsidiaries to the parent company, but also, inversely, to the extension of liability from a parent company to its subsidiaries. This question arises in the context of a claim introduced by *Sumal* against *Mercedes Benz Trucks España* for damages caused by the so-called truck cartel, one of the participants of which was *Daimler, Mercedes Benz Trucks España's* parent company. As the referring court points out, this question is practically very relevant because it is easier to sue subsidiaries in the respective country than their parent companies who were found liable for an infringement by competition authorities in another country.

In the same vein, the question of *who is entitled to claim compensation for what kind of harm suffered* entails many tricky details. After *Kone*,[8] this issue was, just a little more than one year ago, again in the center of the *Otis* case. Here, the question was whether a public body who granted promotional loans to purchasers of products covered by a cartel may request compensation for loss caused by that cartel. The answer of the Court was, in principle, affirmative: In earlier case law, the Court had already stated that "*any individual*" is entitled to claim compensation from the members of a cartel for *any type of loss caused by that cartel*.[9] The neuralgic point thus is, and that was made very clear by the Court in *Otis*, whether there is a sufficient *causal link* between the harm suffered by a person and an anticompetitive behavior.[10] This question concerns the very existence of a right to compensation in each individual case and must therefore be answered on the basis of EU law. National law can, in turn, only be decisive for the concrete procedural modalities for actually establishing a causal link between the harmful event and the harm that has allegedly been suffered.

By contrast, national legal concepts cannot be decisive for the very question of *whether* compensation is due under EU law. This was shown in *Otis* where, according to a specific concept in national law, the right to compensation should be restricted to persons operating as customers on the market concerned by a cartel. The overturning of such national law principles can seem quite revolutionary, as is illustrated by that case: The referring Austrian court, after having received the ECJ's answer, consented that the public body who had granted loans to purchasers of cartelized goods was entitled to claim compensation for the harm caused subject to the existence of a causal link between the two. Nevertheless, this was only true for the period during which Austria had been a member of the EU and the question was thus determined by EU law. By contrast, the Austrian court explicitly stated that the public body was not entitled to claim compensation for the harm caused during the previous period, during which the provisions of national law had been decisive for the determination of the right to compensation.[11]

Finally, the currently pending *Stichting* case[12] is worth being mentioned. Here, a Dutch court has asked the ECJ whether it has jurisdiction to find that there has been an infringement of European competition rules during the period before the entry into force of regulation 1/2003,[13] even if neither the Commission nor a national competition authority have adopted a prior decision in that regard. Conversely, in *Daimler*,[14] the

6 Judgment of March 14, 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraphs 28 et seq.); see, also, opinion of Advocate General Wahl in *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:100, points 55 et seq.).

7 Case C-882/19, *Sumal*.

8 Judgment of June 5, 2014, *Kone and Others* (C-557/12, EU:C:2014:1317).

9 Judgment of July 13, 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 95 and 96).

10 Judgment of December 12, 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraphs 23 et seq.); see, also, opinion of Advocate General Kokott in this case (EU:C:2019:651, points 47 et seq.).

11 Supreme Court of Justice of Austria, judgment of October 21, 2020, 9 Ob 86/19s.

12 Case C-819/19, *Stichting Cartel Compensation and Others.*

13 Council Regulation (EC) No 1/2003 of December 16, 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, p. 1).

14 Case C-588/20, *Daimler*.

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scope of such a Commission infringement decision is in question, as the referring court asks whether refuse collection vehicles are covered by the findings of the Commission's decision on the truck cartel.

Whereas all these cases seem to need an answer deriving only from EU law, the compliance of national law with the principle of effectiveness currently arises in *Volvo*,[15] with questions on the directive on antitrust damages actions,[16] limitation periods for the bringing of compensation claims and the judicial estimation of harm.

This brief overview shows that the interplay between EU law and national law in the field of private enforcement of EU competition law remains a suspenseful and contested matter in 2021.

III. THE PER-OBJECT/PER-EFFECT-DISTINCTION AS REGARDS INFRINGEMENTS OF ARTICLE 101 TFEU

In the same vein, the per-object/per-effect-distinction as regards infringements of Article 101 TFEU is another classic issue that continues to be of unbroken relevance in EU competition law.

It is well known that, according to Article 101 TFEU, an agreement which has as its object the prevention, restriction or distortion of competition is prohibited, without it being necessary to examine the effects of that agreement. Indeed, the anticompetitive object and effect of an alleged competition law infringement are alternative conditions for the application of the prohibition laid down in Article 101.

However, since the very beginning of the Court's case law on what is now Article 101 TFEU, the question of the distinction between per-object- and per-effect-restrictions of competition has been critical.

According to this case law, an agreement is considered having an anticompetitive object if it has, in itself, a sufficient degree of harm to competition for it to be unnecessary to examine its effects in order to determine whether it is capable of restricting competition.[17]

But how to detect when this can no longer be taken as established, so that it is necessary to switch to the analysis of the effects of an agreement? This delicate question has, notably, been touched upon by two cases lately, that is, *Budapest Bank*[18] and *Generics*.[19] As Advocate General Bobek stated in this regard in his opinion in *Budapest Bank*, it is especially the examination of the context of an agreement that serves to "check that there are no *specific circumstances* that may cast doubt on the presumed harmful nature of the agreement in question."[20]

Yet, when does a situation become one in which doubts arise as to the presumed harmfulness and, therefore, the anticompetitive object of a particular agreement?

According to established case law, in order to find that an agreement has, in itself, a sufficient degree of harm to competition for it to be unnecessary to examine its effects, the agreement and its context must reasonably clearly reveal the potential to harm competition.[21]

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15 Case C-267/20, *Volvo and DAF Trucks*.

16 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1).

17 Judgments of June 30, 1966, *LTM* (56/65, EU:C:1966:38, p. 236); of June 4, 2009, *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 29); of September 11, 2014, *CB v. Commission* (C-67/13 P, EU:C:2014:2204, paragraphs 49 to 51 and the case-law cited), and of July 16, 2015, *ING Pensii* (C-172/14, EU:C:2015:484, paragraphs 29 to 31); see, also, opinion of Advocate General Kokott in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, points 42 et seq. and the case-law cited).

18 See judgment of April 2, 2020, *Budapest Bank and Others* (C-228/18, EU:C:2020:265).

19 See judgment of January 30, 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52).

20 Opinion of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 41 to 49, specifically point 48) (emphasis in the original).

21 See judgment of November 26, 2015, *Maxima Latvija* (C-345/14, EU:C:2015:784, paragraphs 18 to 23); see, also, to that effect, opinion of Advocate General Bobek *in Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 40 et seq.).

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This also means that, in order to conclude that an agreement has an anticompetitive object, it must be possible to determine that it is capable of restricting competition without having to examine its effects. Therefore, where it is impossible to determine, despite an analysis of all the relevant inherent contextual factors, whether an agreement is capable of restricting competition, the analysis must switch to the anticompetitive effects of that agreement.[22]

Consequently, an agreement which results in certain benefits for consumers may no longer be categorized as restrictive of competition by its object only if those benefits give rise to doubts as to the anticompetitive object of the agreement. This would be the case if the existence of those benefits means that it is no longer possible to know whether the agreement as a whole is capable of restricting competition without analyzing its effects. Conversely, there is no automatic switch to the obligation to carry out an analysis of the effects of an agreement only because that agreement has afforded certain benefits.

This issue is currently relevant in a whole bundle of cases on patent settlement agreements in the pharmaceutical sector.

In the first place, in *Generics*, the patent settlement agreements at issue in the main proceedings certainly gave rise to some pro-competitive effects such as, notably, a slight price reduction of the concerned pharmaceutical product and better labelling of medicine packs. Nevertheless, these effects were minimal and uncertain. Thus, when set against the overall legal and economic background of the agreements in question, they did not give rise to reasonable doubts that those agreements revealed sufficient harm to competition for being qualified as per-object-infringements.[23]

Currently, this question prominently arises again in the pending *Servier* appeal cases.[24] They concern patent settlement agreements concluded by the French medical firm *Servier* with several producers of generic medicinal products. The EU General Court found that one of the agreements in question did not meet the requirements for being qualified as restrictive of competition by its very object.[25] That case is even more interesting because the General Court found that the Commission had not even established restrictive effects of the agreement concerned, which is also contested by the Commission in its appeal.

These are certainly interesting cases to follow this year, alongside with the *Lundbeck* cases,[26] where it is as well in question if the concerned patent settlements qualify as per-object-infringements.

These cases raise new and complex questions. The evolutions outlined above share, however, a common *leitmotif*: They show how new questions in complex legal and economic settings can be resolved on the basis of the well-established concepts and principles of EU competition law. These concepts and principles give the Court a solid base for coping with new questions raised by new legal and economic developments.

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22 See, to that effect, judgments of September 11, 2014, *CB v. Commission* (C-67/13 P, EU:C:2014:2204, paragraphs 74 et seq.), and of November 26, 2015, *Maxima Latvija* (C-345/14, EU:C:2015:784, paragraphs 22 to 24); see, also, to that effect, opinions of Advocate General Bobek in *Budapest Bank and Others* (C-228/18, EU:C:2019:678, points 50 and 78 et seq.), and of Advocate General Kokott in *Generics (UK) and Others* (C-307/18, EU:C:2020:28, points 157 et seq.).

23 Judgment of January 30, 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraphs 108-110).

24 Cases C-144/19 P, *Lupin v. Commission*; C-151/19 P, *Commission v. Krka*; C-164/19 P, *Niche Generics v. Commission;* C-166/19 P, *Unichem Laboratories v. Commission;* C-176/19 P, *Commission v. Servier and Others*; C-197/19 P, *Mylan Laboratories and Mylan v. Commission*; C-198/19 P, *Teva UK and Others v. Commission*; C-201/19 P, *Servier and Others v. Commission*; and C-207/19 P, *Biogaran v. Commission*.

25 Judgments of the General Court, currently under appeal, of December 12, 2018, *Krka v. Commission* (T-684/14, not published, EU:T:2018:918; Case C-151/19 P, pending), and *Servier and Others v. Commission* (T-691/14, EU:T:2018:922; Cases C-176/19 P and C-201/19 P, pending).

26 Cases C-586/16 P, *Sun Pharmaceutical Industries and Ranbaxy (UK) v. Commission*; C-588/16 P, *Generics (UK) v. Commission*; C-591/16 P, *Lundbeck v. Commission*; C-601/16 P, *Arrow Group and Arrow Generics v. Commission*; C-611/16 P, *Xellia Pharmaceuticals and Alpharma v. Commission*; and C-614/16 P, *Merck v. Commission*; see, also, opinion of Advocate General Kokott in *Lundbeck v. Commission* (C-591/16 P, EU:C:2020:428).

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IV. NEW CHALLENGES BROUGHT ABOUT BY THE DEVELOPMENT OF NEW DIGITAL MARKETS AND DISTRIBUTION CHANNELS AND THE DIGITALIZATION OF COMMERCIAL PRACTICES

Of course, only time will tell whether this is true also for the specific questions raised by the digital economy.

The Commission as well as national regulators all over the world currently search for the right approach to adopt in order to preserve competition and data protection and at the same time enable innovation on digital markets, both via general rulemaking,[27] and single case decision-making.[28] The first cases in these matters have only begun to reach the Union Courts.[29]

It will be interesting to see how new questions in connection with digitalization can be addressed on the basis of the established principles of EU competition law.

In this regard, it seems essential to distinguish data-related practices that only have been modified by the possibilities of digitalization from truly new questions of digitalization. As the Court has demonstrated in the *Coty* judgment on selective distribution via internet sales,[30] cases in which the processing of data and the technical possibilities of the digital economy only serve as a *tool* for the implementation of a traditional practice do not really raise unprecedented questions under competition purposes. Insofar as *Coty* was concerned, whether the prohibition of specific ways of distribution is anti-competitive does indeed not depend on whether it affects internet shops or traditional stores.

Truly new questions of digitalization, by contrast, require a more thorough assessment. This is currently demonstrated in the field of Article 101 by the discussion on the assessment of algorithms for competition purposes. Today, companies increasingly make use of external IT services who offer automatic pricing solutions based on algorithms. These algorithms calculate the "appropriate" price of a certain product at a certain moment and for a certain customer on the basis of a huge amount of data on all relevant market factors. From a competition point of view, it might be problematic when different companies employ the same algorithm provider, who merges the data provided by the clients of all these companies and hands back the same pricing information to all of them. In such a situation, there may indeed be potential for collusion, whether consciously or unconsciously, between the companies because of the exchange and processing of their data via their common IT provider.

However, the Union courts might consider dealing with such practices by applying the jurisprudence on tacit agreements and the well-established principle that passive participation can also constitute collusion.[31] In the same vein, the Court clarified for example in *AC Treuhand* that a facilitator who actively contributes to the implementation of an agreement or concerted practice by other undertakings may be held liable for an infringement of Article 101 TFEU.[32] When such facilitators use algorithms, the analysis of the functioning of these algorithms will be a key factor with regard to the question of whether all concerned operators were aware or ought to have been aware of a potential collusion taking place via the common IT provider.

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27 See, in this regard, for example, the European Commission's proposals for a Digital Markets Act (COM(2020) 842 final) and a Digital Services Act (COM(2020) 825 final) as well as the recently implemented Section 19a of the German Competition Act.

28 See for example the European Commission's decisions of May 17, 2017 (Case No. M.8228 – *FACEBOOK / WHATSAPP*), of June 27, 2017 (AT.39741 – *Google Search (Shopping)*), of July 18, 2018 (AT.40099 — *Google Android*), of March 20, 2019 (AT.40411 – *Google Search (AdSense)*), or the decision of the German Bundeskartellamt of February 6, 2019 (B6-22/16, *Facebook*).

29 Such as T-612/17, *Google and Alphabet v. Commission (Google Shopping)*, T-604/18, *Google and Alphabet v. Commission (Google Android)*, T-334/19, *Google and Alphabet v. Commission (Google AdSense)*, or T-19/21, *Amazon.com and Others v. Commission*.

30 Judgment of December 6, 2017, *Coty Germany* (C-230/16, EU:C:2017:941).

31 Judgments of June 28, 2005, *Dansk Rørindustri and Others v. Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143), of October 22, 2015, *AC-Treuhand v. Commission* (C-194/14 P, EU:C:2015:717, paragraph 31) and of January 21, 2016, *Eturas and Others* (C-74/14, EU:C:2016:42, paragraph 28).

32 Judgment of October 22, 2015, *AC-Treuhand v. Commission*

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Insofar as Article 102 TFEU is concerned, new digital markets in the platform economy raise the question of how to assess data related practices under the concept of abuse. The German Competition Authority, for instance, in its *Facebook* decision,[33] pending before the Düsseldorf Higher Regional Court,[34] principally based the violation of competition law on the non-compliance with data protection rules. In its view, the fact that consumers were pushed into allowing Facebook to collect, use and merge their data stemming not only from their use of Facebook itself but also from their use of other services like WhatsApp or Instagram and third party websites constituted an abuse of Facebook's dominant position on the social media market because this was a condition for being able to use Facebook's services. It remains to be seen if the Union courts agree with such an approach.

Indeed, while there is growing case law on the fundamental importance of data protection rights,[35] further promoted by the entry into force of the General Data Protection Regulation ("GDPR"),[36] the ECJ has to date not had the opportunity to address the role of data in competition law.

In the judgement in *Asnef-Equifax* from 2006, the Court merely stated that "issues relating to the sensitivity of personal data are not, as such, a matter for competition law."[37] It would nonetheless be precipitous to derive a general rule from *Asnef-Equifax* that data protection cannot at all be taken into account in competition cases, as the Court limited its considerations to the extent that data protection is not *as such* a competition matter.

This brings us to the end of this short *tour d'horizon*. To finish, it can be noted that the Court has been shaping EU competition law since the very beginning of its judicial activity and, as the current developments show, there is no shortage of new questions awaiting to be resolved in 2021 and beyond.

33 Decision of the German Bundeskartellamt of February 6, 2019 (B6-22/16, *Facebook*).

34 The principal proceedings in this case are still pending. Meanwhile, Facebook's application for a suspensive effect has been rejected by the German Federal Court of Justice (KVR 69/19 – Order of June 23, 2020).

35 See, for instance, judgment of May 13, 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317) ("right to be forgotten") or judgment of October 6, 2015, *Schrems* (C-362/14, EU:C:2015:650).

36 General Data Protection Regulation 2016/679 ("GDPR") entered into force on May 25, 2018.

37 Judgment of November 23, 2006, *ASNEF-EQUIFAX* (C-238/05, EU:C:2006:734, paragraph 63).

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