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Recent Updates in Cartels Cases

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1. This year, the Court of Justice of the European Union ("**ECJ**") issued important judgments and the European Commission (the "**Commission**") launched initiatives aimed at expanding its regulatory powers. In this chapter, we first address recent developments on parties' rights of defence and the requirement to prove awareness in defining a single and continuous infringement. Second, we analyse a series of important cases clarifying the criteria for classifying an infringement "by object". Third, we provide an update on the Commission's powers in a dawn raid, and its obligations with respect to proportionality on the calculation of fines. Finally, we examine developments in the area of algorithmic collusion in the European Commission's proposed "New Competition Tool".

I. Recent ECJ Judgments in the *Power Cables* Case – NKT and Nexans

2. In 2020, the ECJ issued two judgments (*NKT v Commission*[1] and *Nexans v Commission*[2]), ruling on the separate appeals of two companies that had been fined by the European Commission in its *Power Cables* decision.[3]
3. As background, in 2014, the Commission imposed fines totalling € 302 million on 11 companies for their participation in a cartel in the high voltage underground and/or submarine power cables sector from 1999 to 2009. This summary sets out the ECJ's findings in the appeals lodged by two companies that had been subject to fines: (i) NKT; and (ii) Nexans.

(i) *NKT*: the Commission must respect rights of defence and prove awareness of all elements in a "single and continuous infringement"

4. On 14 May 2020, the ECJ partially annulled the General Court's ("**GC**") judgment[4] that had upheld the Commission's *Power Cables* decision with respect to NKT.
5. As background, in 2014, the Commission found that the Danish company NKT A/S and its wholly-owned German subsidiary NKT Verwaltungs GmbH ("**NKT**") were jointly liable for participating in a cartel in the high voltage underground and/or submarine power cables sector from 3 July 2002 until 17 February 2006 and imposed a joint fine of € 3,887,000 on the companies.
6. In its application for annulment to the GC, NKT claimed, among others, that its rights of defence had been breached, and that the finding of a "single and continuous infringement" ("**SCI**") was erroneous. In 2018, the GC dismissed NKT's appeal in its entirety. NKT subsequently appealed to the ECJ.
7. The ECJ partially overturned the GC's decision based on two main deficiencies as described below.
8. **Failure to respect NKT's rights of defence.** The ECJ found that the Commission had excluded numerous elements from its statement of objections ("**SO**"), thereby preventing NKT from commenting on those allegations. In particular, it excluded "*activities of the parties relating to the activities of the cartel relating to sales in countries outside the EU or the EEA*".[5] The ECJ found that this violated Article 27(1) of Regulation 1/2003,[6] which requires the Commission to base its decisions only on objections that the parties have been able to reply to, emphasising the SO's role as a procedural safeguard to the rights of defence of parties.[7]
9. In this respect, the ECJ's decision reaffirms established jurisprudence that a Commission decision imposing a fine on a party cannot rely on objections that were not previously communicated to parties.[8]
10. **Failure to prove NKT's full awareness of all elements.** With respect to the anticompetitive practice of the collective refusal to supply accessories and technical assistance to competitors, the Commission acknowledged that NKT had not directly participated in this conduct. Nonetheless, it imputed responsibility for this on NKT because it considered that NKT was aware or could have reasonably foreseen the practice of the other participants in the cartel. NKT appealed this on the basis that the failure to demonstrate their awareness breached the presumption of innocence. On appeal, the GC found that such proof of awareness was unnecessary as the disputed element was a "*non-essential characteristic*" of the infringement at issue.[9]
11. In defending its decision before the ECJ, the Commission argued that NKT "*should have known that the cartel would be implemented by different anticompetitive practices*".[10]
12. The ECJ disagreed. It emphasised the strict requirement for the Commission to demonstrate awareness of all the components of the infringement, regardless of whether or not the components are "essential" parts of the infringement,[11] and stated that the "*case-law does not distinguish between practices which are "essential" and those which are not*".[12] In this case, however, the relevant activity did in fact constitute one of the "principal activities" of the cartel.[13]
13. This judgment provides a two-fold reminder to the Commission of the importance of meeting all procedural and evidentiary obligations in cartel cases.

(ii) *Nexans*: the Commission's powers in a dawn raid and GC's assessment of fines

14. On 16 July 2020, the ECJ issued its judgment on Nexans'

appeal of the Commission's decision in the *Power Cables* case. This follows a related set of judgments from the ECJ and GC where the Courts annulled part of the inspection decision due to its excessively broad scope.[14]

15. As background, in 2009, the Commission raided Nexans' offices in France. Nexans challenged the legality of the inspection decision before the GC, arguing that the Commission had gone beyond the scope permitted by Article 20 of Regulation 1/2003. This culminated in the ECJ's partial annulment of the inspection decision, as noted above.
16. In 2014, the Commission imposed a fine of € 4,903,000 on Nexans France with respect to its participation in the cartel from 13 November 2000 to 11 June 2001, and a fine of over € 65 million jointly on Nexans France and its parent company, Nexans, with respect to their involvement from 12 June 2001 to 28 January 2009.[15] In 2014, Nexans appealed the decision before the GC, and the GC dismissed the action in its entirety.[16] Subsequently, Nexans appealed to the ECJ, disputing the extent of the Commission's investigation powers.
17. **The Commission's power to copy documents without prior examination.** Nexans argued that according to Article 20(2)(b) and (c) of Regulation 1/2003, the Commission would not have been entitled to make copies and store documents from the inspection without first having carried out a thorough examination of the documents.
18. The ECJ dismissed Nexans' appeal, finding that Article 20(2)(b) permitted the Commission "*a certain discretion regarding its specific examination procedures*".[17] Therefore, the Commission may make copies of the data. Furthermore, the rights of defence are safeguarded where, as in this case, the Commission copies the data (without prior examination), but subsequently "*assesses the relevance of the data in compliance with the rights of the defense of the undertaking concerned, before those documents found to be relevant are placed in the file and the remainder of the copied data is deleted*".[18] However, it also clarified that Article 20(2)(c) could not be relied upon to permit the Commission to take materials without prior examination. Specifically, the wording of that provision presupposed that the Commission had already determined that the evidence seized consisted of documents "covered by the subject matter of the inspection".[19]
19. **The Commission's examination of materials outside its premises.** Nexans argued that the Commission was not allowed to examine materials in the Commission premises, and that the examination had to be conducted in the undertaking's premises.[20] The ECJ dismissed this argument, finding that such a limitation was not prescribed in Article 20(1) and (2) of Regulation 1/2003, and that the Commission can continue assessing evidence in the Commission premises when justified for effectiveness or to avoid excessive interference in the operations of the undertaking.[21]

II. Further Guidance on "By Object" Infringements

20. This has been a prolific year for the clarification of the highly debated tests and requirements of "by object" infringements. The CJEU has issued several decisions and Opinions on the interpretation of conduct as a "by object" infringement. These judgments expand and clarify the high evidentiary standard set in the ECJ's landmark judgment *Cartes Bancaires*,[22] notably that the concept of a "by object" infringement must be interpreted restrictively.
21. ***Budapest Bank* and *Generics*.** In early 2020, the ECJ issued two decisions providing guidance on the characterisation of "by object" infringements, in the *Generics* and *Budapest Bank* cases.[23] Both cases, which were responses to preliminary references from national courts, dealt with the characterisation of conduct as an infringement "by object".
22. In *Budapest Bank* and *Generics*, the ECJ set out several expanded and new criteria for the characterisation of a "by object" infringement:
    (i) **Robust prior experience.** The nature and content of the agreement must be analysed before concluding that it is inherently anticompetitive; and such a conclusion must be supported by robust prior experience. This finding constitutes a reminder to the Commission and national authorities that reliance on inconsistent precedents and non-uniform practices would not be sufficient to ground such a conclusion.[24]
    (ii) **Pro-competitive effects.** For the first time, the ECJ underscored that pro-competitive aspects of the conduct advanced by parties in their defence must be considered when evaluating whether a certain conduct is sufficiently harmful to amount to a restriction "by object".[25]
    (iii) **Counterfactual.** The ECJ clarified that a "by object" analysis must consider parties' arguments on the counterfactual – that is, the arguments of parties assessing that the competitive situation would have been worse absent the agreement.[26]
    (iv) **Settlement of patent disputes with generics.** In this specific context, the ECJ held that in order to constitute a restriction "by object", it must be apparent that the value transfer from the patent holder to the generic manufacturer "*has no other explanation other than the generic manufacturer's undertaking not to compete with its product during the agreed period*".[27]
23. ***Lundbeck*.** In June 2020, the latest in the series of CJEU guidance on the "by object" characterisation arrived in the form of Advocate General Kokott's Opinion in the *Lundbeck* case.[28]
24. As background, in June 2013, the European Commission fined a Danish pharmaceutical company, Lundbeck, for infringing Article 101 TFEU. The infringements concerned six agreements between Lundbeck and several pharmaceutical generics companies that operated in 2002 and 2003. In 2002, as Lundbeck's patents protecting an active ingredient (citalopram) were set to expire, it agreed to pay four manufacturers of generic medicines to refrain from entering the market, essentially delaying the marketing of generic versions of citalopram.
25. The European Commission found that the agreements infringed competition law "by object" as the intention was to exclude generic manufacturers from the market for the agreed period of time by means of payments made to them by Lundbeck, and not, as argued by Lundbeck, to resolve a patent dispute. The Commission imposed a fine of € 93 million on Lundbeck.
26. Lundbeck appealed the Commission's decision before the GC, notably disputing the Commission's characterisation of its actions as "by object" restrictions. The GC dismissed the appeal in its entirety. Lundbeck subsequently appealed that decision before the ECJ.
27. In her Opinion, Advocate General Kokott recommended that the ECJ dismiss Lundbeck's appeal. The Opinion is noteworthy for its careful adherence to the ECJ's findings in *Generics* and *Budapest Bank*, continuing a coherent trend of views with respect to "by object" criteria as follows:

28. First, AG Kokott supported the principle that agreements which require a generic manufacturer to refrain from entering the market in return for compensation are liable to restrict competition "by object". AG Kokott restated the GC's position that where a payment is combined with an "*exclusion of competitors from the market or a limitation of the incentives to seek market entry, it is possible to consider that that limitation does not arise exclusively from the parties' assessments of the strength of the patent but rather was obtained by means of that payment that therefore constitutes a buying off of competition*".
29. Second, AG Kokott highlighted the fact that the GC had correctly conducted a counterfactual analysis, "*it is necessary to determine whether, in the absence of the agreement, there would have existed real and concrete possibilities for an undertaking outside the market to compete with the undertaking already established there*"[29] – while somewhat curiously distancing herself from the term "counterfactual". Nevertheless, AG Kokott's view confirms the need for an authority to weigh out the counterfactual as this may well show that the agreement cannot actually restrict competition, or on the flipside, may in fact be pro-competitive.
30. Finally, AG Kokott acknowledged the need to take into account any pro-competitive effects of an agreement for the purpose of characterising a "by object" restriction as part of the overall assessment. However, the appellants had not claimed such pro-competitive effects.
31. The focus now shifts to the ECJ to see whether it will align with AG Kokott's findings and continue to crystallise the criteria for "by object" restrictions in the same direction.

III. Proportionality and Implicit Assessment of Fines

32. ***Infineon* – Proportionality of fines.** Last year's edition discussed the *Infineon v Commission* decision, where the ECJ partially annulled the GC's decision due to the failure to consider Infineon Technologies AG's ("Infineon") specific conduct in the cartel. In 2014, the European Commission had imposed a fine of € 82.7 million on Infineon for its participation in the smart card chip cartel.[30] Infineon's appeal to the GC[31] was dismissed. Infineon subsequently appealed to the ECJ, arguing that the GC had made a manifest error of assessment by basing its decision on a review of only five out of the 11 alleged anticompetitive contacts.[32] The ECJ partially annulled the GC's decision and found that the fine had to be adjusted to take into account the number of contacts in which Infineon was involved, that were not assessed by the GC. Additionally, the ECJ found that the GC failed to explain why it had not assessed all the contacts to which Infineon had been party. As a result, the ECJ referred the case back to the GC in order for it to carry out a proper assessment of all the relevant circumstances and the proportionality of the fine, but the ECJ did not itself reduce the fine.
33. On 8 July 2020, the GC issued its judgment, reducing Infineon's fine by approximately 7% to € 76.9 million.[33] In doing so, it examined all 11 contacts challenged by Infineon and considered that the 20% reduction that the Commission accorded to Infineon was insufficient, as it did not properly reflect the limited anticompetitive contacts that Infineon had been involved in. Further, the GC found that the Commission had only proved 10 out of the 11 alleged anticompetitive conducts.[34]
34. ***Nexans* – assessment of fines.** In the same decision discussed above, Nexans, relying on the ECJ judgment in *Infineon*,[35] argued that the GC erred in failing to make its own assessment of the level of the fine set by the Commission, taking account of all the circumstances including the lack of effects.
35. The ECJ rejected this argument. It found that although the GC did not expressly state that the appellant's arguments were not capable of persuading it to reduce the fines, the GC had in fact referred to the proportion of sales as a factor relevant to establishing the gravity of the infringement.[36] In doing so, it distinguished the circumstances in *Infineon*, where the GC had failed to provide any response to certain arguments of the appellant. This accords with established case-law which states that the reasons on which a judgment is based must clearly disclose the GC's thinking, even if it is implicit – on the condition that it enables parties to "*know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review*".[37]
36. These decisions follow a clear trend of intervention from the GC and ECJ with respect to the proportionality of fines as well as the adequacy of reasoning.[38] It is expected that the Commission will exercise greater caution in assessing and justifying the proportionality of its fines, and ensuring that any reductions reflect the relative involvement of the specific party to the cartel.

IV. Potential New Powers in a "New Competition Tool" for the European Commission to Regulate Algorithm-Based Collusion

37. In June 2020, the Commission launched consultations with respect to a New Competition Tool ("**NCT**") intended to allow it to expand its review powers beyond the scope of Article 101 (and Article 102) infringements. In the proposed NCT, the Commission also envisions the power for itself to impose behavioural or structural remedies without the need to engage in individual infringement proceedings. Part of the rationale is based on the difficulties the Commission faces in imposing effective remedies to correct market failures, as they must first conduct a thorough investigation, which typically implies a lengthy review period. In certain circumstances, while the Commission undertakes an investigation into alleged infringements, the market structure may irreversibly tip in favour of a certain player – without the possibility of effective remedies. Thus, it is important to be aware of developments on the NCT as risk assessments pertaining to cartel behaviour will need to evolve according to new rules in the near future.
38. In its Inception Impact Assessment, the Commission indicated its concerns that in digital markets, "*even short of individual market power, increasingly concentrated markets can allow companies to monitor the behaviour of their competitors and create incentives to compete less vigorously without any direct coordination (so called tacit collusion). Moreover, the growing availability of algorithm-based technological solutions, which facilitate the monitoring of competitors' conduct and create increased market transparency, may result in the same risk even in less concentrated markets*".[39]
39. In the Commission's view, EU competition law is presently insufficient to tackle "structural competition problems", such as the structural lack of competition where a market is not working well and not delivering competitive outcomes due to factors including increased transparency due to algorithm-based technological solutions. Notably, the Commission seeks to regulate and potentially impose remedies on companies that fall within such a framework *irrespective of their conduct*. This type of concern has been

espoused in theories of harm considering algorithms as "autonomous" cartelists where pricing algorithms, instead of explicit communication, could be used to signal unilateral pricing intentions.

40. Nevertheless, the Commission has yet to express its stance on the legal standard for a finding of "algorithm-based collusion" that purportedly exceeds the scope of Article 101 TFEU – besides the fact that there may well be overlaps in the issues addressed by the NCT with the scope of Article 101. Therefore, the Commission will need to tread carefully to avoid creating legal uncertainty. In setting the rules and implementing the NCT, the Commission must abide by established legal principles in cartel cases, such as: the requirement to prove intention or awareness (or other established indicia of tacit collusion); the burden of proof; and other criteria paramount to the finding of a cartel infringement.
41. The Commission's questions[40] eliciting feedback for the design of the NCT indicate a clear desire to include algorithmic pricing as a trigger for regulatory intervention. The Commission anticipates finalising its Impact Assessment by the end of 2020. Further developments will be closely monitored as the potential new rules will likely affect a very broad range of companies, beyond pure "digital players", due to the increasing involvement of all sectors in the digital space.

V. Endnotes

1. Judgment of the ECJ of 14 May 2020 in case C-607/18 P – *NKT Verwaltungs and NKT v Commission*.
2. Judgment of the ECJ of 16 July 2020 in case C-606/18 P – *Nexans France and Nexans v Commission*.
3. Commission Decision of 2 April 2014 in case AT.39610 – *Power Cables*.
4. Judgment of the GC of 12 July 2018 in case T-447/14 – *NKT Verwaltungs and NKT v Commission*.
5. NKT ECJ judgment, para. 40.
6. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty of the Functioning of the European Union ("Regulation 1/2003").
7. NKT ECJ judgment, para. 49.
8. NKT ECJ judgment, para. 50.
9. NKT ECJ judgment, para. 168.
10. NKT ECJ judgment, para. 162.
11. NKT ECJ judgment, para. 169.
12. NKT ECJ judgment, para. 166.
13. NKT ECJ judgment, para. 167.
14. Judgment of the GC of 14 November 2012 in case T-135/09 – *Nexans France and Nexans v Commission*; and judgment of the ECJ of 25 June 2014 in case C-37/13 – *Nexans and Nexans France v Commission*.
15. Nexans ECJ judgment para. 29.
16. Judgment of the GC of 12 July 2018 in case T-449/14 – *Nexans France and Nexans v Commission*.
17. Nexans ECJ judgment, para. 61.
18. Nexans ECJ judgment, para. 64.
19. Nexans ECJ judgment, para. 58.
20. Nexans ECJ judgment, para. 78.
21. *Ibid.* para. 87.
22. Judgment of the ECJ of 11 September 2014 in case C-67/13 P – *Groupement des Cartes Bancaires v Commission*.
23. Judgment of the ECJ of 30 January 2020 in case C-307/18 – *Generics (UK) Ltd and Others v Competition and Markets Authority* ("*Generics*"); and Judgment of the ECJ of 2 April 2020 in case C-228/18 – *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others* ("*Budapest Bank*").
24. *Budapest Bank*, para. 76.
25. *Budapest Bank*, paras. 82 and 83; *Generics*, para. 103.
26. *Budapest Bank*, para. 83; *Generics*, para. 38.
27. *Generics*, paras. 85–95.
28. Opinion of Advocate General Kokott delivered on 4 June 2020 in case C591/16 P – *H. Lundbeck A/S and Lundbeck Ltd v European Commission* ("*Lundbeck v Commission*").
29. AG Kokott in *Lundbeck v Commission*, para. 139.
30. Commission Decision of 3 September 2014 in case AT. 39574 – *Smart card chips*.
31. Judgment of the GC of 15 December 2016 in case T758/14 – *Infineon Technologies v Commission*.
32. Judgment of the ECJ of 26 September 2018 in case C-99/17 P – *Infineon Technologies v Commission*.
33. Judgment of the GC of 8 July 2020 in case T758/14 RENV – *Infineon Technologies v Commission*, para. 34.
34. *Ibid.* paras. 194–198.
35. Judgment of the ECJ of 26 September 2018 in case C-99/17 P – *Infineon Technologies v Commission*.
36. Nexans ECJ judgment, paras. 105, 106.
37. Judgment of the ECJ of 11 July 2013 in case C-439/11 P – *Ziegler SA v Commission*, para. 82.
38. See for instance recent judgments of the GC: of 10 November 2017 in case T-180/15 – *Icap v European Commission*; or of 28 March 2019 – *Pometon v Commission*.
39. New Complementary Tool to Strengthen Competition Enforcement, Commission's Inception Impact Assessment (4 June 2020), p. 1, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool.
40. In its Consultation Questionnaire, the Commission asked questions such as: "*14.3. What are the main features of markets where pricing algorithms are used? (The market is highly transparent / Prices might be aligned without market players explicitly agreeing their prices)*"; and "*15. Do you consider that there is a need for the Commission to be able to intervene in markets where pricing algorithms are prevalent in order to preserve/improve competition?*".

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