Table of Contents

Historical background

Mapping of national jurisdictions for the application of EU competition and State aid law

The **application** of EU **competition law** can be divided into three distinct periods.

The first period from 1957 to 2003 saw very little **litigation concerning competition law** (including **State aid** cases) at the national level. Although the European Court of Justice (CJEU) held that Articles 101-102 TFEU were capable of **producing direct effect** at the national level[1], the centralisation of the **enforcement of competition law** in the hands of the European Commission focused competition law litigation at the EU rather than national level.

The same principle applied to State aid litigation: the European Commission played a central role in **negotiating legitimate State aid** [2]and held a monopoly in determining whether a State aid was compatible with the Common Market. Where such cases evolved, the matter was seen as a public-law issue, focusing often on the constitutionality of the measure being implemented by the State. This provided the few opportunities for State aid cases to come before national courts. There was, however, **no harmonisation** of EU legislation on how EU competition law should be applied so it was for the domestic legal system of each Member State to **designate the courts and tribunals** having jurisdiction to apply competition law.

Regulation 1/2003[3] was a **significant turning point in the enforcement** of EU competition law and launched the second period in the application of EU competition law at the national level. This Regulation obliged the Member States to introduce national laws implementing Articles 101 and 102 TFEU and **increased the need for national judges to be familiar** with European Commission practice, guidance and developments in the case law of the European Courts. The Member States were obliged **to create national competition law authorities**, alongside sectorial regulators as part of the parallel liberalisation of public sectors such as telecoms, postal services, utilities and transport. The Member States could designate one single NCA, or allocate competence between several authorities. Litigation at the national level thus focused on judicial review and other forms of public-law remedies against decisions taken by the national competition authorities and regulators.

In addition to the **public-law control of national competition authority** decisions, some Member States also **developed and refined criminal-law liability** for a breach of the national competition law provisions.

Various safeguards were included in Regulation 1/2003 to **avoid competition law developing in different ways in the Member States**, for example the creation of the European Competition Network. Article 15 of the Regulation envisaged a frequent process of cooperation between the Commission and the national courts, though as the survey of national judges conducted for this study reveals, many judges remain unaware of how to apply these provisions.

The Commission can **transmit information in its possession or transmit procedural information to the national courts** (Article 15(1)); give its opinion on questions regarding the application of the EU competition rules (Article 15(1)); and (alongside national competition authorities) can submit observations to national courts as *amicus curiae* (Article 15(3)). Under Article 15(2), national courts are obliged to submit to the Commission a copy of any written judgment in which Articles 101 or 102 TFEU has been applied (Article 15(2)). It was within this context that the "Training of Judges" funding programme was introduced.

State aid was not covered by Regulation 1/2003 but from 2000 onwards the European Commission **embarked on a modernisation of State aid**, allowing the Member States a greater role in self-assessment of State aid within the General Block Exemption and its various Guidelines, as well as soft- and hard-law regulation of Services of

[1] *See, for example, BRT v Sabam, EU:C:1974:25. See also "Articles [101 TFEU] and [102 TFEU] are a matter of public policy which must be automatically applied by national courts." Eco Swiss China Time Ltd v Benetton International NV. EU:C:1999:269*

[2] But the CJEU confirmed in Case C-78/76 *Steinike and Weinlig* EU:C:1977:52, that national courts have the competence to determine the notion of existence of of a state aid. Increasingly, this is a question that arises in national courts and tribunals. The Commission addressed the role of national courts in the Notice on cooperation between national courts and the Commission in the State aid field, published in 1995.The 1995 Cooperation Notice introduced mechanisms for cooperation and exchange of information between the Commission and national courts.

[3] *Council Regulation (EC) No 1/2003 of 16 December 2002 on the* implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, O J L 1, 04.01.2003, p.1-25.*

General Economic Interest and *De Minimis* principles. In 2009 the Commission updated its earlier 1995 Cooperation Notice.[4]

A third period in the enforcement of EU competition law emerged as a result of the **acknowledgement that an individual can rely on a breach of Article 101 or 102 TFEU** in the national courts, even where the individual was a party to the illegal agreement[5].

This **line of case law** was developed later[6], raising the question of how **compensation (damages) could be obtained** in a coherent and effective manner in the 28 Member States given the traditional view of the CJEU that – in the absence of harmonising rules – each Member State is free to determine its own procedural rules and remedies subject to the principles of effectiveness and equivalence.

The Damages Directive[7] was adopted on 26 November 2014 and should be transposed into national law by 27 December 2016. The **aim of the new Directive** is to strengthen the private enforcement of EU competition law and to counterbalance the uneven distribution of litigation in different jurisdictions.

There may therefore be a **need for a different or perhaps complementary approach** to judicial training needs, for example a greater emphasis on case management, how to handle expert evidence, how to handle the burden of proof and for exchanges of information on how EU competition law is applied in the Member States through the different national procedures.

Reading and comprehension activities

Question formation:

Use the collocations and expressions below to make questions based on the text. Use the examples below:

application of EU competition law

- **How many periods can the application** of EU **competition law** be divided into ?

litigation concerning competition law *(including* ***State aid*** *cases)*

- Within the first period was there much **litigation concerning competition law** (including **State aid** cases)?

Collocations and expressions for the questions:

- *producing direct effect*
- *enforcement of competition law*
- *negotiating legitimate State aid*
- *no harmonisation of EU legislation*
- *To designate the courts and tribunals*

[4] Commission notice on the enforcement of State aid law by national courts, OJ C 2009 85/1.
[5] *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, EU:C:2001:465.*
[6] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA. EU:C:2006:461; Europese Gemeenschap v Otis NV and Others EU:C:2012:684 ; Bundeswettbewerbsbehörde v Donau Chemie AG and Others, EU:C:2013:366; Kone AG and Others v ÖBB-Infrastruktur AGEU:C:2014:1317.*
[7] *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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 349/1, 5.12.2014.*

- *a significant turning point in the enforcement*
- *increased the need for national judges to be familiar with*
- *to create national competition law authorities*
- *public-law control of national competition authority*
- *developed and refined criminal-law liability*
- *To avoid competition law developing in different ways in the Member States*
- *transmit information in its possession or transmit procedural information to the national courts*
- *embarked on a modernisation of State aid,*
- *De Minimis principles*
- *acknowledgement that an individual can rely on a breach of Article 101 or 102 TFEU*
- *line of case law*
- *compensation (damages) could be obtained*
- *aim of the new Directive*
- *a need for a different or perhaps complementary approach*
- *burden of proof*
- *Expert evidence*

Competition law: fundamental concepts

Definitions: read the following concepts and try to re-tell what you have read to your partner without looking at the text

Entity:

"any entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed" (C-41/90)

/Corporations, state-owned companies, public employment agencies, football players, central banks, etc./

Economic activity

"Any activity consisting in offering goods and services on a market is economic activity" But "political" exclusions (e.g., social security services, etc.) the activity needs to be in exchange of economic consideration.

Legal Material

DAY 1: Case Study - the concept of an undertaking

The cases, the Parties, the Matter at Hand and the Questions Referred
In Case 30/87
Reference to the Court under Article 177 of the EEC Treaty by the French Cour de Cassation, Paris, **for a preliminary ruling** in the proceedings pending before that court between

Corinne Bodson, residing in Charleville-Mézières (France),
and
Pompes Funèbres des Régions Libérées S.A., whose registered office is in Reims,
on the interpretation of Articles 37, 85, 86 and 90 of the EEC Treaty,

THE COURT (Sixth Chamber) - **Judgment**
Grounds
By a judgment of 20 January 1987, which was received at the Court on 2 February 1987, the French *Cour de Cassation* ((Court of Cassation)) referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 37, 85, 86 and 90 of the EEC Treaty, in order to assess the compatibility with those provisions of national rules on **exclusive concessions of communal monopolies for certain funeral services.**

Those questions arose in a dispute between Pompes Funèbres des Régions Libérées S.A. (hereinafter referred to as "PFRL"), a subsidiary of Pompes Funèbres Générales, which has since 1972 been given an exclusive concession by the town of Charleville-Mézières **to provide the "external services" for funerals**, on the one hand, and Mrs Corinne Bodson, who had engaged in certain activities forming part of the "external services" for funerals within the territory of that commune, on the other.

A French Law of 1904, whose main provisions at present form part of Article L 362-1 et seq. of the Code des Communes ((Code relating to the Communes)), entrusted the "**external services" for funerals** to the communes. Those services cover exclusively the carriage of the body after it has been placed in the coffin, the provision of hearses, coffins and external hangings of the house of the deceased, conveyances for mourners, the equipment and staff needed for burial and exhumation and cremation.

In particular, the "external services" **do not include either the "internal services", which relate to the religious services, or the "unregulated services"** which cover non-essential funeral services such as the supply of flowers and marblework.

It is apparent from the documents before the Court that 5 000 French communes, out of a total of some 36 000, with 25 million inhabitants, approximately 45% of the population of France, have granted to a private undertaking a concession to provide the "external services". Pompes Funèbres Générales and its subsidiaries hold the concession in 2 800 communes. They carry out a large proportion of burials in France. According to the information provided by the Commission, the parent company, Pompes Funèbres Générales, is itself a subsidiary of an undertaking which forms part of the Lyonnaise des Eaux group.

Mrs Bodson operates an **undertaking business** under a franchise from Mr Michel Leclerc, who has set up a network of such firms in France which provide their services at prices substantially lower than those normally charged in that sector, in particular by Pompes Funèbres Générales and is subsidiaries. When Mrs Bodson organised funerals within the territory of the town of Charleville-Mézières, the holder of the exclusive concession instituted **proceedings for an injunction against her.**

Mrs Bodson **appealed** to the Cour de Cassation against the interim judgment of the Cour d' Appel, Reims, which prohibited Mrs Bodson from engaging in any activity relating to the "external services"

for funerals and prescribed a penalty in the event of any infringement. In the proceedings before the Cour de Cassation, Mrs Bodson contended that the group comprising Pompes Funèbres Générales and its subsidiaries had **abused its dominant position on the market**. She referred to a notice issued by the French Commission on Competition stating that that group enjoyed a monopoly or a dominant position.

She alleged that this monopoly or dominant position had arisen as a result of the fact that the Pompes Funèbres Générales group had been exclusively granted a large proportion, and in some regions of France almost all, of the communal concessions for the "external services" for funerals and the abuse consisted, in particular, of the charging of excessive prices. She claimed that the **applicability of Article 37 of the EEC Treaty** could not be ruled out where there were a number of **communal monopolies** covering the national territory.

Please read the questions and be prepared to summarise them without (if possible) referring to the text:

The Cour de Cassation considered that it was necessary to ascertain whether the Treaty had to be interpreted as applying to situations of the kind described; it therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling :

1. Is Article 37 of the EEC Treaty capable of applying to a number of communal monopolies granted to a single undertaking or to a single group of undertakings covering part of the national territory whose object is the provision of the 'external services' for funerals as defined by Article L 362-1 et seq. of the Code des Communes set out above, which include the provision of services and the supply of goods?

2. Is Article 90 of the EEC Treaty capable of being applied to an undertaking or to a group of undertakings to which a number of such monopolies have been granted in that field?

3. If Article 90 of the EEC Treaty is not applicable, can Article 85 or Article 86 apply to that undertaking or group of undertakings? More specifically, is Article 85 applicable to contracts for such concessions concluded with the communes?

4. Does it make any difference to the answers to the above questions if all the monopolies or the dominant position resulting therefrom in fact also relate to the provision of services or the supply of goods in connexion with funerals which are outside the scope of the 'external services' as defined by Article L 362-1 of the Code des Communes?

The first question relates to the interpretation of the Treaty in the context of State monopolies, whilst the other three questions, which should be considered together, are concerned with the interpretation of the competition rules applicable to undertakings.

First question
With regard to the interpretation of Article 37 of the EEC Treaty, it must be borne in mind that, as the Court has consistently held (see in particular the judgment of 28 June 1983 in Case 271/81, Société Coopérative du Béarn v Mialocq, ((1983)) ECR 2057), it follows both from the place occupied by Article 37 in the chapter of the EEC Treaty on the elimination of quantitative restrictions and from the wording used in that provision that **it refers to trade in goods and cannot relate to a monopoly over the provision of services.** However, the **possibility cannot be ruled out that a monopoly** over the provision of services may have an indirect influence on trade in goods between Member States, in particular where the monopoly over the provision of services established by an undertaking or by a group of undertakings leads to discrimination against imported goods as opposed to products of domestic origin.

It must also be pointed out that **Article 37 applies to State monopolies of a commercial character, an expression which covers, according to the second subparagraph of Article 37** (1), any body

through which a Member State either directly or indirectly supervises, determines or appreciably influences trade between Member States, and which also applies to monopolies delegated by the State to others.
However, the situation described by the national court is not covered by either of those alternatives. The national rules entrust the provision of the "external services" for funerals to the communes, which are at liberty to grant private undertakings the concession to provide the service, to leave it entirely unregulated or to operate it themselves.

It is apparent from those considerations **that the situation envisaged by the national court must be dealt with in the light of the Treaty provisions applicable to undertakings, and in particular Articles 85, 86 and 90, rather than in the light of the rules relating to State monopolies in Article 37.**

Second, third and fourth questions
It must be pointed out, in the first place, that **the aim of Article 90 is to specify in particular the conditions for the application of the competition rules laid down by Articles 85 and 86 to public undertakings, to undertakings granted special or exclusive rights by the Member States and to undertakings entrusted with the operation of services in the general economic interest.** Accordingly, it is necessary to start by examining the problems relating to the applicability of Articles 85 and 86.

With regard to Article 85, the national court asks, more specifically, in the second limb of its third …..

The third condition laid down by Article 86 is the abuse of a dominant position. By way of illustration, indent (a) of the second paragraph of Article 86 refers to the imposition, whether directly or indirectly, of unfair prices. In this case, the complaints addressed to the Commission were concerned precisely with the imposition of unfair prices by the concession holders. In these proceedings, Mrs Bodson contended that Pompes Funèbres Générales and its subsidiaries charge excessive prices.

The French Government and PFRL have denied that the prices charged by the subsidiaries of Pompes Funèbres Générales are unfair. The documents before the Court do not contain any information enabling that problem to be resolved. Since over 30 000 communes in France have not granted to an undertaking the concession to provide "external services" for funerals, but have left that service unregulated or operate it themselves, it must be possible to make a comparison between the prices charged by the group of undertakings which hold concessions and prices charged elsewhere. Such a comparison could provide a basis for assessing whether or not the prices charged by the concession holders are fair.

- concession holders are not in a position to "impose" any price, since the prices to be charged are fixed by the contract specifications which form part of the conditions for the concession. **That argument cannot be accepted. It is clear from the documents before the Court that the grant of the concession for the "external services" for funerals is regarded in France as a contract concluded between the commune and the concession holder,** which, moreover, corresponds to the view taken by the national court. It follows from that finding that the level of prices is indeed attributable to the undertaking, since the latter assumes full responsibility for the contracts which it has concluded.

- so far as the communes imposed a given level of prices on the concession holders, in the sense that they refrained from granting concessions for the "external services" to undertakings if the latter did not agree to charge particularly high prices, the communes are covered by the situation referred to in Article 90 (1) of the Treaty. That provision governs the obligations of the Member States - which includes, in this context, the public authorities at the regional, provincial or communal level - towards undertakings "to which ((they)) grant special or exclusive rights ". That situation covers precisely the grant of an exclusive concession for the "external services" for funerals.

- finding that public authorities may not, in circumstances such as those of this case, either enact or maintain in force any "measure" contrary to the rules of the Treaty, in particular the rules laid down by Articles 85 and 86. They may not therefore assist undertakings holding concessions to charge unfair prices by imposing such prices as a condition for concluding a contract for a concession.

It follows from all the foregoing considerations that:

(a) Article 85 of the Treaty does not apply to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service;

(b) Article 86 of the Treaty applies in a case in which a number of communal monopolies are granted to a single group of undertakings whose market strategy is determined by the parent company, in a situation in which those monopolies cover a certain part of the national territory and relate to the "external services" for funerals,

- where the activities of the group, and the monopoly enjoyed by the undertakings in question over a part of the territory of a Member State, affect the importation of goods from other Member States or the possibility for competing undertakings established in other Member States to provide services in the first-mentioned Member State,
- where the group of undertakings occupies a dominant position characterized by a position of economic strength which enables it to hinder effective competition on the market in funerals,
- and where that group of undertakings charges unfair prices, even though the level of those prices is fixed by the contract specifications which form part of the conditions of the contract for the concession;

(c) Article 90 (1) of the Treaty must be interpreted as precluding public authorities from imposing on undertakings to which they have granted exclusive rights, such as a monopoly in the provision of the "external services" for funerals, any conditions as to price that are contrary to Articles 85 and 86.

Vocabulary:

Write the number next to the vocabulary from the text

1: the ones directly related to and used in the judgment

2: the ones with no legal context at all

3: the ones that are used within a different than the one established by the judgment

- *Party to the proceedings (define or explain by referring to the text)*
- *The original lawsuit*
- *Domicile*
- *Provide services*
- *Provision of services*
- *Legal provisions*
- *The law provides that*
- *Entity*
- *Legal entity*
- *Physical entity*
- *Communal monopoly*
- *Communal bathroom*
- *An undertaking*
- *An undertaker*

- *An undertaking business*
- *To undertake something*
- *Exclusive*
- *Inclusive*
- *To grand a confession*
- *Confession*
- *To confess*

Questions:

1. Who are the parties to the case and where were they domiciled?
2. Who referred the case to the ECJ?
3. When (under what circumstances) may a case be referred to ECJ for preliminary ruling?
4. What was the main issue in the instant case (interpretation of which Article was it concerned with)?
5. What does the term "communal monopolies" refer to?
6. What commercial activities were the parties to the dispute engaged in?
7. What was the core of the dispute concerned with?
8. What is the concept of "external services" for funerals and what do hose services cover under the French law?
9. What does Mrs. Bodson operate?
10. What do the external services not include?
11. What do the "internal services" and the "unregulated services" include?
12. What does an undertaking business do?
13. Why did the holder of the exclusive concession instituted proceedings for an injunction and who was the injunction to be directed against?
14. What did Mrs. Bodson appeal against, what did she contend and which unfair competition practice did she allege?
15. How many questions were referred for a preliminary ruling and what was, briefly said, the core of each of the questions referred?
16. What, in short, was the answer to the first question: find the relevant extract in the text and underline it as well as some reasoning behind it.
17. What, in short, was the answer to the second question: find the relevant extract in the text and underline it as well as some reasoning behind it.
18. What in, short was, the answer to the third question: find the relevant extract in the text and underline it as well as some reasoning behind it.

Reading: Black Cabs in London ruling

Reading Part I: Black Cabs in London Retain 'Exclusive' Rights to Drive in Bus Lanes[8]

Read the first part of the article and fill in the gaps with an appropriate adjective from the list. Make sure you review the meaning of the words in the list before you start. Read once for meaning, thinking which word might go into the gap, and then complete the exercise.

Some have legal meanings while others do not.

A. regulatory	*B. consumer*	*C. enduring*	*D. traffic*	*E. exclusive*
F. fierce	*G. traditional*	*H. form-based*	*I. major*	*J. thorough*

Black Cabs in London Retain 'Exclusive' Rights to Drive in Bus Lanes

Erika Szyszczak

A detailed note on Case C-518/13 The Queen, on the application of Eventech Ltd v The Parking Adjudicator (judgment of 14th January 2015)

An (1) _____ feature of EU law is that it may be used in an opportunist manner in some of the lowest tribunals in the EU to create challenges to national rules and policies. This was how the *Eventech* case arose. But the case has not made an impact upon the established case law on State aid, or focused attention upon the *effects* of (2)_____ rules, instead retreating into a comfortable (3)_____ approach towards State aid.

The Issue

In London, bus lanes may be used by the (4) _____ "Black Cabs" to transport fares but also to pick up fares through the process of "hailing a cab". Evidence produced before the High Court in London revealed that in a 2009 survey only 8 % of Black Cab journeys were pre-booked' (AG Wahl Opinion, para 19). The regulatory rules imposed by Transport For London did not allow other taxi companies ("minicabs"), to use the bus lanes or ply for trade. This was because Black Cabs were under an obligation to be recognisable, be capable of carrying persons in wheelchairs, to set the fares by meters and to have a (5) _____ knowledge of the City of London. This is a policy used in other (6) _____ cities for registered taxi companies and is regulated by local authorities and is often endorsed by (7) _____ groups to protect the safety of passengers. In London Black Cabs do not pay for this (8) _____ right, but obviously incur costs in meeting the criteria to be classified as a "Black Cab".

AG Wahl noted that 'taxis and PHVs are engaged in (9) _____ competition with each other across Europe, and London is not the only city where conflicts have arisen'. This system of

[8] http://stateaidhub.eu/blogs/stateaid/post/1237

(10) _____ control is increasingly being challenged by calls for de-regulation as new taxi services are emerging, employing new technology to make taxi bookings using apps, smart phones and the internet. For arguments against de-regulation see L. Eskenazi, 'The French Taxi Case: Where Competition Meets—and Overrides—Regulation' in the *Journal of European Competition Law & Practice*.

Reading Part II: Verb practice

Read the second part of the article and complete the gaps with the correct form of the verb provided in brackets. The verbs are both passive and active. A gap has been provided for each missing word in the verb phrase.

The Process

The case (1) _____ [***begin***] with a fine imposed upon Eventech (a private hire taxi company, a subsidiary company of Addison Lee) when Eventech (2) _____ _____ _____ [***use, deliberately***] the bus lanes on Southampton Row in London. Addison Lee had wanted to challenge the exclusive rights of Black Cabs in time to offer a competitive taxi service for the London Olympics. An appeal against the penalty fine (3) _____ _____ [***make***] to the Parking Adjudicator in August 2011 and this was refused, as was an application for judicial review of this decision by Burton J in July 2012. On appeal to the Court of Appeal a mixture of EU free movement and State aid issues (4) _____ _____ [***raise***]: was the Transport for London policy a breach of the freedom to provide services under Article 56 TFEU?; (5) _____ _____ _____ _____ [***breach, the policy***] the EU principle of equal treatment? Was the policy a breach of the EU State aid rules? On the State aid point the Court of Appeal (6) _____ [***raise***] the question of whether the exclusive right of the Black Cabs to use the bus lanes was the use of State resources. Thus questions (7) _____ _____ [***refer***] to the CJEU on issues relating to State resources, selectivity, whether the rules were proportionate and whether the policy was liable to affect trade between the Member States.

State Resources

AG Wahl concluded that an analogy could (8) _____ _____ _____ [***draw, not***]with the ruling in *NOx,* [Case C-279/80P *Commission v Netherlands* [2011] ECR I-551]. That "releasing" Black Cabs from an obligation to pay a fine for using the London bus lanes (9) _____ _____ _____ [***give, not***] rise to a transfer of State resources. The AG argued that regulating public infrastructure (10) _____ _____ _____ _____ [***engage, normally, not***] the State aid rules but the State should ensure that infrastructure is available on an equal and non-discriminatory basis. The AG (11) _____ [***find***] that Black Cabs and minicabs are not in a comparable situation in all respects, since although both could find clients through pre-bookings, only Black Cabs could use the

bus lanes to ply for trade. This would be the pivotal question: whether State resources are at issue. The CJEU agreed with the submissions made by the Commission and the EFTA Surveillance Authority that where the State (12) _____ _____ [***pursue***] an objective, laid down in legislation, grants a privileged access to public infrastructure which is not operated commercially by the public authorities to users of that infrastructure the State does not necessarily confer an economic advantage for the purposes of Article 107(1) TFEU. [CJEU judgment, para 48]. This reasoning is confusing since the Black Cabs (13) _____ _____ [***give***] exclusive, privileged rights to commercially exploit their trade by free access to the infrastructure, created through State resources, at the expense of competitors. Yet the CJEU creates an artificial boundary which ignores the *effects* of the Transport for London policy:

> *"[I]t is common ground that the right of privileged access is the right to use bus lanes; that that right has an economic value; that the right is granted by the competent traffic authority; that it is stated in the relevant road traffic legislation that the objective pursued by the legislation at issue is that of ensuring a safe and efficient transport system; that neither the road network concerned nor the bus lanes are operated commercially; that the criterion for granting that right is that of providing taxi services in London; that that criterion was established in advance and in a transparent manner and, last, that all the providers of such services are treated equally"* [para 50].

Reading Part III: Summarising

*Read the final part of the article and summarise it trying to use the words in **bold**. Make sure you look up any words that you do not understand. Practice your summary with a partner.*

Selectivity

On the question of **selectivity** the CJEU **held** that this would normally be a question for the national court to decide, but in this case there was sufficient information before the Court to give **guidance**. In paras 60 and 61 of the judgment the CJEU concludes that Black Cabs and minicabs are in different **factual and legal situations** and thus the Transport for London policy does not confer a **selective economic advantage** on Black Cabs. Having come to this conclusion the CJEU did not consider it necessary to consider the **proportionality of the measure**.

Inter-State Trade

The EFTA Surveillance Authority had made submissions in the case urging the CJEU to depart from the **established case law** [Case C-280/00 *Altmark* [2003] ECR I-415] that there is "no threshold too low" to meet the requirement of an effect on **inter-State trade**. But the AG had stated that this was perhaps premature, and this view is confirmed by the CJEU:

"… it is conceivable that the effect of the bus lanes policy is to render less attractive the provision of minicab services in London, with the result that the **opportunities for undertakings** established in other Member States to penetrate that market are thereby reduced, which it is for the referring court to determine." [para 71].

Conclusion

Anyone who has hailed a Black Cab in London [and is over the age of 30] will probably revel in the nostalgia of this ruling. It takes a **review of State regulation** – and the **building of infrastructure** funded by the State – as having few economic consequences for the **competitive use** and modernization of activities. And yet as John Fingleton has recently reminded us it may be necessary to extend competition rules to tackle pervasive **state regulatory barriers** to trade and growth.

Eventech also stands as a judgment of the CJEU oblivious to the developments elsewhere in competition law of using the competition rules, especially Articles 102 TFEU and Article 106 TFEU, to challenge regulation by the State [see for example, Case C-41/90 *Hofner v Macrotron* [1991] ECR 1979; Case C-553/12P *DEI,* judgment of 17 July 2014] that stands in the way of **modernisation**, **liberalisation** and **experimentation** within competitive markets.

About the contributor:
Professor Erika Szyszczak (University of Sussex, Littleton Chambers, London) specialises in EU competition law and in particular State intervention in markets.

Reading: Case C-518/13 The Queen v The Parking Adju Excerpt

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 24 September 2014 (1)

Case C-518/13

The Queen, on the application of Eventech Ltd

v

The Parking Adjudicator

(Request for a preliminary ruling from the Court of Appeal (England and Wales) (United Kingdom))
(State aid — Concept of 'aid' under Article 107(1) TFEU — Rules governing access to and use of public infrastructure — Authorisation granted to taxis but not to private hire vehicles to use the bus lanes in the Greater London Area — Transfer of State resources — Selecti ity — Effect on trade between Member States)

Reading/Grammar Part I: Prepositions

Read the first part of the Opinion and complete the gaps with the correct preposition

across	***in***	***Under***	***by***
during	***to***	***between***	***on***
for	***over***	***within***	***with***

1. The Court of Appeal (England and Wales) has asked the Court to clarify whether a contested London bus lane policy ('the bus lane policy') adopted (a) _____ Transport for London ('TfL') comes (b)_____ the concept of 'aid' under Article 107(1) TFEU. (c) _____ that policy, only black cabs (that is to say, London taxis) are allowed, (d) _____ certain periods of the day, to use the lane reserved for public buses (e) _____ public roads, (f) _____ the exclusion of private hire vehicles ('PHVs').
2. This dispute comes (g) _____ the wake of the technological advances made (h) _____ the past few decades. In particular, the advent of satellite navigation systems and smartphones (i) _____ specific applications designed (j) _____ facilitating requests for transport have changed the way in which customers behave, blurring the lines (k) _____ taxis and PHVs. The result is that taxis and PHVs are engaged in fierce competition with each other (l) _____ Europe, and London is not the only city where conflicts have arisen. (2)
3. In point of fact, I do not find that the State aid rules are generally concerned with State measures such as the bus lane policy, provided that equal treatment is ensured in respect of comparable undertakings.

Reading/Grammar Part II: Articles, determiners, and pronouns

Read the second part of the Opinion and complete the gaps with the correct word or blank (–).

the (x 5)	***they***	***that***	***– (x 4)***
a (x 2)	***which***	***no***	***their***

I – The national legal framework

A – *Black cabs and PHVs*

4. In London taxi services are provided by black cabs and PHVs. Both types of services are licensed by (a)_____ body which is under (b) _____ supervision of TfL. (c) _____ are, however, licensed under different statutory provisions and are subject to (d) _____ different conditions.
5. Black cabs are licensed under the provisions set out in the London Cab Order 1934. (e) _____ Order was made pursuant to (f) _____ power in section 6 of the Metropolitan Public Carriage Act 1869 ('the 1869 Act'), (g) _____ provides in section 8(2) that '(h) _____ hackney carriage shall

ply for hire' (emphasis added) in London unless under (i) _____ charge of (j) _____ driver licensed by TfL under section 8 of the 1869 Act. (k) _____ effect of this is that only (l)_____ black cabs are permitted to collect (m) ___ passengers from (n) _____ street despite the absence of a prior booking.

6. PHVs are licensed separately under the Private Hire Vehicles (London) Act 1998. They are not permitted to 'ply for hire' in London, but may take (o) _____ passengers that have pre-booked (p)_____ services.

For further Day 2 and day 3 cases see the section at the end of the manual.

DAY 2: Investigation and Enforcement of Competition Law

Sanctions and judicial review

Reading: **"The 'tangible' examination of inspections and seizures:**
- A requirement after the ECtHR *Vinci* judgment"[9]

Part I: *Vinci* judgment

Look at the Key Points from an article written about the Vinci judgment and decide where the missing nouns should go. Compare with a partner.

a. reviewing judge	*b. seizures*	*c. best practices*
d. investigation	*e. obligation*	*f. examination*

Key Points:

- According to the Vinci Judgment, Article 8 of the ECHR seems to impose indirectly an (1) _____on the European National Competition Authorities to be precise, circumscribed, and proportionate in the volume and subject matter of their (analogic or digital) (2) _____
- The ECtHR requires that the (3) _____ must carry out a 'tangible' (i.e. concrete and factual) (4) _____ of the seizures to determine whether the documents fall outside the scope of the _____ or under LPP.
- This article examines how the (5) _____ developed by the European Commission and national competition authorities so far enable a judge to carry out a 'tangible' examination of digital seizures.

Part II: Focused reading

Introduction:

The Judgment of 2 April 2015 issued by the European Court of Human Rights (hereinafter ECtHR) and discussed in this article brought a new element to the protection of companies' rights to respect for their private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR). In this judgment, the ECtHR reviewed the inspection practices of the French competition authority and the judicial review possibilities of such an inspection under French law. It concluded that it must be possible in such cases that the judicial review entails a 'tangible' (i.e. concrete and factual) examination of the inspection and seizures.

In this article, it will be explored what the requirement of a tangible examination can entail and how the best practices of competition authorities foresee in this. We will first describe the factual

[9] excerpted from Goffinet, P. & T. Bontinck (2016) "The 'tangible' examination of inspections and seizures: A requirement after the ECtHR *Vinci* judgment". *Journal of European Competition Law & Practice*.

background to the Vinci case (Section II). Then, we will give an overview of the case law of the ECtHR on the protection of companies' rights to respect for their private life during inspections and seizures by public authorities (Section III). We will subsequently explain in detail the position of the ECtHR in the Vinci Judgment of 2 April 2015 (Section IV). Moreover, we will explain why the best practices set out by the European Commission as well as by the Belgian and Dutch Competition Authorities can provide National Competition Authorities with guidance on how to make it possible for a reviewing judge to carry out a 'tangible' examination of the lawfulness of the inspections and seizures (Section V). Finally, we will conclude in Section VI.

Part III : Extended reading and questions.

Scan the second part of the article and answer the following questions:

1. Where did the DGCCRF court carry out inspections and seizures and under whose authorisation?

2. According to French law who makes decisions about granting inspections and seizures?

3. What exactly was seized during the inspections?

4. What did Vinci and GTM claim in their appeal before the JLD and what was the ruling?

5. What did the French Supreme Court rule?

6. What did Vinci and GTM allege in the appeal lodged with the ECtHR and what judgment was issued?

7. Which articles of the ECHR were invoked by the applicants and what did the ECtHR rule?

Factual and procedural backgrounds

The case started with an investigation conducted by the French Department for Competition, Consumer Affairs and Fraud Prevention (hereinafter DGCCRF) into illegal concerted practices prohibited by French competition law and Article 81 of the European Community Treaty (nowadays Article 101 TFEU) in the construction sector.

In the context of that investigation, DGCCRF officials carried out inspections and seizures on the premises of the companies Vinci Construction (hereinafter Vinci) and GTM on 23 October 2007.[10]

Pursuing to national law, they asked, to that effect, an authorisation from the liberties and detention judge (hereinafter JLD) designated as being competent for that sort of act under French law. That judge took a decision authorising the inspections and seizures on 5 October 2007. Under French law, inspections and seizures are carried out under the control of the JLD. Moreover, when the operations are completed, the inspection and the resulting seizures can also be challenged by the targeted company before the JLD.

In the Vinci case, numerous documents and computer files were seized (several thousands), even entire email

[10] Since the Act n8 2008-776 of 4 August 2008, agents of the Competition Authority are in charge of the majority of investigations regarding illegal concerted practices within the meaning of Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU), as well as Articles L420-1 and L420-2 of French Commercial Code. Investigators of DGCCRF stay in charge of investigations concerning micro-practices infringing competition law. [For further footnotes see the original article]

accounts of certain employees. Some of these documents were found to be under the protection of confidentiality of communications between lawyers and their clients (hereinafter the legal professional privilege or LPP) or outside the scope of the investigation.

Vinci and GTM appealed against the inspections and seizures before a JLD, claiming that the seizures were illegal because they were 'widespread and indiscriminate'. While minimising the number of documents seized falling under LPP, the DGCCRF explained that it would not oppose the restitution of documents falling under LPP. On 2 and 9 September 2008, the JLD ruled that these operations did not infringe (i) domestic law2 nor (ii) the rights guaranteed by the ECHR. As regards the LPP, the JLD explained that it was not prohibited to seize documents falling under LPP.

The JLD's judgments of September 2008 were also challenged by Vinci and GTM before the French Supreme Court (*la Cour de cassation*). On 8 April 2010, the companies' claims were however dismissed, on the ground that Article L450-4 of Commercial Code, in its wording at the material time, did not infringe the rights guaranteed by Articles 6(1), 8, and 13 of the ECHR. As regards the LPP, the Supreme Court rejected the claims of Vinci and GTM because the parties did not invoke, among the documents falling under LPP, any communication in relation to the exercise of their rights of defence.

As a result, on 7 October 2010, Vinci and GTM lodged an appeal before the ECtHR, alleging that Articles 6(1) and 8 of the ECHR regarding, respectively, the right to an effective remedy and the right to respect for private life had been violated. On 2 April 2015, the ECtHR issued a judgment along these following lines (hereinafter the Vinci Judgment).

The applicant companies put forward, firstly, a violation of Article 6(1) of the ECHR because they could only challenge the JLD's decisions before the Supreme Court. It was argued that such a challenge does not allow for effective judicial review of both the lawfulness and the merits of a JLD's decision to grant authorisation for inspecting business premises and seizing documents. The ECtHR followed Vinci and GTM on this issue, considering that it had been decided before in *Société Canal Plus e.a. v France* case (see below) that Article L450-4 of Commercial Code in its wording did not comply with Article 6(1) of the ECHR.

The applicant companies then invoked a violation of Articles 6(1) and 8 of the ECHR, alleging that the seizures in question had been 'widespread and indiscriminate', as they concerned several thousand of electronic data (digital documents), many of which were outside the scope of the investigation or fell under LPP. Facing the applicant companies' complaints, the ECtHR noted that in the present case, these complaints concerned essentially the right to respect for private life, home, correspondence, and confidentiality attached to lawyer – client relations, which are to be examined only in the light of Article 8 of the ECHR (and not Article 6(1) of the ECHR).

Part IV: Extended reading and summarizing.

In small groups or pairs read one of the parts of the rest of the article and prepare a short summary to present to the rest of the class. Use the underlined words to help you remember the information.

[GROUP A]

III. The case law of the ECtHR on the protection of companies' rights to respect for their private life during inspections and seizures

The right to respect for private life of companies in the context of inspections conducted by public authorities has been considered by the ECtHR, especially with regard to both home search and confidentiality attached to lawyer–client exchanges.

A. Home search of companies

The ECtHR first decided on the principles regarding the protection of the companies' right to respect for private life, home and correspondence, guaranteed by Article 8 of the ECHR, in 2002, in the Société Colas Est case.

The Société Colas Est case gave the ECtHR the opportunity to state that legal entities (corporations)8 have a right to respect for their 'homes' (business premises). In this French case, several companies complained about the conditions of investigation, which were conducted by DGCCRF's investigators pursuant to the then applicable legal provisions, but without any prior judicial authorisation. The ECtHR also noted that, while carrying out the raids, the inspectors seized various documents containing evidence of agreements related to certain contracts, which fell outside the scope of the investigation.

In this context, the ECtHR states that 'the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises'. As the principles of Article 8 of the ECHR were to apply to the business premises of a corporation, the ECtHR concluded that 'although the scale of the operations that were con- ducted [...] in order to prevent the disappearance or concealment of evidence of anti-competitive practices justified the impugned interference with the applicant companies' right to respect for their premises, the relevant legislation and practice should nevertheless have afforded adequate and effective safeguards against abuse'. The ECtHR observed, however, that such safeguards were absent in the case at hand and that, at the material time, the inspections took place without any prior warrant being issued by a judge. Even if it were supposed that the entitlement to interfere may be more far-reaching where the business premises of a corporation are concerned (rather than a private person in her home), the ECtHR considered that, having regard to the manner of proceeding, the impugned operations in the field of competition law could not be regarded as strictly proportionate to the legitimate aims pursued.]

Czech Republic has also seen its legislation on investigation in the area of Competition law challenged. In the Delta Pekarny case, the ECtHR concluded that there had been a violation of Article 8 of the ECHR, as the national legal framework did not provide for an effective possibility to prevent the National Competition Authority from abusing its power during investigations (lack of prior judicial authorisation and a 'ex post facto' review of the necessity of the interference).

However,, it is via the principle of confidentiality attached to lawyer – client relations that the issue of the protection of the right to respect for a private life of companies has been developed in other cases.

[GROUP B]

B. Confidentiality of lawyer–client correspondence

The case law developed by the ECtHR regarding the legal professional privilege as an aspect of the right to respect for private life, laid down in Article 8, is abundant. We will examine here the ECtHR's supervision on the respect of the LPP of lawyers during investigations carried out by public authorities in the context of criminal proceedings and tax fraud presumption.

In the Niemietz case, the ECtHR decided, for the first time, that investigations conducted on lawyers' premises in the context of criminal proceedings initiated against a third person were to be examined in the light of Article 8 of the ECHR. There had been a violation of the lawyer's right to respect for his or her private life, as (i) the inspections were conducted on his or her business premises, and (ii) the interference was not necessary in a democratic society.

The Wieser and Bicos case confirms this case law, pointing out that the search and seizure of electronic data in the context of a search on lawyers' premises constitute an interference with the rights of the applicants to respect for their correspondence guaranteed by Article 8 of ECHR.

In the André and another case, a law firm complained about the conduct of a search on its business premises. In the context of this inspection carried out by tax authorities, the latter seized data related to a suspected fraud on the part of one of law firm's clients. The applicants, invoking in particular a violation of Article 8 of the ECHR, complained about a breach of the LPP.

The ECtHR concluded that there had been a violation of Article 8 of the ECHR, as the purpose of this inspection was to discover at the premises of the applicants, purely in their capacity as lawyers of the company suspected of fraud, documents which could establish the existence of such fraud on the company's part and to use such documents as evidence against it. The ECtHR noted that the applicants were not accused or suspected

of having committed an offence or being involved in any fraud committed by their client. As a result, the ECtHR ruled that in the circumstances of the case, the search and seizures carried out at the applicants' premises were disproportionate to the aim pursued (i.e. the interference was not necessary in a democratic society).

The ECtHR pointed out that search and seizures on law firms' premises could not be carried out by a public authority without special procedural safe- guards, such as the presence of the chairman of the Bar Association of which the applicants were members or the presence of the judge in charge of the inspection.

This case law shows clearly the limits of investigation powers for a public authority when facing a lawyer or localised in a lawyer's office. If lawyers do not participate in an alleged infringement (committed by their client or not), it is almost impossible for a public authority to obtain from lawyers any document produced in the context of a client – lawyer relationship. Specific safeguards are organised in case of inspections in the business premises of a lawyer, such as the intervention of the chairman of the Bar Association. Before the Vinci Judgment, there had been no real assessment by the ECtHR of the limits of investigation powers when documents, which have been produced in the context of a client – lawyer relationship, are obtained from a company.

[GROUP C]

IV. The Vinci Judgment

The Vinci Judgment brought a new element to the protection under Article 8 ECHR. It was the first time that the ECtHR ruled on a seizure, which was carried out by investigators of a National Competition Authority and concerned electronic data of a company containing information covered by the LPP.

After having acknowledged that there was (i) an interference with Article 8 of the ECHR (the inspections and seizures) (ii) in accordance with the law and (iii) with a legitimate aim (i.e. the prosecution and prevention of antitrust infringements), the ECtHR examined whether the seizures were necessary and proportionate to the legitimate aim.

The ECtHR repeated its position held in Société Canal Plus case, i.e. if national proceedings offer a certain number of safeguards which are effectively applied, there is no violation of the right to respect for private life of the targeted companies. In particular, there was a prior authorisation granted by a judge (a JLD), the inspections and seizures were carried out under the supervision of a JLD, and there was a possibility to challenge the inspections and seizures before a JLD.

The ECtHR then pointed out that the relevant question in the present case was to determine whether these safeguards had been applied in a manner that was concrete and effective, rather than theoretical and illusory, especially with regard to a substantial number of electronic data seized, and to the respect of confidentiality attached to lawyer–client correspondence (the LPP).

In this regard, the ECtHR reiterates the Government's position, according to which seizures have not been 'widespread and indiscriminate', as (i) the seizures were circumscribed to the purpose of the investigation and (ii) a sufficiently detailed inventory was communicated to the applicants. As regards this last point, the ECtHR explained that the applicants received a list of the selected documents (including the name of the file, the path, the date, and an ID number) and that they had received a DVD with all the seized data.

The ECtHR noted, however, that the seizures concerned numerous documents, including the entirety of certain employees' professional e-mail accounts. Moreover, the DGCCRF and the applicants agreed that these documents contained information and correspondence exchanged with lawyers that were covered by the LPP.

The ECtHR also noted that the applicant companies were unable to take note about the documents being seized, or to discuss the appropriateness of these seizures, while the operations were conducted. The ECtHR pointed out that, without that kind of safeguards, applicant companies should have been able to obtain, after the inspection, an effective review of its lawfulness. The French proceedings organising an appeal before a JLD under Article L450-4 of the French Commercial Code should have allowed them (i) to obtain restitution of the seized documents falling under LPP or being outside the scope of the investigation or (ii), as regards electronic data, to ensure that the latter were deleted.

In the present case, the ECtHR considered that this appeal before a JLD did not offer an effective and practi-

cal safeguard for the applicant companies to be afforded a concrete control of proportionality over the documents being seized: the JLD merely conducted a formal examination of the lawfulness of the context in which the seizures were done, without carrying out the 'tangible' (i.e. a concrete and factual) examination which was nevertheless required. On this basis, the ECtHR concluded that the seizures in question were disproportionate with regard to the aim pursued (the prevention and prosecution of anti-trust infringements) and that there has been therefore a violation of Article 8 of the ECHR.

[GROUP D]

V. How can a judge carry out a 'tangible' examination of the documents seized?

The Vinci Judgment seems to impose the requirement that the national legal framework must make it possible for the reviewing judge to carry out a 'tangible' (i.e. a concrete and factual) examination of the documents seized. However, given the absence of detail in the Vinci Judgment and the very formalistic approach of the JLD, it is not possible to determine on this basis what constitutes a 'tangible' examination in the case of seizures of massive amounts of electronic data. Therefore, we will discuss below a Belgian case where the issue of the 'tangible' examination has been raised under similar circumstances. We will then further explain why the best practices set out by the European Commission can provide competition authorities with guidance on how to make it possible for a reviewing judge to carry out a 'tangible' examination of the lawfulness of the inspections and seizures. Finally, we will give more details about two sets of best practices that have been published by National Competition Authorities.

A. An interesting precedent, the Belgacom case

In a Belgian case from 2013, the Belgacom case, the question of the tangible examination of an electronic seizure by a reviewing judge has been concretely addressed (before that the Vinci judgment raised this question).28 In this case, 759,000 files (among others, complete e-mail accounts) had been seized by the National Competition Authority during inspections of October 2010 as regards alleged abuse of dominance on the Belgian market for wholesale access to the xDSL network (i.e. the scope of the investigation). Afterwards, 290,327 files had been selected on the basis of further filtering with keywords in March 2011. These files had been transferred on a support and put under sealed envelope. On 4 March 2011, the National Competition Authority decided that all the 290,327 files were in scope and requested to have access to them, despite the fact that Belgacom considered that at least approximately 1,500 of these files were either outside of scope or falling under LPP. An appeal was lodged by Belgacom against this decision of the National Competition Authority before the Brussels Court of Appeal. In this context, the Brussels Court had to make a 'tangible' examination of the relevant seizures.

The Brussels Court of appeal took the position that seizures of complete e-mail accounts were equivalent to 'fishing expeditions' and that such expeditions were prohibited by Article 8 of the ECHRThe Court explained that the use of appropriate keywords could enable the authority to avoid 'fishing expeditions'. , The Court considered that, despite using keywords, the number of documents selected was so high, 290,327 files, (i) that 'a shallow reading would take dozens of thousands of hours' and (ii) the selection as determined in the decision of 4 March 2011 was not proportionate.

The Brussels Court of Appeal then issued an injunction to the National Competition Authority to corroborate all the documents selected with at least an additional key- word, to statistically check the relevance of the selection being made and to carry out this selection in the presence of the lawyers of the targeted company.

The Brussels Court of Appeal did not state that it was unable to carry out a 'tangible' examination of the seizures, but it stated that the selection was not proportionate. Underlying, it is clear from the motivation of the Court that it was not possible for it to carry out a tangible examination of the seizures (as explained by the Court, 'a shallow reading [of these documents] would take dozens of thousands of hours').

Following this judgment, the Belgian Competition Authority adopted best practices which are close to the best practices of the European Commission, which we will examine in the section below.

[GROUP E]

B. The best practices of the EU Commission

Since 2011, the Commission has developed best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, accompanied by an explanatory note on the Commission's approach in inspections' matters.

This explanatory note, revised in September 2015, concerns especially the framework on copy and search of data. In particular, while carrying out an inspection on the premises of a company, Commission's inspectors are 'entitled to examine any books and records related to the business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records. This includes the examination of electronic information and the taking of electronic or paper copies of such information'. In this regard, inspectors 'may search the IT-environment and all storage media of the undertaking'. Yhey 'may not only use any built-in (keyword) search tool, but may also make use of their own dedicated software and/or hardware ("Forensic IT tools"). These Forensic IT tools allow the Commission to copy, search and recover data whilst respecting the integrity of the undertakings' systems and data'. Inspectors may also restore any deleted in- formation using these tools.

The information obtained on keyword research basis is then uploaded on a data carrier L, and the inspectors manually select the relevant documents. This manual selection occurs in the presence of the representatives of the company (or its lawyers) who can 'oppose' the seizure of documents out of scope or falling under LPP. The selected documents are then exported from the platform of the forensic software of the Commission and stored in an encrypted self-extracting archive file.

'Each time that an export is copied on a data carrier, the data carrier and a printed list of the exported items are handed over to the company representatives. The list of items mentions the name, the path, the date and an ID number for each exported document'. At the end of each day of the inspection, the data carrier and the printed list of the exported items are communicated to the company, which can check in detail all the selected documents and communicate its comments to the inspectors of the Commission. It is important to note that the inspectors do not take this data carrier and the printed list with them when they leave the premises of the company.

At the end of the inspection, the targeted company receives both a copy of the data carrier of all the exported items which are added to the Commission's case file and a detailed list of these items according to the technical proceedings described above. The company will be requested to sign the printed list(s) of data items selected. Moreover, 'the Inspectors completely wipe all Forensic IT tools on which company data have been stored. Hardware provided by the undertaking will not be wiped by the Inspectors, but returned to the undertaking'.

If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection (at the company's premises), the copy of the data set still to be searched may be collected to continue the inspection at a later time. This copy will be secured by placing it in a sealed envelope according to the technical proceedings explained above. The company may request a duplicate. The Commission will invite the company to be present when the sealed envelope is opened and during the continued inspection process at the Commission's premises. Alternatively, the Commission may decide to return the sealed envelope to the company without opening it. […]

DAY 3: Private Enforcement

Criminalization of Competition Law

Article 101 (cartels)

Article 101[11]

The requirements of Article 101(1)

Article 101(1) prohibits as incompatible with EU principles, all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the EU.

The following must be established for an infringement of Article 101(1):

- an agreement or concerted practice between two or more undertakings, or a decision by an association of undertakings;
- which has as its object or effect the prevention, restriction or distortion of competition;
- an appreciable effect on competition; and
- an appreciable effect on trade between Member States.

The concept of an "undertaking" under Article 101 includes individuals, partnerships, corporations, limited partnerships, trusts, charities, co-operatives, nationalised firms, state- owned commercial organisations and non-profit making organisations. It could also include government departments and agencies in respect of certain activities. The European Court of Justice has stated that "in the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".

Agreements made between companies within the same corporate group will generally not be caught by the competition rules as they will all be treated as part of the same economic entity. It is only when the subsidiary company has the freedom to determine its own prices and marketing policy that the parent and subsidiary may be regarded as separate.

"Agreement" is widely construed and includes written agreements and oral agreements, whether or not they are intended to be legally binding. Informal agreements and "gentlemen's agreements" are caught: it is sufficient that the undertakings in question have expressed their joint intention to conduct themselves on the market in a specified way. Moreover, the companies involved need not actually reach an agreement as the term "concerted practices" covers collusion falling short of a definite agreement. A concerted practice might be found, for example, where one company "signals" to its competitors a future price increase, and that company and its competitors then were to increase prices at or about the same time.

Types of Offences

Read the definitions for various competition law offences, breaches and concepts:

Cartels	Legal definition: a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (United Brands).

[11] From EU Competition Law: Article 101 and Article 102, Field Fisher Waterhouse January 2012, Available http://www.field-fisher.com/pdf/EU-competition-law-articles-101-102.pdf

Vertical agreements	Agreements amongst rivals to fix prices, limit output, share markets (customers), limit investments.
Mergers	An advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities: examples include general taxation measures or employment legislation.
Bid Rigging	Agreements that are generally pro-competitive but may too yield anticompetitive effects.
Horizontal cooperation agreements	A genuinely good act (operation), presumed pro-competitive (recital 4 of R. 139/2004) and often bring efficiencies, and only generate problems in exceptional circumstances when concerned with monopoly.
Abuse of dominance	Agreement restricting competition in the context of public tenders and public procurement perceived as hard infringement of competition practices.
Dominance	Aspect of dominance that is considered unlawful as it impairs competition through the conduct of such an entity as markets on which an entity occupies a key position are presumed insufficiently competitive.
State aid	Agreements between competitors which do not purport to restrict competition, but that may have anti-competitive effects.

How many of the concepts from the previous exercise can you remember?

Case study with language input:

European Union: ECJ Upholds GC Ruling That Reduction In Subsidiary's Fine Also Applies To Parent Company Where Appeals Have Common Object

Read the text and answer the comprehension questions:

On 22 January 2013, the Court of Justice of the EU ("ECJ") ruled that, when the EU courts **reduce a fine imposed** by the Commission **on a subsidiary for an infringement of the EU competition rules**, they may also apply the same reduction to the fine **imposed jointly and severally** on the **subsidiary's parent**, provided that the subsidiary's and parent's **appeals** before the EU courts **have the same object (and even if this reduction goes beyond the scope of the parent company's pleas).**

The ECJ's judgment concerns appeals arising from the Commission's decision in the copper fittings cartel case. In its decision of 20 September 2006, the Commission fined several companies for their participation in a cartel between 31 December 1988 and 1 April 2004 relating to **the supply of copper**

fittings. Among the addressees of the decision were Pegler, which was found to have **directly participated in the cartel**, and Tomkins, which was Pegler's **parent company during the time of the infringement**. Pegler and Tomkins were jointly and severally fined **€ 5.25 million for the infringement**.

The two companies **separately brought actions for annulment before the General Court** ("GC").

Both companies **contested the Commission's assessment of the duration of Pegler's involvement in the cartel, although the scope and grounds of their arguments were different.** Pegler also contested the Commission's application of a **1.25 deterrence multiplier in the calculation of the fine**.

In a first judgment of 24 March 2011, ruling on Pegler's appeal, the GC **annulled the decision in so far as the Commission found that Pegler had participated in the cartel from 31 December 1988 to 29 October 1993** and applied a deterrence multiplier in the calculation of the fine.

Consequently, the GC set the amount of the fine for which Pegler was liable at € 3.4 million (see VBB on Competition Law, Volume 2011, No. 3, available at www.vbb.com).

In a second judgment issued on the same day, ruling on Tomkins' appeal, the GC considered **that account should be taken of the outcome of the action brought by Pegler given that Tomkins had also contested the duration of Pegler's involvement in the cartel (even though the scope and grounds of its pleas on this point were different to Pegler's)**.

As a result, the GC reduced the amount of the fine imposed on Tomkins to € 4.25 million, in respect of which it was jointly and severally liable with Pegler as to € 3.4 million. (Tomkins' fine was not further reduced to € 3.4 million because, unlike Pegler, Tomkins had not contested the Commission's application of a 1.25 deterrence multiplier in the calculation of the fine.)

To reach this conclusion, the GC pointed out that Tomkins was not held liable for the cartel on account of its direct participation in the cartel's activities but only as Pegler's parent company.

The GC recalled that, according to EU competition law, the applicant and its subsidiary constitute a single entity and the imputation of liability to Tomkins meant that it had the benefit of the partial annulment of the contested decision.

Concerned by the fact that this ruling could be regarded as ultra petita (because Tomkins benefited from specific arguments put forward by Pegler concerning the duration of the infringement which it had not raised in its own action), the GC reasoned that, in actions for annulment brought separately by a parent company and by its subsidiary, the court is not ruling ultra petita if account is taken in the parent's action of the outcome of the subsidiary's action provided that the form of order sought in both actions has the same object. According to the GC, this was the case with Tomkins' and Pegler's appeals.

The Commission sought to set aside this judgment before the ECJ and raised a number of grounds in support of its appeal. In particular, the Commission argued that Tomkins was not entitled, in the proceedings initiated by its application, to benefit from the reduction of fine decided in the proceedings initiated by the separate action brought before the GC by Pegler, given that the ultra petita rule does not recognise exceptions on the basis that two applicants belong to the same undertaking and have been declared jointly and severally liable.

In its judgment, the ECJ rejected the Commission's arguments, holding that the GC had been correct to rely on the principle that Tomkins' liability as parent company was purely derivative and thus depended on that of its subsidiary. As regards the scope of the ultra petita rule as discussed by the GC, the ECJ clarified that the notion of the "same object" does not require that the scope of the applications of the parent and subsidiary and the arguments on which they rely to contest the duration of the infringement be identical. The ECJ therefore upheld the GC's findings and dismissed the appeal.

I. Comprehension practice: Answer the following questions

1. The ruling at hand was issued by
    a) *national Competition authority*
    b) *ECHR*
    c) *Court of Justice of European Union*

2. The relevant legal question was concerned
    a) *with the fine being imposed unlawfully on both the mother and daughter company*
    b) *relevance of the penalty imposed on the mother company with regards to the subsidiary*
    c) *mother company being penalised for the breach conducted by a subsidiary*

3. Based on the information available in the article
    a) *both the mother and daughter company submitted identical plea contesting the extent of the penalty*

b) *only the mother company submitted a plea contesting the extent of the penalty*
c) *the plea submitted by the mother company was different from that submitted by the daughter company*

4. The breach at the centre of the core decision was concerned with
   a) *price fixing*
   b) *cartels*
   c) *state aid*

5. In the case at hand the penalty for breach for imposed
   a) *upon two unrelated companies Pegler and Tomkins*
   b) *upon both the daughter company Tomkins and the parent company Pegler*
   c) *upon both the daughter company Pegler and the parent company Tomkins*

6. The penalty imposed
   a) *was € 5.25 million for the infringement upon each company*
   b) *was € 5.25 million for the infringement upon the daughter company*
   c) *was € 5.25 million for the infringement upon both companies*

7. The companies appealed separately
   a) *seeking to have the decision set aside*
   d) *seeking to have the penalty imposed upon the other company*
   e) *seeking to have the penalty reduced*

8. The appeals submitted by the companies were
   a) *identical in their arguments*
   b) *substantially different in their arguments*
   c) *insufficiently supported by arguments*

9. The main issues of the appeal by Pegler was concerned with
   a) *lack of authority of the Commission*
   b) *incorrect assessment of the breach*
   c) *both incorrect assessment of the breach and extensive penalty*

10. The appeal of Pegler before General Court
   a) *was admitted and partially granted*
   b) *was admitted and fully granted*
   c) *was admitted but dismissed*

11. The General Court
   a) *reduced the penalty of the parent company and the daughter company*
   b) *reduced the company of the parent company*
   c) *decided against reduction of the penalty*

13. The GC relied on EU concept
   a) *that for the purposes of completion law the parent and the subsidiary are treated as separate entities*
   b) *that the parent and the daughter are always both directly liable for the breach*
   c) *that the parent and the daughter company are to be perceived as single entity*

14. The Commission appealed the judgement of the GC before CJEU on the grounds of
   a) *the daughter company is not entitled to benefit from the reduction*
   b) *the daughter company is not entitled to such an extensive reduction*
   c) *the daughter company is not entitled to appeal*

15. The ultra petita rule
   a) *was not mentioned by the GC*
   b) *was referred to by both the GC and the Commission*
   c) *was relied on by the Commission*

16. The ECJ
    a) *focused on procedural aspects of the case*
    b) *focused on the derivative liability of the parent company*
    c) *focused on the derivative liability of the subsidiary*

17. The ECJ
    a) *rejected the arguments of the Commission*
    b) *dismissed the Commission's appeal as inadmissible*
    c) *upheld the appeal and the arguments of the Commission*

II. Case study and relevant arguments:

Arguments by Tomkins	Arguments by Pegler	Commission's arguments	Reasoning of the General Court	Reasoning of the ECJ

Look at the following list of arguments and reasoning and divide them based on the entity :

Competition breach was committed and penalty must be imposed.

1. The breach was committed by the daughter company as a direct participant and the parent company is therefore liable too.
2. The decision of the Commission s erroneous and should be set aside.
3. The duration of the involvement in cartel was erroneously assessed.
4. The application of 1.25 deterrence multiplier in the calculation of the fine was erroneous.
5. The decision of the Commission is to be annulled in the part regarding the assessment of the duration of the involvement in the cartel.
6. The fine is to be reassessed.

7. The action brought by the subsidiary concerning the penalty implied jointly and severally is to be taken into account when considering the outcome of the action brought by the parent company in the same matter even if the arguments are not identical.
8. Even if the parent company was not seeking reduction of the penalty, it should be reduced if the penalty imposed on the subsidiary has been reduced.
9. The applicant and its subsidiary constitute a single entity and the imputation of liability to Tomkins means that it has the benefit of the partial annulment of the contested decision.
10. In actions for annulment brought separately by a parent company and by its subsidiary, the court is not ruling ultra petita if account is taken in the parent's action of the outcome of the subsidiary's action provided that the form of order sought in both actions has the same object.
11. Tomkins' liability as parent company was purely derivative and thus depended on that of its subsidiary.
12. Tomkins was not entitled, in the proceedings initiated by its application, to benefit from the reduction of fine decided in the proceedings initiated by the separate action brought before the GC by Pegler..
13. Tomkins' and Pegler's appeals had the same object.
14. The notion of the “same object” does not require that the scope of the applications of the parent and subsidiary and the arguments on which they rely to contest the duration of the infringement be identical.
15. Ultra petita rule does not recognise exceptions on the basis that two applicants belong to the same undertaking and have been declared jointly and severally liable.

Vocabulary: State Aid control[12]

Read the following text about State Aid control and complete the gaps with the words in the box below. Before you begin make sure you know the meanings of the noun phrases.

A. State resources	*B. government intervention*	*C. policy objectives*	*D. tax reliefs*
E. new legislation	*F. Member States*	*G. notification procedure*	*H. investigation procedure*
I. taxation measures	*J. regulatory framework*	*K. selective basis*	*L. industry sectors*

Why control State aid?

A company which receives government support gains an advantage over its competitors. Therefore, the Treaty generally prohibits State aid unless it is justified by reasons of general economic development. To ensure that this prohibition is respected and exemptions are applied equally across the European Union, the European Commission is in charge of ensuring that State aid complies with EU rules.

[12] http://ec.europa.eu/competition/state_aid/overview/index_en.html

What is State aid?

State aid is defined as an **advantage** in any form whatsoever conferred on a (1) _____ _____ **to undertakings** by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State aid (examples include general (2) _____ _____ or employment legislation).

To be State aid, a measure needs to have these features:

- there has been an **intervention by the State or through (3)** _____ _____ which can take a variety of forms (e.g. grants, interest and (4) _____ _____, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);
- the intervention gives **the recipient an advantage on a selective basis**, for example to specific companies or (5) _____ _____, or to companies located in specific regions
- **competition has been or may be distorted**;
- the intervention is likely to **affect trade (6)** _____ _____.

Despite the general prohibition of State aid, in some circumstances (7) _____ _____ is necessary for a well-functioning and equitable economy. Therefore, the Treaty leaves room for a number of (8) _____ _____ **for which State aid can be considered compatible**. The legislation stipulates these **exemptions**. The l**aws** are regularly reviewed to improve their efficiency and to respond to the European Councils' calls for less but better targeted State aid to boost the European economy. The Commission adopts (9) _____ _____ in close cooperation with the Member States.

How is State aid verified?

The European Commission has strong investigative and decision-making powers. At the heart of these powers lies the (10) _____ _____ which -except in certain instances- the Member States have to follow.

The 2013 revision of the State aid Procedural Regulation introduced the possibility of conducting State aid sector inquiries, which was previously only possible as part of Antitrust and Merger control. State aid sector inquiries can be launched in situations where State aid measures may distort competition in several Member States, or where existing aid measures are no longer compatible with the (11)_____ _____.

Aid measures can only be implemented after **approval by the Commission**. Moreover, the Commission has the power to **recover incompatible State aid**.

Three Commission Directorates-General carry out State aid control: Fisheries (for the production, processing and marketing of fisheries and aquaculture products), Agriculture (for the production, processing and marketing of agricultural products), and Competition for all other sectors.

Companies and consumers in the European Union are also important players who may trigger investigations by lodging complaints with the Commission. Furthermore, the Commission invites interested parties to submit

comments through the Official Journal of the European Union when it has doubts about the compatibility of a proposed aid measure and opens a formal (12) _____ _____.

Vocabulary/Word Formation: Antitrust Overview[13]

Adjectives and adverbs

Complete the gaps the with the related adjective or adverb

Competition encourages companies to offer consumers goods and services at the most (1)_____ [***favour***] terms. It encourages efficiency and innovation and reduces prices. To be (2) _____ [***effect***], competition requires companies to act (3)_____ [**independence**] of each other, but subject to the (4) _____ [***competition***] pressure exerted by the others. European antitrust policy is developed from two (5) _____ [***centre***] rules set out in the Treaty on the Functioning of the European Union:

- First, Article 101 of the Treaty prohibits agreements between two or more independent market operators which restrict competition. This provision covers both (6) _____ [***horizontal***] agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at (7) _____ [***difference***] levels, i.e. agreement between a manufacturer and its distributor). Only (8) _____ [***limit***] exceptions are provided for in the general prohibition. The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors, which may involve price-fixing and/or market sharing.
- Second, Article 102 of the Treaty prohibits firms that hold a (9) _____ [***dominance***] position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

The Commission is empowered by the Treaty to apply these rules and has a number of (10) _____ [***investigate***] **powers** to that end (e.g. inspection at business and non-business premises, written requests for information, etc.). The Commission may also impose fines on undertakings which violate the EU antitrust rules. The main rules on procedures are set out in Council Regulation (EC) 1/2003. Read more about:

- The procedures for anticompetitive practices cases
- The procedures for abuse of dominance cases
- The key actors and checks and balances in proceedings for the application of Articles 101 and 102 TFEU.

National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not (11) _____ [***distort***] or restricted. National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty. Building on these achievements, the Communication on Ten Years of Antitrust Enforcement identified further areas to create a common competition enforcement area in the EU.

[13] http://ec.europa.eu/competition/antitrust/overview_en.html

As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts. It also cooperates with national courts to ensure that EU competition rules are applied (12) _____ [***coherence***] throughout the EU.

Role play

Student A: you work for the Commission and need to present your arguments to the ECJ regarding the case at hand. Prepare your speech, use the arguments from the previous exercise as relevant and focus on

- *coherence and cohesion*
- *addressing and rebutting the arguments of the opposing party*
- *intonation*
- *voice pitch*
- *sentence and word stress*

Student B: you work for the Tomkin and need to present your arguments to the ECJ regarding the case at hand. Prepare your speech, use the arguments from the previous exercise as relevant and focus on

- *coherence and cohesion*
- *addressing and rebutting the arguments of the opposing party*
- *intonation*
- *voice pitch*
- *sentence and word stress*

Structure

All the best speeches have a central backbone, a spinal column to ensure that the speech stands up: the witnesses have motives to lie, the witnesses were drunk, the witnesses all contradict each other. The possibilities are endless but if you can build your speech around a theme of this sort it will be far easier to follow.

Of course exactly how you structure your speech is up to you. It will vary from case to case. But a good pattern is this:

State your argument early on.

Illustrate the argument with examples from the evidence.

Conclude by stating it again.

Make it easy for the jury to return the verdict you want

PRINCIPLES OF SPEECH DELIVERED:

This is a principle that you should bear in mind throughout your speech.

The party should begin their submissions with the following: 'May it please the Court that I, (...name...), am appearing for the appellant/ applicant.

My learned friend/ colleague (...name...) shall also be appearing for the appellant, while counsels (...name...) and (...name...) shall be appearing for the respondent'. Other mooters need only introduce themselves formally.

DO NOT refer to other counsels as 'opponents' or 'colleagues' this is mooting, not debating. Either refer to them as 'counsel', 'my learned friend' or simply refer to them by their title, e.g. 'the junior respondent'.

ALWAYS refer to the judge as 'my Lord' and instead of saying 'you' refer to him as 'your Lordship'. For female judges, the appropriate form of address is 'my Lady' and in the third person 'your Ladyship' should be used instead of 'you'.

> (*Introducing the advocates could go as follows:*
> *'My Lord, I am John Smith, and this is Tom Hughes. We are counsel for the appellant, Mr X / X plc, who is the claimant in this case. My learned friends opposite Mr Jones, and Mr Baldwin, appear for the respondents Mr Y / Y plc / the Crown.')*
> *(Always refer to R / Regis / Regina as 'The Crown'. The case name R v. Smith should be read in a moot as 'The Crown and Smith'.)*
> *'Would your Lordship like a brief summary of the facts of this case?'*
> *(The judge will almost invariably reply 'yes'.)*
> *'In this case, X plc...(give a brief summary of the facts stated, including details of the decision at first instance, and the grounds of appeal.)'*

NEVER give your opinion. Avoid phrases such as 'I think' and 'I believe'. Instead, say 'I **put it to the court that', 'it is submitted that' or 'the appellant/respondent contends that'**. The judge does not care about your opinion and will not hesitate to tell you so.

Give

– A brief account of the relevant facts.
– All the pleas in law on which the application is based.
– The arguments in support of each plea in law. They must include relevant references to the case law of the Court.
– The forms of order or remedy sought, based on the pleas in law and arguments.

DISCOURSE MARKERS AND THEIR USAGE

1) with regard to; regarding; as regards; as far as..... is concerned, as for

These expressions focus attention on what follows in the sentence. This is done by announcing the subject in advance. As regards and as far as.....is concerned usually indicate a change of subject.

Examples:

His judgments in civil law cases are flawless. As regards criminal cases...

With regard to the latest case law of the European Court ...

Regarding our efforts to remove undue delays in proceedings for ...

As far as I am concerned, we should focus on training regarding the application of European case law..

As for your thoughts, let's take a look at the latest judgement regarding due process.

2) on the other hand; while; whereas

These expressions give expression to two ideas which contrast but do not contradict each other.

Examples:

Juries are common in England, while in Germany they don't even exist.

We've been steadily improving our awareness of European case law.

On the other hand our Civil Code needs to be re-codified.

The Appellant argues Article 6 applies whereas the Respondent states it does not.

3) however, nonetheless, nevertheless

All these words are used to present two contrasting ideas.

Examples:

The case at hand is proved to be quite straightforward. Nonetheless, one question requires detailed analysis.

The Authority imposed a penalty. However, the legality of it has been contested.

Such conduct is clearly prohibited by several legal sources. Nevertheless, the Defendant argues it was lawful.

4) moreover, furthermore, in addition

We use these expressions to add information to what has been said. The usage of these words is much more elegant than just making a list or using the conjunction 'and'.

Examples:

Several arguments presented by the Petitioner are erroneous. Moreover, there seems to be discrepancy in his interpretation if facts.

The Court accepted the arguments of the Respondent. Furthermore, the Court extended its reasoning even beyond the presented arguments.

The Defendant furnished relevant evidence to the court. In addition to this, he is prepared to testify in a hearing.

5) therefore, as a result, consequently

These expressions show that the second statement follows logically from the first statement.

Examples:

The Authority reduced the penalty imposed upon the subsidiary. As a result, the parent company sought reduction too..

The entity was found in breach of the applicable legal provision. Consequently, a penalty was imposed.

The Plaintiff is seeking compensation for the damage suffered. Therefore, he needs to submit to the court quantification of the damage.

Speaking Activities: Social English and Practice of Law

Ice breaking and getting to know each other:

Social English:
I hope you don't mind me asking,..
May I ask you a personal question?
I would rather not talk about it..
I was wondering

Practice of law:
ask your partner some of the following questions:
Which university did you graduate from?

When did you obtain your first degree?

What did you major in?

What was the focus of your thesis?

Have you ever considered a career as an attorney?

Have you ever considered taking a different career path?

Have you ever considered receiving another degree?

When and where did you land your first job?

Were you happy in your first job?

Do you do legal research on daily basis?

Do you hear and try cases on daily basis?

Do you sit on a bench as a presiding judge?

Do you prosecute cases on regular basis?

What is a court hearing?

Who can list a court hearing?

Are the hearings always held in a courtroom?

Do you go to a courthouse on daily basis?

What is your main area of expertise?

Do you often meet parties to the proceedings?

Do you mostly handle civil or criminal proceedings?

What are your interests outside work?

Do you socialise with your colleagues outside work?

What do you enjoy being involved in when you are not working?

PRESENTATION INPUT : Useful Phrases for the Presentation:

Signpost language

Introducing the topic
The subject/topic of my talk is...
I'm going to talk about...
My topic today is…
My talk is concerned with...

Overview (outline of presentation)
I'm going to divide this talk into four parts.
There are a number of points I'd like to make.
Basically/ Briefly, I have three things to say.
I'd like to begin/start by...
Let's begin/start by...
First of all, I'll...
… and then I'll go on to …
Then/ Next...
Finally/ Lastly...

Finishing a section
That's all I have to say about...
We've looked at...
So much for...

Starting a new section
Moving on now to …
Turning to...
Let's turn now to …
The next issue/topic/area I'd like to focus on …
I'd like to expand/elaborate on …
Now we'll move on to...
I'd like now to discuss...
Let's look now at...

Analysing a point and giving recommendations
Where does that lead us?
Let's consider this in more detail...
What does this mean for...?
Translated into real terms...
Why is this important?
The significance of this is...

Giving examples

For example,...
A good example of this is...
As an illustration,...
To give you an example,...
To illustrate this point...

Summarising and concluding

To sum up...
To summarise...
Let's summarise briefly what we've looked at...
If I can just sum up the main points...
Finally, let me remind you of some of the issues we've covered...
To conclude...
In conclusion...
In short...
So, to remind you of what I've covered in this talk, …
Unfortunately, I seem to have run out of time, so I'll conclude very briefly by saying that …..
I'd like now to recap...

Paraphrasing and clarifying

Simply put...
In other words.....
So what I'm saying is....
To put it more simply....
To put it another way....

Invitation to discuss / ask questions

I'm happy to answer any queries/ questions.
Does anyone have any questions or comments?
Please feel free to ask questions.
If you would like me to elaborate on any point, please ask.
Would you like to ask any questions?
Any questions?

Special Phrases:

I would like to refer to a case I have dealt with
I have heard of
I am familiar with
I find interesting
I hope you will find interesting
I consider the question interesting
I thought it a good idea to look into this in greater detail

The presentation talk: more input:

- I am going to talk about a Czech/ Bulgarian/ German/ hypothetical case.
- The case is concerned with / concerns the right to legal assistance within the scope of Article 6 of the European Convention of Human Rights.
- The facts of the case are as follows.....
- The legal question the Court has to test/ answer is this (whether/ if)
- The core legal point / right(s) / principle(s) in the instant case is

Listening Comprehension Activities

Listening 1: European Court of Justice Rules in Favour of Black Cabs[14]

In this video you will hear a report about the ECJ's ruling in favour of Black Cabs. Please note that the speakers (both mother tongue and foreigners) speak with mainly West African accents, so you may have difficulty understanding every single word.

Listen the first time and answer the following questions

1. Which types of cabs can and which types cannot use the bus lanes?
2. What was the European Court of Justice's decision based on?
3. What did Transport of London have to say about the possibility of allowing minincabs to use the bus lanes?
4. What does the first minicab driver say about how they were being treated?
5. What does the second man interviewed on the street have to say about Black Cabs?
6. What did the Court say about the possible effects of the decision on minicabs' business?

Now listen again and complete the missing nouns.

Reporter: Here on the busy streets of London it's business as usual as Black Cabs continue to use bus lanes while minicabs still have no (1) _____. The European Court said its (2) _____ was based on the fact that Black Cabs are distinct from minicabs. Transport for London argues that allowing thousands of minicabs to drive in bus lanes would also affect the (3) _____ of bus (4) _____.

Minicab driver: Yes, because it's the governments regulated, yeah, stuff, which to be honest, yeah, with you, yeah, we are very very treated unfairly, because we are part of London transports, so that's the way I look at it.

[14] https://www.youtube.com/watch?v=F04c19eVKJw

Well, eventually, yeah, I think we have to do something about it because it's very unfair to us. The governments should take that into consideration and look at it.

Man on the street 1: Well, in one hand, it's not fair.

Man on the street 2: On the other hand, black cabs are more easy to identify, whereas some-one could possibly be impersonating a regular minicab. It's a very difficult (5) _____.

Reporter: The EU Court recognises that the (6) _____ could make minicabs less attractive and reduces their (7) _____ to penetrate the (8) _____. Those who have said that the policy is unfair also hold the (9) _____ that there should be no cab (10) _____ since both types of cab provide the same (11) _____. It seems things will have to remain this way however until the (12) _____ returns from the (13) _____ of Appeal.

Listening 2: London MEP praises bus lane ruling[15]

In this video the London Member of the European Parliament (MEP) for the Green Party talks about why she is happy about the ruling to limit the use of the bus lanes to Black Cabs. You will have to complete the missing verbs (and, occasionally, adverbs) in this activity so pay attention to which forms are used (and and try to explain why). The number of words (when more than one) is provided in parentheses.

Reporter: Jean Lambert, Green MEP for London. The European Court (1) _____ _____ [2 words] that EU law (2) _____ [4]. Black Cabs, but not other kind of taxis, are allowed in bus lanes. What's your reaction?

JL: I'm really pleased with this ruling from the European Court of Justice on the Black Cabs (3) _____ access to bus lanes in London and this (4) _____ _____ [3] as state aid or sort of public support in that sort of way. I (5) _____ it's a really good ruling.

Reporter: What's the impact of this ruling? What (6) _____ [3] for London?

[15] https://www.youtube.com/watch?v=iXWIezPozXY

JL: Well, I think what it (7) _____ for London is that it's still within the power of London authorities to decide who (8) _____ access to the bus lanes. And of course, given that the whole point of a bus lane is (9) _____ _____ [4] public transport moving efficiently and as smoothly as possible. Anything that actually says you (10) _____ [3] open it up to a whole range of other users actually (11) _____ the purpose of the bus lanes. So I think this is good for London's traffic and you know London's buses (12) _____ all the help they (13) _____ _____ [2] in moving smoothly.

Reporter: Because the Court (14) _____ [3] in the opposite direction and ruled that all kinds of taxis (15) _____ [3] to use the bus lanes. What (16) _____ [3] the implication of that and why (17) _____ [3] so strongly that that shouldn't happen?

JL: Well, if the Court (18) _____ [2] differently, then obviously we (19) _____ [4] at bus lanes no longer being able to give priority to certain vehicles, but that you know effectively any minicab in London (20) _____ [3] them and therefore you'd begin to look at a bus lane almost as if it's any other ordinary traffic lane. So that (21)_____ the whole object of actually (22) _____ to keep certain forms of traffic moving more quickly to give a more efficient service for users. So we (23) _____ _____ [3] an even greater clogging up really of London's traffic again, which is certainly not what London's public transport users (24) _____. And given that they think they're paying a lot already to use London traffic, London buses, they want them (25) _____ _____ [5] as smoothly as possible.

Reporter: Does this underline to you that there is a difference between general taxis, public cars that (26) _____ [3] and pre-booked, and the Black Cabs that can be picked up on the kerb, on the side of the road?

JL: I think this ruling (27) _____ [2] that there is a difference between the London Black Cabs and the minicabs. That it's recognised that Black Cabs (28) _____ _____ [3, that they have requirements about disability access, they have requirements about training of their drivers in terms of knowledge of

London, a whole set of things which (29) _____ to one particular group of drivers, in this case the Black Cab drivers. And I think that this also will have implications for other sort of taxis elsewhere in the European Union that also have those sort of similar regulations.

Listening 3: Cartels[16]

Before listening to the short video about cartels, read the transcript and try to guess what the missing noun phrases might be. Then listen and complete the gaps with the missing words.

Richard Whish is one of the country's leading authorities on competition law.

"Well, the most serious _____ _____ is what we call a cartel. And that's the situation where a number of _____ _____ get together and basically decide 'let's not compete with one another'. The most obvious example of a cartel is a _____-_____ _____, and that's where a number of competitors get together and they agree to fix their prices. For example, they might all agree that next Monday they will put their prices up to an _____ _____. What we can say quite simply is consumers get a raw deal from cartels. We come across very _____ _____ where firms simply agree to _____ _____. But you can imagine more complicated examples. One would be what we call _____-_____, and this is where a firm goes out to _____ _____, asking a number of companies to bid competitively to win a contract. And what they do is they get together and they decide 'it is my turn' to win the _____ _____. So it is agreed that I will bid a price of a million pounds, somebody else will bid £1.2 million, somebody else £1.4 million. Well, obviously, I will win the bid and we have created the _____ _____ _____. And clearly the likelihood is that the price even of a million is higher than the _____ _____ should be. The very interesting thing about _____ _____ is that it can take place at a number of different levels within a company, and you could imagine a situation where somebody from the _____ _____ _____ of company A has discussions with a director of a company B. Or this might all take place at a much lower level, where perhaps _____ _____ from two

[16] https://www.youtube.com/watch?v=JO2R4Yort-g

different organizations have discussions with one another. And there are also examples where the _____ _____ sometimes takes place through a _____ _____, for example, a trade association. It's a very important thing for business people to understand that cartels don't only mean cloak and dagger operations. If competitors are all together at a social event, for example they go to a _____ _____ dinner, then after the dinner they go to the bar and they start talking to each other about their _____ _____ and that they're thinking of raising prices, this can also be illegal."

Listening 4: Office of Fair Trading Dawn Raid[17]

Listening 4: Part I
Watch the first part of the video about a fictionalized account of a raid at an electronics company suspected of being involved in unfair trading activities and answer the following questions.

1. What does the company that is being raided deal in?
2. How many other companies are involved?
3. What did these companies allegedly agree to do?
4. At whose home do they also have a team in place? Why?
5. Does the receptionist know anything about the raid? What does she say?
6. Who is Mr Huston on the phone with? Where is her husband?
7. What does the woman investigator show Mr Huston?
8. What kind of investigation is being conducted? What specifically does it regard?
9. What does the warrant allow the representative from the OFT to do?
10. Why do they want to speak to the IT expert?

Listening 4 Part II

[from 2:55] Now listen to the second part of the video and complete the gaps with the missing (2 or three) words

[17] https://www.youtube.com/watch?v=unJFpbjnKVo

Reporter: That was a fictionalized account of what could happen if a business is suspected of (1) _____. There are serious consequences for individuals and firms of all sizes that (2) _____. These can include (3) _____ _____ and fines. We're going to speak to some (4) _____ that will explain to you why competition law is important, what it says and how you can (5)_____. And what to do if you suspect that another business or someone within your own business has (6) _____. So why should we care? Well, competition law is designed to (7) _____ from distorting the (8) _____. It encourages rivalry and ensures that markets are open. It spurs (9) _____. It means that consumers and businesses can access the widest possible (10_____ and services at the (11) _____. All businesses need to comply with competition law.

John Fingleton: Well the OFT's job is to make markets work well for consumers. That means (12) _____ well for business too. One of the ways we do that is through (13) _____. You can see the big benefits for (14) _____ _____ that come from, for example, in the aviation market where … and telecoms market where prices have come down by up to 90% over the last 20 years from (15)_____. Given the importance for competition for the economy and for consumers there are (16) _____ for breaking conpetition law. They include in the UK (17) _____ of up to five years, direct disqualification and fines of up to 10% of turnover for companies. So we try to help business comply with the law and one of the ways in which we do that is with a setting out a (18)_____ for complying with competition law that you'd hear about in this video.

Listening 5: European Commission Fighting against cartels[18]

Background: Companies can distort competition by cooperating with competitors, fixing prices or dividing the market up so that each one has a monopoly in part of the market. Companies in cartels are not under pressure to launch new products, improve quality or keep prices down. Consumers end up paying more for lower quality. Cartels are illegal under EU competition law, and the Commission imposes heavy fines on the companies involved. However, as they are generally highly secretive, evidence is hard to find. In this video you will see how the European Commission works to fight against cartels.

[18] http://ec.europa.eu/avservices/video/player.cfm?ref=I072385

Listening 5: Part I

[up until 2.00] *Watch the first part of the video and listen for the following noun phrases in context. Can you remember was was said about each of these and some of the other words they were used with?*

history of anti-cartel enforcement

sector(s) of the economy

free market economy

fundamental principle(s)

variety of choice(s)

competitive market

lower prices

higher quality products

competing companies

secret agreement between competitors

prices and supply

detriments from cartels

goods and services

choice of better quality

innovation in the market

Listening 5: Part II

Now listen to a fictitious account of an "ice-cream cartel" in a village. The transcript is provided below but there are thirteen mistakes in what is written. Correct the mistakes.

So let's look at how cartels work. In this town here most people are really passionate about ice-cream. So selling ice-cream here is obviously a pretty good business. That's why there are four shops in the village. Usually, shop owners try to get a lot of customers coming to their own shop. So they invent new tastes, they make ads, they are as nice as possible to the customers and do everything that you do when you want to keep their customers. But, one

day they all meet up and say: “Hey, this is all very hard work, isn’t it? Why don’t we all decide to have people pay a higher price? A similar price? Let’s say €1. And the beauty of it is, we don’t even have to work anymore because our customers don’t have much choice.”

Listening 5: Part III

Now listen to some more of the video and write information about what they say about the following:

People understanding the existence of cartels	
Cartel decisions by the European Commission, 2010	
LCD screen cartel	
Bathroom fittings cartel	
Banana cartel	
A case involving car glass	
Uncovering proof of a cartel	
Investigation into the “ice-cream cartel”	

Whistle-blowing policy, leniency	

DAY 2 and 3: further cases

Case study: Akzo Nobel Chemicals Ltd

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission

Available at:
http://curia.europa.eu/juris/fiche.jsf?id=C%3B550%3B7%3BPV%3B1%3BP%3B1%3BC2007%2F0550%2FJ&pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=c-550%252F07&td=%3BALL&pcs=Oor&avg=&mat=or&jge=&for=&cid=473562

Appeal – Competition – Measures of inquiry – Commission's powers of investigation – Legal professional privilege – Employment relationship between a lawyer and an undertaking – Exchanges of e-mails

Facts:

On the 10th of February 2003 the Commission adopted decision C(2003) 559/4, amending its decision C(2003) 85/4 of 30 January 2003, whereby the Commission ordered, inter alia, Akzo … and Akcros … and their respective subsidiaries to submit to an investigation on the basis of Article 14(3) of Regulation No 17… aimed at seeking evidence of possible anti-competitive practices (together "the decision ordering the investigation").

On the 12th and the 13th of February 2003, Commission officials, assisted by representatives of the Office of Fair Trading ('OFT', the British competition authority), carried out an investigation on the basis of the decision ordering the investigation at the applicants' premises in Eccles, Manchester (United Kingdom). During the investigation the Commission officials took copies of a considerable number of documents.

In the course of those operations the applicants' representatives informed the Commission officials that certain documents were likely to be covered by the protection of confidentiality of communications between lawyers and their clients ("legal professional privilege" or "LPP").

The Commission officials then informed the applicants' representatives that it was necessary for them to examine briefly the documents in question so that they could form their own opinion as to whether the documents should be privileged. Following a long discussion, and after the Commission officials and the OFT officials had reminded the applicants' representatives of the consequences of obstructing investigations, it was decided that the leader of the investigating team would briefly examine the documents in question, with a representative of the applicants at her side.

During the examination of the documents in question, a dispute arose in relation to five documents which were ultimately treated in two different ways by the Commission.

The third document which gave rise to a dispute consists of a number of handwritten notes made by Akcros' … general manager, which are said by the applicants to have been written during discussions with employees and used for the purpose of preparing the typewritten memorandum of Set A. Finally, the last two documents in issue are two e-mails, exchanged between Akcros' … general manager and Mr S., Akzo's … coordinator for competition law. The latter is enrolled as an Advocaat of the Netherlands Bar and, at the material time, was a member of Akzo's … legal department and was therefore employed by that undertaking on a permanent basis.

After examining the last three documents and obtaining the applicants' observations, the head of the investigating team took the view that they were definitely not privileged. Consequently, she took copies of them and placed the copies with the rest of the file, without isolating them in a sealed envelope. The applicants identified the three documents as "Set B".

On the 17th of February 2003 the applicants sent the Commission a letter setting out the reasons why, in their view, the documents … in Set B were protected by LPP.

By the letter of the 1st of April 2003, the Commission informed the applicants that the arguments set forth in their letter of 17 February 2003 were insufficient to show that the documents in question were covered by LPP. However, the Commission pointed out that the applicants could submit observations on those provisional conclusions within two weeks, after which the Commission would adopt a final decision.

On the 8th of May 2003 the Commission adopted decision C(2003) 1533 final concerning a claim of legal privilege in the context of an investigation pursuant to Article 14(3) of Regulation No 17 ("the rejection decision of 8 May 2003").

> In Article 1 of that decision the Commission rejects the applicants' request for the return of the documents in … Set B and for confirmation by the Commission that all copies of those documents in its possession had been destroyed. …
>
> On the 8th of September 2003 … at the request of the President of the Court of First Instance, the Commission sent the President, under confidential cover, a copy of the Set B documents...'

Commission's powers of investigation include the power to require the production of a communication between a lawyer and client. Such power is limited by the legal professional privilege with respect to communications between lawyers and their clients. Nonetheless, communications with in-house lawyers are excluded from such protection of confidentiality.

In paras 40-41, 44-45, 47-49, 58-59, 95, 106, the Court held that the benefit of legal professional privilege with respect to communications between lawyers and their clients is subject to two cumulative conditions. First, the exchange with the lawyers must be connected to the client's rights of defence and, second, the exchange must emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.

It follows that the requirement of independence means that there should exist no employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

The concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence of his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

An in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.

Furthermore, under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks which may have an effect on the commercial policy of the undertaking and which cannot but reinforce the close ties between the lawyer and his employer.

It follows that, because both of an in-house lawyer's economic dependence and of the close ties with his employer, he does not enjoy a level of professional independence comparable to that of an external lawyer.

In-house lawyers being in a fundamentally different position from that of external lawyers, so that their respective circumstances are not comparable, no breach of the principle of equal treatment results from the different treatment of those professionals with respect to legal professional privilege.

Even assuming that the consultation of in-house lawyers employed by the undertaking or group were to be covered by the right to obtain legal advice and representation, that would not exclude the application, where in-house lawyers are involved, of certain restrictions and rules relating to the exercise of the profession without that being regarded as adversely affecting the rights of the defence.

Finally, the fact that, in the course of an investigation by the Commission, legal professional privilege is limited to exchanges with external lawyers in no way undermines the principle of legal certainty.

The Commission's powers under Regulation No 17 and Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty may be distinguished from those in enquiries which can be carried out at national level. Both types of procedure are based on a division of powers between the various competition authorities. The rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it.

In this respect, in paras 102-105, the Court held that restrictive practices are viewed differently by European Union law and national law. Whilst Articles 101 TFEU and 102 TFEU view them in the light of the obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of considerations peculiar to it and considers restrictive practices solely in that context.

In those circumstances, the undertakings whose premises are searched in the course of a competition investigation are able to determine their rights and obligations vis-à-vis the competent authorities and the law applicable, as, for example, the treatment of documents likely to be seized in the course of such an investigation and whether the undertakings concerned are entitled to rely on legal professional privilege

in respect of communications with in-house lawyers. The undertakings can therefore determine their position in the light of the powers of those authorities and specifically of those concerning the seizure of documents.

The principle of legal certainty does not, therefore, require identical criteria to be applied as regards legal professional privilege in those two types of procedure.

The uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out in conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.

The Court reminded in paras 115 and 119 that in investigations conducted by the Commission as European competition authority, national law is applicable only in so far as the authorities of the Member States lend their assistance, in particular with a view to overcoming opposition by the undertakings concerned through the use of coercive measures, in accordance with Article 14(6) of Regulation No 17 or Article 20(6) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. However, the question of which documents and business records the Commission may examine and copy as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.

The rules of procedure with respect to competition law, as set out in Article 14 of Regulation No 17 and Article 20 of Regulation No 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty, are part of the provisions necessary for the functioning of the internal market whose adoption is part of the exclusive competence conferred on the Union by virtue of Article 3(1)(b) TFEU.

In accordance with the provisions of Article 103 TFEU, it is for the European Union to lay down the regulations or directives to give effect to the principles in Articles 101 TFEU and 102 TFEU concerning the competition rules applicable to undertakings. That power is, in particular, intended to ensure observance of the prohibitions referred to in those articles by the imposition of fines and periodic penalty payments and to define the Commission's role in the application of those provisions.

In that connection, Article 105 TFEU provides that the Commission is to ensure the application of the principles laid down in Articles 101 TFEU and 102 TFEU and to investigate cases of suspected infringement.

Accordingly, neither the principle of national procedural autonomy nor the principle of conferred powers may be invoked against the powers enjoyed by the Commission in the area in question.

Case study: Joined Cases - GlaxoSmithKline Services

GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc
v.
Commission of the European Communities
(Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P:)

Available at:
http://curia.europa.eu/juris/fiche.jsf?id=C%3B501%3B6%3BPV%3B1%3BP%3B1%3BC2006%2F0501%2FJ&pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&mat=or&parties=glaxosmithkline&jge=&for=&cid=464693

Appeals – Agreements, decisions and concerted practices – Restriction of parallel trade in medicines – Article 81(1) EC – Restriction of competition by object – National price regulations – Replacement of grounds – Article 81(3) EC – Contribution to promoting technical progress – Review – Burden of proof – Statement of reasons – Interest in bringing proceedings)

2. Facts:

GlaxoSmithKline Services Unlimited ('GSK'), formerly Glaxo Wellcome plc, is a company incorporated under the laws of England and Wales and having its registered office in Brentford (United Kingdom). The GlaxoSmithKline group, to which it belongs, is one of the world's main producers of pharmaceutical products. Glaxo Wellcome, SA ('GW'), a company incorporated under Spanish law and established in Madrid (Spain), is one of the Spanish subsidiaries of the GlaxoSmithKline group. Its main activity, directly and via its subsidiaries, is the development, manufacture and marketing of medicines in Spain.

By letter of 6 March 1998, GW notified to the Commission a document entitled 'General Sales Conditions of pharmaceutical specialities belonging to [GW] and its subsidiaries to authorised wholesalers' ('the General Sales Conditions') with a view to obtaining negative clearance or an exemption pursuant to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87). By letter of 28 July 1998, GSK sent a supplementary notification to the Commission.

The General Sales Conditions apply to 82 medicines intended for sale to wholesalers established in Spain with whom GW has commercial relations in Spain outside any distribution network. Those wholesalers may intend to resell the medicines to Spanish hospitals or to Spanish pharmacies, which dispense them to patients on presentation of a medical prescription. They may also intend to resell them in other Member States, through parallel trade, in which they engage on account of price differentials. For all 82 medicines concerned, Clause 4 of the General Sales Conditions provides for two different prices, 'the Clause 4 A price' and 'the Clause 4 B price'. Clause 4 is worded as follows:

'(A) Pursuant to the provisions of subsections 1 (first paragraph) and 2 of Article 100 of [Law 25/1990], the price of pharmaceutical products of [GW] and its subsidiary companies shall, in no event, exceed the maximum industrial price, established by the Spanish health authorities when the two factors which allow for the application of the said legal rules are present, namely:

- that the aforementioned pharmaceutical products are financed by the funds of the Spanish Social Security or by Spanish public funds,
- that the acquired pharmaceutical products are subsequently marketed at a national level i.e. through pharmacies or Spanish hospitals.

(B) In the absence of one of these two factors (i.e. in all cases where Spanish law gives full freedom to the laboratories to set the prices of their pharmaceutical products themselves), [GW] and its subsidiaries will fix the price of their pharmaceutical products according to real, objective and non-discriminatory economic criteria and completely irrespective of the destination of the product determined by the purchasing warehouse.

Seventy-five wholesalers, with sales accounting for more than 90% of GW's total sales in Spain in 1998, agreed to follow the price policy set by [GW].

The General Sales Conditions entered into force on 9 March 1998. Their lawfulness was subsequently disputed before the Spanish Competition Authority and the Spanish courts by two Spanish trade associations, Asociación de Exportadores Españoles de Productos Farmacéuticos (Aseprofar) and Asociación de

Empresarios de Cooperativas Farmacéuticas, and also by a Spanish wholesaler, Spain Pharma, SA. In addition, a number of complaints that the General Sales Conditions infringed Article 81(1) EC were lodged with the Commission by Aseprofar, supported by another Spanish trade association, Federación Nacional de Asociaciones de Mayoristas Distribuidores de Especialidades Farmacéuticas y Productos Parafarmacéuticos (Fedifar), by Spain Pharma and by two other trade associations, the Bundesverband der Arzneimittel-Importeure eV ('BAI') and the European Association of Euro Pharmaceutical Companies (EAEPC).

On the 8th of May 2001, the Commission adopted Decision 2001/791/EC relating to a proceeding pursuant to Article 81 of the EC Treaty (Cases: IV/36.957/F3 Glaxo Wellcome (notification), IV/36.997/F3 Aseprofar and Fedifar (complaint), IV/37.121/F3 Spain Pharma (complaint), IV/37.138/F3 BAI (complaint), IV/37.380/F3 EAEPC (complaint)) (OJ 2001 L 302, p. 1; 'the Decision').

Article 1 of the Decision provides that GW 'has infringed Article 81(1) [EC] by entering into an agreement with Spanish wholesalers operating a distinction between prices charged to wholesalers in the case of domestic resale of reimbursable drugs to pharmacies or hospitals and higher prices charged in the case of exports to any other Member State'.

Article 2 of the Decision provides that the request for an exemption of the agreement is rejected.

Articles 3 and 4 of the Decision order GW to bring the infringement to an end immediately and to inform the Commission of the steps which it has taken in order to do so.

The Court of First Instance annulled Articles 2, 3 and 4 of Commission Decision 2001/791/EC of 8 May 2001 and dismissed the remainder of the application.

The European Court of Justice dismissed the appeals brought by GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc, the Commission of the European Communities, the European Association of Euro Pharmaceutical Companies (EAEPC) and the Asociación de exportadores españoles de productos farmacéuticos (Aseprofar).

3. Anti-competitive purpose of an agreement. Criteria for assessment. The adverse effect on competition is sufficient to conclude that Art. 81 (1) EC has been infringed. The intention of the parties to an agreement to restrict competition is an unnecessary criterion in order to conclude that Art. 81 (1) EC has been infringed.

In para. 55, the Court held that the anti-competitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in Article 81(1) EC. The alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. If, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the consequences of the agreement are then to be considered and for it to be caught by the prohibition factors must be found to be present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent. It is not necessary to examine the effects of an agreement once its anti-competitive object has been established.

In para. 58, the Court held that in order to assess the anti-competitive nature of an agreement, regard must be had, in particular, to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing to prohibit the Commission or the Community judicature from taking that aspect into account.

4. Agreements intended to restrict parallel trade have an adverse effect on competition.

In paras 59-60, 62-64, the Court affirmed that, in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition. Neither the wording of Article 81(1) EC nor the case-law lends support to the position that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price. First, there is nothing in the wording of Article 81(1) EC to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price. It

follows that a finding of an anti-competitive object of an agreement may not be made subject to a requirement of proof that the agreement entails disadvantages for final consumers.

5. On who lies the burden of proof in order to obtain an exemption ?

With respect to the burden of proof, the Court reminded in paras 82-83, 102-103 that a person who relies on Article 81(3) EC must demonstrate, by means of convincing arguments and evidence, that the conditions for obtaining an exemption are satisfied. The burden of proof thus falls on the undertaking requesting the exemption. However, the facts relied on by that undertaking may be such as to oblige the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.

In particular, the examination of an agreement for the purposes of determining whether it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, and whether that agreement generates appreciable objective advantages, must be undertaken in the light of the factual arguments and evidence provided in connection with the request for exemption under Article 81(3) EC. Such an examination may require the nature and specific features of the sector concerned by the agreement to be taken into account if its nature and those specific features are decisive for the outcome of the analysis. Taking those matters into account does not mean that the burden of proof is reversed, but merely ensures that the examination of the request for exemption is conducted in the light of the appropriate factual arguments and evidence provided by the party requesting the exemption.

6. The Court's limits of review

In respect of the Commission's complex evaluation of economic matters, the Court acknowledged in paras 84-86, 146-148 and 163-164 that, when dealing with an application for annulment of a decision by the Commission taken in response to a request for exemption under Article 81(3) EC, the Community judicature carries out a restricted review of its merits. In the course of such a review, it may, in particular, ascertain whether the Commission provided sufficient reasons with regard to the factual arguments and relevant evidence submitted by the applicant in support of its request for exemption. When the Commission has not provided reasons in relation to one of the conditions laid down in Article 81(3) EC, the Court of First Instance must examine whether or not the statement of reasons in the Commission's decision relating to that condition is, from an overall perspective, sufficient. Such an approach is fully in keeping with the principle that the review by the Community judicature of complex economic assessments made by the Commission is necessarily confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. It is not for the Community judicature to substitute its economic assessment for that of the institution which adopted the decision whose legality it is requested to review.

7. The exemption is conditioned by the improvement of production or distribution of goods or promotion of technical or economic progress

Finally, the Court found in paras 92-94, 120 that in order to be exempted under Article 81(3) EC, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. That contribution is identified, not with all the advantages which the undertakings participating in the agreement derive from it as regards their activities, but with appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition. An exemption granted for a specified period may require a prospective analysis regarding the occurrence of the advantages associated with the agreement, and it is therefore sufficient for the Commission, on the basis of the arguments and evidence in its possession, to arrive at the conviction that the occurrence of the appreciable objective advantage is likely in order to presume that the agreement entails such an advantage. The Commission's approach may therefore entail ascertaining whether, in the light of the factual arguments and the evidence provided, it seems more likely either that the agreement in question must make it possible to obtain appreciable advantages or that it will not. Furthermore, the existence of an appreciable objective advantage does not necessarily suppose that all the additional funds must be invested in research and development.

Case study: CASE C-41/90 – MACROTRON GmbH

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht München, Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between:

KLAUS HÖFNER and FRITZ ELSER and
MACROTRON GmbH

on the interpretation of Articles 7, 55, 56, 59, 86 and 90 of the EEC Treaty

Available at:
http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-41/90&td=ALL

Definition of an undertaking

2. Facts & questions:

The questions were raised in proceedings brought by Messrs Höfner and Elser, recruitment consultants, against Macrotron GmbH, a company governed by German law, established in Munich.

The dispute concerns fees claimed from that company by Messrs Höfner and Elser pursuant to a contract under which the latter were to assist in the recruitment of a sales director.

Employment in Germany is governed by the Arbeitsförderungsgesetz (Law on the promotion of employment, hereinafter referred to as 'the AFG'). According to Paragraph 1, measures taken under the AFG are intended, within the economic and social policy of the Federal Government, to achieve and maintain a high level of employment, constantly to improve job distribution and thus to promote economic growth. Paragraph 3 entrusts the attainment of the general aim described in Paragraph 2 to the Bundesanstalt für Arbeit (Federal Office for Employment, hereinafter referred to as 'the Bundesanstalt'), whose activity consists essentially in bringing prospective employees into contact with employers and administering unemployment benefits. The first of the abovementioned activities, defined in Paragraph 13 of the AFG, is carried out by the Bundesanstalt by virtue of the exclusive right granted to it for that purpose by Paragraph 4 of the AFG (hereinafter referred to as the 'exclusive right of employment procurement').

However, Paragraph 23 of the AFG provides for the possibility of a derogation from the exclusive right of employment procurement. The Bundesanstalt may, in exceptional cases and after consulting the workers' and employers' associations concerned, entrust other institutions or persons with employment procurement for certain professions or occupations. However, their activities remain subject to the supervision of the Bundesanstalt.

The Bundesanstalt must, by virtue of Paragraphs 20 and 21 of the AFG, exercise its exclusive right of employment procurement impartially and without charging a fee. Paragraph 167 of the AFG, contained in the sixth title thereof, which deals with the financial resources enabling the Bundesanstalt to carry out its activities on that basis, allows the Bundesanstalt to collect contributions from employers and workers.

The eighth title of the AFG contains provisions concerning penalties and fines. Paragraph 228 provides that fines may be imposed for the conduct of any employment procurement activity in breach of the AFG.

Notwithstanding the Bundesanstalt's exclusive right to undertake employment procurement, specific recruitment and employment procurement activity has developed in Germany for business executives. That activity is carried on by recruitment consultants who assist undertakings regarding personnel policy.

The Bundesanstalt reacted to that development in two ways. First, in 1954 it decided to set up a special agency for the placement of highly qualified executives in management posts in undertakings. Secondly, it published circulars in which it declared that it was prepared, under an agreement between the Bundesanstalt, the Federal Ministry of Employment and several professional associations, to tolerate certain activities on the part of recruitment consultants concerning business executives. That tolerant attitude is also apparent in the fact that the Bundesanstalt has not systematically invoked Paragraph 228 of the AFG and prosecuted recruitment consultants for activities undertaken by them. Whilst the activities of recruitment consultants are thus to some extent tolerated by the Bundesanstalt, the fact remains that any legal act which infringes a statutory prohibition is void under Paragraph 134 of the German Civil Code and, according to German case-law, that prohibition applies to employment procurement activities carried out in breach of the AFG.

The dispute in the main proceedings concerns the compatibility of the recruitment contract concluded between Messrs Höfner and Elser, on the one hand, and Macrotron, on the other, with the AFG. As required by the contract, Messrs Höfner and Elser presented Macrotron with a candidate for the post of sales director. He was a German national who, according to the recruitment consultants, was perfectly suitable for the post in question. However, Macrotron decided not to appoint that candidate and refused to pay the fees stipulated in the contract.

Messrs Höfner and Elser then commenced proceedings against Macrotron before the Landgericht (Regional Court) Munich I in order to obtain payment of the agreed fees. The Landgericht dismissed their claim by judgment of 27 October 1987. The plaintiffs appealed to the Oberlandesgericht, Munich, which considered that the contract at issue was void by virtue of Paragraph 134 of the German Civil Code (Bundesgesetzbuch), since it was in breach of Paragraph 13 of the AFG. That court nevertheless considered that the outcome of the dispute ultimately depended on an interpretation of Community law and it therefore submitted the following questions for a preliminary ruling:

'1. Does the provision of business executives by personnel consultants constitute a service within the meaning of the first paragraph of Article 60 of the EEC Treaty and is the provision of executives bound up with the exercise of official authority within the meaning of Articles 66 and 55 of the EEC Treaty?

2. Does the absolute prohibition on the provision of business executives by German personnel consultants, laid down in Paragraphs 4 and 13 of the Arbeitsförderungsgesetz, constitute a professional rule justified by the public interest or a monopoly, justified on grounds of public policy and public security (Articles 66 and 56(1) of the EEC Treaty)?

3. Can a German personnel consultant rely on Articles 7 and 59 of the EEC Treaty in connection with the provision of German nationals to German undertakings?

4. In connection with the provision of business executives is the Bundesanstalt für Arbeit (Federal Employment Office) subject to the provisions of the EEC Treaty, and in particular Article 59 thereof, in the light of Article 90(2) of the EEC Treaty, and does the establishment of a monopoly over the provision of business executives constitute an abuse of a dominant position on the market within the meaning of Article 86 of the EEC Treaty?'

3. The Court's findings and reasons:

"20. Having regard to the foregoing considerations, it is necessary to establish whether a public employment agency such as the Bundesanstalt may be regarded as an undertaking within the meaning of Articles 85 and 86 of the Treaty.

21. It must be observed, in the context of competition law, first that the concept of **an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed** and, secondly, that employment procurement is an economic activity**.**

22. The fact that employment procurement activities are normally entrusted to public agencies cannot affect the **economic nature of such activities**. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.

23. It follows that **an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules**.

24. It must be pointed out that **a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest**, such as those envisaged in Article 3 of the AFG, **remains subject to the competition rules pursuant to Article 90(2) of the Treaty unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties**..."

Case study: Otis NV

C-199/11
Europese Gemeenschap

v

Otis NV, General Technic-Otis Sàrl, Kone Belgium NV, Kone Luxembourg Sàrl, Schindler NV, Schindler Sàrl, ThyssenKrupp Liften Ascenseurs NV, ThyssenKrupp Ascenseurs Luxembourg Sàrl

Available at:

http://curia.europa.eu/juris/document/document.jsf?text=&docid=129323&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514894

Representation of the European Union before national courts – Articles 282 EC and 335 TFEU – Claim for damages in respect of loss caused to the European Union by a cartel – Article 47 of the Charter of Fundamental Rights of the European Union – Right to fair hearing – Right of access to a tribunal – Equality of arms – Article 16 of Regulation No 1/2003

2. Facts:

Background to the main proceedings

After receiving a number of complaints, the Commission, in 2004, began an investigation into the possible existence of a cartel among the four major European manufacturers of elevators and escalators, namely the Otis, Kone, Schindler and ThyssenKrupp groups. The investigation culminated in Commission Decision C(2007) 512 final of 21 February 2007 relating to a proceeding under Article 81 EC (Case COMP/E-1/38.823 – Elevators and Escalators) ('the decision of 21 February 2007').

In that decision the Commission found that the undertakings to which it was addressed, including the defendants in the main proceedings, had infringed Article 81 EC by allocating tenders and other contracts in Belgium, Germany, Luxembourg and the Netherlands in order to share markets and fix prices, by agreeing on a compensation scheme in certain cases, by exchanging information on sales volumes and prices and by participating in regular meetings and by establishing other contacts in order to decide on the above-mentioned restrictions and implement them. The Commission imposed fines totalling more than EUR 990 million in respect of those infringements.

Several companies, including the defendants in the main proceedings, brought actions for annulment of that decision before the General Court of the European Union.

By judgments of 13 July 2011 in Case T-138/07 Schindler Holding and Others v Commission [2011] ECR II-4819, Cases T-141/07, T-142/07, T-145/07 and T-146/07 General Technic-Otis v Commission [2011] ECR II-4977, Cases T-144/07, T-147/07 to T-150/07 and T-154/07 ThyssenKrupp Liften Ascenseurs v Commission [2011] ECR II-5129 and Case T-151/07 Kone and Others v Commission [2011] ECR II-5313, the General Court dismissed those actions, with the exception of the actions brought by the ThyssenKrupp group, which it upheld in part with regard to the amounts of the fines.

The applicants went on to bring appeals before the Court of Justice, seeking to have those judgments set aside. The appeals were registered under case numbers C-493/11 P, C-494/11 P, C-501/11 P, C-503/11 P to 506/11 P, C-510/11 P, C-516/11 P and C-519/11 P. By orders of 24 April and 8 May 2012, the President of the Court ordered Cases C-503/11 P to 506/11 P, C-516/11 P and C-519/11 P to be removed from the register of the Court. By orders of 15 June 2012 in United Technologies v Commission and Otis Luxembourg and Others v Commission, the Court dismissed the appeals in Cases C-493/11 P and C-494/11 P. Cases C-501/11 P and C-510/11 P were still pending before the Court on the 6th of November 2012, when the Court rendered its decision in this case.

Proceedings before the referring court

By an originating summons dated 20 June 2008, the European Community, now the European Union ('the EU'), represented by the Commission, brought proceedings before the referring court, seeking, primarily, an order that the defendants in the main proceedings pay the EU the provisional sum of EUR 7 061 688 (exclusive of interest and costs) in respect of the loss sustained by it as a result of the anti-com-

petitive practices established in the decision of 21 February 2007. The EU had concluded with the defendants in the main proceedings several contracts for the installation, maintenance and renewal of elevators and escalators in various buildings, located in Belgium and Luxembourg, of the Council of the European Union, the European Parliament, the Commission, the European Economic and Social Committee, the Committee of the Regions of the European Union and the Publications Office of the European Union. In the alternative, the EU requested that an expert be appointed in order to determine, inter alia, the entirety of the loss sustained.

The defendants maintained that there is an infringement of the principles of judicial independence and equality of arms on account of the special role played by the Commission in proceedings relating to infringements of Article 81(1) EC. They submit that, if account is taken of the fact that, under Article 16 of Regulation No 1/2003, the decision of 21 February 2007 is binding on the referring court, there is also an infringement of the principle that no one can be a judge in his own cause (*nemo judex in sua causa*).

In those circumstances, the Rechtbank van koophandel te Brussel (Brussels Commercial Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'…

(2) (a) Article 47 of the [Charter] and Article 6(1) of the European Convention on Human [Rights] and Fundamental Freedoms [signed in Rome on 4 November 1950 (the 'ECHR')] guarantee every person's right to a fair trial as well as the related principle that no one can be a judge in his own cause. Is it reconcilable with that principle if the Commission, in an initial phase, acts as the competition authority and penalises the conduct complained of – namely, the formation of a cartel – as a breach of Article 81 [EC], now Article 101 [TFEU] after it has itself conducted the investigation in that regard, and subsequently, in a second phase, prepares the proceedings for seeking compensation before the national court and takes the decision to bring those proceedings, while the same Member of the Commission is responsible for both matters, which are connected, a fortiori as the national court seised of the matter cannot depart from the decision imposing penalties?

(b) (Subsidiary question) If the answer to Question 2(a) is in the [negative], (there is irreconcilability), how then must the victim (the Commission and/or the institutions and/or the [EU]) of an unlawful act (the formation of the cartel) assert its entitlement to compensation under [EU] law, which is likewise a fundamental right?'

3. Article 47 of the Charter of Fundamental Rights of the European Union does not preclude the European Commission from bringing an action before a national court, on behalf of the European Union, for damages in respect of loss sustained by the Union as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU.

By its second question, the referring court asked, in essence, whether Article 47 of the Charter precludes the Commission from bringing an action, on behalf of the EU, before a national court for damages in respect of loss sustained by the EU as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC.

In particular, the referring court entertained doubts, in the first place, as to whether, in such an action, the right to a fair hearing, laid down in Article 47 of the Charter and Article 6 of the ECHR, is infringed on account of the fact that, under Article 16(1) of Regulation No 1/2003, a Commission decision relating to a proceeding under Article 81 EC is binding on that court. The referring court stated that a decision adopted by one of the parties to the dispute requires it to accept the finding of an infringement of Article 81 EC, which thus prevents the national court from considering in its absolute discretion one of the elements conferring entitlement to compensation, namely the occurrence of an event giving rise to damage (a 'harmful event').

The referring court also wished to ascertain whether, in the context of such an action, the Commission is not both judge and party in its own cause in breach of the *nemo judex in sua causa* principle.

The Court has already had occasion to state that any person can rely on a breach of Article 81 EC before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that article (see Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619, paragraph 59).

As regards, in particular, the possibility of seeking compensation for loss caused by a contract or conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any person to claim damages for loss caused to him by a contract or conduct liable to

restrict or distort competition (see Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraph 26, and Manfredi and Others, paragraph 60).

Such a right in fact strengthens the working of the EU competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the EU (Courage and Crehan, paragraph 27).

It follows that any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81(1) EC (see Manfredi and Others, paragraph 61).

The EU, therefore, also enjoys that right.

The principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter (see Case C-279/09 DEB [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 Chartry [2011] ECR I-819, paragraph 25; and Case C-69/10 Samba Diouf [2011] ECR I-7151, paragraph 49).

The principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.

With regard, in particular, to the right of access to a tribunal, it must be made clear that, for a 'tribunal' to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it.

It is true in that respect that, according to the Court's case-law (Case C-344/98 Masterfoods and HB [2000] ECR I-11369, paragraph 52), which is now given legislative expression in Article 16 of Regulation No 1/2003, when national courts rule on agreements, decisions or practices under, inter alia, Article 101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.

That rule also applies when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU.

An application of the EU competition rules is thus based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the EU Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty (Masterfoods and HB, paragraph 56).

It must be borne in mind in that regard that it is the EU Courts – not the courts of the Member States – which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid (see, to that effect, Case 314/85 Foto-Frost [1987] ECR 4199, paragraphs 12 to 20).

The rule that national courts may not take decisions running counter to a Commission decision relating to a proceeding under Article 101 TFEU is thus a specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts.

That rule does not mean, however, that the defendants in the main proceedings are denied their right of access to a tribunal, as referred to in Article 47 of the Charter.

Indeed, EU law provides for a system of judicial review of Commission decisions relating to proceedings under Article 101 TFEU which affords all the safeguards required by Article 47 of the Charter.

In this connection, it must be stated that the legality of a Commission decision may be reviewed by the EU Courts under Article 263 TFEU. In this case, the defendants in the main proceedings, to whom the decision had been addressed, did in fact bring actions for the annulment of that decision, as has been recalled in paragraphs 20 to 22 of this judgment.

The review provided for by the Treaties thus involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for in Article 31 of Regulation No 1/2003, therefore meets the requirements of the principle of effective judicial protection in Article 47 of the Charter (see, to that effect, Chalkor v Commission, paragraph 67).

Finally, a civil action for damages, such as the action before the referring court, requires, as can be seen from the order for reference, not only that a harmful event be found to have occurred, but also that loss and a direct link between the loss and that harmful event be established. Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the

existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.

Indeed, even when the Commission has in its decision determined the precise effects of the infringement, it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages. Such an assessment is not contrary to Article 16 of Regulation No 1/2003.

In view of all the foregoing considerations, the Commission cannot be regarded as judge and party in its own cause in the context of a dispute such as that in the main proceedings.

In respect of the subsidiary question (2) (b), the Court held that the principle of equality of arms, which is a corollary of the very concept of a fair hearing (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P Sweden and Others v API and Commission [2010] ECR I-8533, paragraph 88), implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

The defendants in the main proceedings argued that the balance between the parties has been jeopardised because the Commission conducted the investigation into the infringement of Article 101 TFEU with the aim of subsequently claiming compensation for the loss sustained as a result of that infringement. That argument is belied by the prohibition, set out in Article 28(1) of Regulation No 1/2003, on using information gathered in the course of the investigation for purposes other than those of the investigation.

Nor does the fact that both the decision of 27 February 2007 and the decision to bring the action for damages in the main proceedings were taken by the College of Commissioners call the foregoing considerations in question, since EU law contains a sufficient number of safeguards to ensure that the principle of equality of arms is observed in such an action – for example, the safeguards deriving from Article 339 TFEU, Article 28 of Regulation No 1/2003 and point 26 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC.

Finally, the Court rejected the arguments which the defendants in the main proceedings based on the judgment in Yvon v France, No 44962/98, ECHR 2003-V. The factors which led the European Court of Human Rights to make a finding of infringement of Article 6 ECHR – which included, inter alia, the considerable impact of the Government Commissioner's submissions on the assessment of the court dealing with expropriation cases and the rules concerning the Government Commissioner's access to, and use of, relevant information – were not accompanied, unlike the factors characterising the case in the main proceedings here, by judicial review or safeguards comparable or equivalent to those mentioned in paragraphs 63 and 75 of this judgment.

Case study: Case C-360/09, Pfleiderer AG

Pfleiderer AG v Bundeskartellamt,

Available at:
http://curia.europa.eu/juris/document/document.jsf?text=&docid=85144&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=530796

REFERENCE for a preliminary ruling under Article 234 EC from the Amtsgericht Bonn (Germany) concerning the interpretation of Articles 11 and 12 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and the second paragraph of Article 10 EC, read in conjunction with Article 3(1)(g) EC.

2. Facts:

On 21 January 2008, pursuant to Article 81 EC, the Bundeskartellamt imposed fines amounting in total to EUR 62 million on three European manufacturers of decor paper and on five individuals who were personally liable for agreements on prices and capacity closure. The undertakings concerned did not appeal and the decisions imposing those fines have now become final.

On the conclusion of that procedure, Pfleiderer submitted an application to the Bundeskartellamt on 26 February 2008 seeking full access to the file relating to the imposition of fines in the decor paper sector, with a view to preparing civil actions for damages. Pfleiderer is a purchaser of decor paper and, more specifically, special paper for the surface treatment of engineered wood. Pfleiderer is one of the world's three leading manufacturers of engineered wood, surface finished products and laminate flooring. It stated that it had purchased goods with a value in excess of EUR 60 million over the previous three years from the manufacturers of decor paper which have been penalised.

By letter of 8 May 2008 the Bundeskartellamt replied to the application for access to the file by sending three decisions imposing fines, from which identifying information had been removed, and a list of the evidence recorded as having been obtained during the search.

Pfleiderer then sent a second letter to the Bundeskartellamt expressly requesting access to all the material in the file, including the documents relating to the leniency applications which had been voluntarily submitted by the applicants for leniency and the evidence seized. On 14 October 2008 the Bundeskartellamt partly rejected that application and restricted access to the file to a version from which confidential business information, internal documents and documents covered by point 22 of the Bundeskartellamt's notice on leniency had been removed, and again refused access to the evidence which had been seized.

Pfleiderer thereupon brought an action before the Amtsgericht (Local Court) Bonn challenging that decision of partial rejection, pursuant to Paragraph 62(1) of the Law on administrative offences (Gesetz über Ordnungswidrigkeiten, the 'OWiG'), as amended by the Law of 29 July 2009.

On 3 February 2009 the Amtsgericht Bonn delivered a decision by which it ordered the Bundeskartellamt to grant Pfleiderer access to the file, through its lawyer, in accordance with the combined provisions of Paragraph 406e(1) of the Code of Criminal Procedure and Paragraph 46(1) of the OWiG. In the view of the Amtsgericht Bonn, Pfleiderer is an 'aggrieved party' within the meaning of those provisions, given that it may be assumed that it paid excessive prices, as a result of the cartel, for the goods which it purchased from the cartel members. Further, the Amtsgericht held, Pfleiderer had a 'legitimate interest' in obtaining access to the documents, since those were to be used for the preparation of civil proceedings for damages.

The Amtsgericht Bonn therefore ordered access both to the material in the file which the applicant for leniency had voluntarily made available to the German competition authority pursuant to point 22 of the Bundeskartellamt notice on leniency and to the incriminating material and evidence collected. Access to confidential business information and internal documents, that is to say, notes on legal discussions of the Bundeskartellamt and correspondence within the framework of the European Competition Network ('the ECN'), was limited. According to the Amtsgericht Bonn, various interests had to be weighed in order to

determine the extent of the right of access, which is restricted to documents required for the purpose of substantiating a claim for damages.

The enforcement of the decision was stayed by the Amtsgericht Bonn.

The Amtsgericht Bonn stated that the decision which it is inclined to take could run counter to European Union law, in particular the second paragraph of Article 10 EC, Article 3(1)(g) EC and Articles 11 and 12 of Regulation No 1/2003, which provide for close cooperation and the mutual exchange of information between the Commission and the national competition authorities of the Member States in proceedings for the enforcement of Articles 81 EC and 82 EC. In order to ensure the effectiveness and proper functioning of those provisions, which are crucially important for the ECN and for the decentralised application of competition law, it might prove necessary, in relation to the impositions of fines in cartel proceedings, to deny to third parties access to leniency applications and to documents voluntarily submitted by applicants for leniency. As it took the view that the resolution of the dispute before it required an interpretation of European Union law, the Amtsgericht Bonn decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of Community competition law – in particular Articles 11 and 12 of Regulation No 1/2003 and the second paragraph of Article 10 EC, in conjunction with Article 3(1)(g) EC – to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 81 EC?'

3. **The provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.**

In para 25-26, the Court reminded that leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU. The effectiveness of those programmes could, however, be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to grant to the applicant for leniency exemption, in whole or in part, from the fine which they could have imposed.

Then, the Court held that the view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes, particularly when, pursuant to Articles 11 and 12 of Regulation No 1/2003, the Commission and the national competition authorities might exchange information which that person has voluntarily provided.

Nevertheless, it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition (see Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraphs 24 and 26, and Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619, paragraphs 59 and 61).

The existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union (Courage and Crehan, paragraph 27).

Accordingly, in the consideration of an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (see, to that effect, Courage and Crehan, paragraph 29) and to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.

That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.

Transcripts

Listening 1 European Court of Justice Rules in Favour of Black Cabs

Reporter: Here on the busy streets of London it's business as usual as Black Cabs continue to use bus lanes while minicabs still have no (1) access. The European Court said its (2) decision was based on the fact that Black Cabs are distinct from minicabs. Transport for London argues that allowing thousands of minicabs to drive in bus lanes would also affect the (3) reliability of bus (4) services.

Minicab driver: Yes, because it's the governments regulated, yeah, stuff, which to be honest, yeah, with you, yeah, we are very very treated unfairly, because we are part of London transports, so that's the way I look at it. Well, eventually, yeah, I think we have to do something about it because it's very unfair to us. The governments should take that into consideration and look at it.

Man on the street 1: Well, in one hand, it's not fair.

Man on the street 2: On the other hand, black cabs are more easy to identify, whereas someone could possibly be impersonating a regular minicab. It's a very difficult (5) situation.

Reporter: The EU Court recognises that the (6) policy could make minicabs less attractive and reduces their (7) ability to penetrate the (8) market. Those who have said that the policy is unfair also hold the (9)opinion that there should be no cab (10) segregation since both types of cab provide the same (11) service. It seems things will have to remain this way however until the (12) case returns from the (13) Court of Appeal.

Listening 2: London MEP praises bus lane ruling Transcript

Reporter: Jean Lambert, Green MEP for London. The European Court (1) has ruled that EU law (2) has not been broken. Black Cabs, but not other kind of taxis, are allowed in bus lanes. What's your reaction?

JL: I'm really pleased with this ruling from the European Court of Justice on the Black Cabs (3) having access to bus lanes in London and this (4) not being seen as state aid or sort of public support in that sort of way. I (5) think it's a really good ruling.

Reporter: What's the impact of this ruling? What (6) does it mean for London?

JL: Well, I think what it (7) means for London is that it's still within the power of London authorities to decide who (8) has access to the bus lanes. And of course, given that the whole point of a bus lane is (9) to try and keep public transport moving efficiently and as smoothly as possible. Anything that actually says you (10) don't have to open it up to a whole range of other users actually (11) maintains the purpose of the bus lanes. So I think this is good for London's traffic and you know London's buses (12) need all the help they (13) can get in moving smoothly.

Reporter: Because the Court (14) could have gone in the opposite direction and ruled that all kinds of taxis (15) would be allowed to use the bus lanes. What (16) would have been the implication of that and why (17) did you feel so strongly that that shouldn't happen?

JL: Well, if the Court (18) had ruled differently, then obviously we (19) would have been looking at bus lanes no longer being able to give priority to certain vehicles, but that you know effectively any minicab in London (20) could have used them and therefore you'd begin to look at a bus lane almost as if it's any other ordinary traffic lane. So that (21) defeats the whole object of actually (22) trying to keep certain forms of traffic moving more quickly to give a more efficient service for users. So we (23) would have seen an even greater clogging up really of London's traffic again, which is certainly not what London's public transport users (24) want. And given that they think they're paying a lot already to use London traffic, London buses, they want them (25) to be able to run as smoothly as possible.

Reporter: Does this underline to you that there is a difference between general taxis, public cars that (26) can be hired and pre-booked, and the Black Cabs that can be picked up on the kerb, on the side of the road?

JL: I think this ruling (27) does underline that there is a difference between the London Black Cabs and the minicabs. That it's recognised that Black Cabs (28) are more regulated, that they have requirements about disability access, they have requirements about training of their drivers in terms of knowledge of London, a whole set of things which (29) apply to one particular group of drivers, in this case the Black Cab drivers. And I think that this also will have implications for other sort of taxis elsewhere in the European Union that also have those sort of similar regulations.

Listening 3: Cartels Transcript

Richard Whish is one of the country's leading authorities on competition law.

"Well, the most serious anti-competitive agreement is what we call a cartel. And that's the situation where a number of competing businesses get together and basically decide 'let's not compete with one another'. The most obvious example of a cartel is a price-fixing agreement, and that's where a number of competitors get together and they agree to fix their prices. For example, they might all agree that next Monday they will put their prices up to an agreed level. What we can say quite simply is consumers get a raw deal from cartels. We come across very obvious cartels where firms simply agree to fix prices. But you can imagine more complicated examples. One would be what we call bid-rigging, and this is where a firm goes out to competitive tender, asking a number of companies to bid competitively to win a contract. And what they do is they get together and they decide 'it is my turn' to win the next contract. So it is agreed that I will bid a price of a million pounds, somebody else will bid £1.2 million, somebody else £1.4 million. Well, obviously, I will win the bid and we have created the illusion of competition. And clearly the likelihood is that the price even of a million is higher than the competitive price should be. The very interesting thing about cartel activity is that it can take place at a number of different levels within a company, and you could imagine a situation where somebody from the board of directors of company A has discussions with a director of a company B. Or this might all take place at a much lower level, where perhaps sales people from two different organizations have discussions with one another. And there are also examples where the exchange of information sometimes takes place through a third party, for example, a trade association. It's a very important thing for business people to understand that cartels don't only mean cloak and dagger operations. If competitors are all together at a social event, for example they go to a trade association dinner, then after the dinner they go to the bar and they start talking to each other about their future plans and that they're thinking of raising prices, this can also be illegal."

Listening 4: OFT Dawn Raid Transcript

Two of the Office of Fair Trading's investigators, Trevor Holden and Sharn Davis, are about to launch a dawn raid on the head office of an importer and distributer of electronic devices. The OFT suspects that they, along with three other companies, have agreed the prices at which they will sell their products.

SD: We received intelligence to suggest that the major UK importers and distributors of electronic devices have agreed to keep their prices artificially high. If this turns out to be true, that means competition's being restricted and that customers are paying inflated prices.

TH: So we're therefore part of a bigger team carrying out raids at all four companies. We also have a team in place at the homes of one of the sales managers whom we're told initiated the cartel and sometimes works from home.
Good morning, my name is Trevor Holden and this is my colleague Sharn Davis. We're from the Office of Fair Trading and we're here with a warrant to search the premises. I need to speak to the person in charge.
Receptionist: I don't know anything about this. I'll need to call Mr Huston, he's the MD and you'll need to talk to him.

Mr Huston: Let me guess. The OFT. They're here to look. I'll get someone to call you back as soon as I know what's going on. That was my sales manager's wife on the phone, says that the OFT are at her house. Her husband went to see a customer this morning and she can't get hold of him. I really have no idea why you're here. Never mind his house. That's beyond me. You'd better come into my office.
I don't understand what this can be about. We've always been scrupulously fair in all of our business dealings.

SD: Let me explain. This is a copy of the warrant and a notice explaining our powers as well as the company's rights. You'll need to read that carefully. You may also want to consult a lawyer. We're conducting a criminal investigation into suspected price fixing involving your company and a number of ex-competitors in the market for electronic devices. The warrant allows us to enter and search the premises and to seize any relevant documents. Failing to comply is a criminal offence.

TH: We're looking for any relevant documents, either paper or on the computer. We'll take the paperwork and leave you with a list of what we've seized but in respect of the electronic material we'll want to take a forensic image.

Do you have an IT expert we could speak to about the company's computer setup?
You'll also need to leave us your laptop, phone and any other portable devices.

Mr Huston: If it's ok with you I'm going to I'm going to call my solicitor.

SD: And we will need to speak to your sales manager as soon as he's back from his meeting.

TH: Well, now, that went pretty smoothly. At least they were cooperative and we seem to have gotten some really useful stuff to help us progress with the investigation.

SD: I guess they don't have much choice over whether to comply, but it is easier for everyone when they're cooperative. I'll be interested to hear what the sales manager has to say in his interview. He looked a bit taken aback when he heard the police were here to arrest him

Reporter: That was a fictionalized account of what could happen if a business is suspected of (1) breaking competition law. There are serious consequences for individuals and firms of all sizes that (2) breach competition law. These can include (3) prison sentences and fines. We're going to speak to some (4) leading experts that will explain to you why competition law is important, what it says and how you can (5) avoid breaking it. And what to do if you suspect that another business or someone within your own business has (6) broken the law. So why should we care? Well, competition law is designed to (7) prevent businesses from distorting the (8) competitive process. It encourages rivalry and ensures that markets are open. It spurs (9) innovation and creativity. It means that consumers and businesses can access the widest possible (10) range of goods and services at the (11) most competitive price. All businesses need to comply with competition law.

John Fingleton: Well the OFT's job is to make markets work well for consumers. That means (12) making it work well for business too. One of the ways we do that is through (13) enforcing competition law. You can see the big benefits for (14) consumers and business that come from, for example, in the aviation market where … and telecoms market where prices have come down by up to 90% over the last 20 years from (15) increased competition. Given the importance for competition for the economy and for consumers there are (16) strong sanctions for breaking conpetition law. They include in the UK (17) prison sentences of up to five years, direct disqualification and fines of up to 10% of turnover for companies. So we try to help business comply with the law and one of the ways in which we do that is with a setting out a (18) four-step process for complying with competition law that you'd hear about in this video.

Listening 5 Part II Transcript

So let's look at how cartels work. In this village here everyone is really passionate about ice-cream. So selling ice-cream her is obviously not a bad business. That's why there are three shops in the village. Usually, shop owners try to get as many customers coming to their own shop. So they invent new flavours, they make ads, they try to be nice to the customers and do everything that you do when you want to get new customers. But, one day they all get together and say: "Hey, this is all very hard work, isn't it? Why don't we all decide to charge a higher price? The same price? Let's say €1. And the beauty of it is, we don't even have to