

Particularities of Proving a Single and Continuous Infringement of EU Competition Rules

by

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Abstract

A single and continuous infringement of EU competition rules is a qualified form of infringement of EU Competition Law characterized by the existence of a global plan having a single objective between undertakings. Given the specificity of this form of infringement, proving it is somewhat different from the standard evidentiary

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process for proving infringements of competition rules before EU courts. This article aims to give an overview of the evidentiary rules through the case law of the Court of Justice of the EU and analyze their application in practice.

Resumé

Une infraction unique et continue aux règles de concurrence de l'UE est une forme qualifiée d'infraction au droit de la concurrence de l'UE caractérisée par l'existence d'un projet commun aux entreprises ayant un objectif unique. Compte tenu de la spécificité de cette forme d'infraction, la preuve est différente de la procédure de preuve standard pour prouver les infractions aux règles de concurrence devant les tribunaux de l'UE. Cet article vise à donner un aperçu des règles de preuve à travers la jurisprudence de la Cour de justice de l'UE et à en analyser l'application dans la pratique.

Key words: competition law; antitrust; infringement; cartels; single and continuous infringement; evidence; CJEU; European Union; Croatia.

JEL: K21, K23, K40

I. Introduction

A single and continuous infringement of competition rules, sometimes referred to as 'single and complex' or 'single and persistent' infringement, appeared as a legal notion for the first time in the Commission decision of 23 April 1986 – *Polypropylene*. This concept can be defined as a participation of undertakings in different actions that form part of an overall plan “because their identical object distorts competition within the EU market”¹. The particularity of this form of infringement is precisely in the identical or single objective² shared by the behavior of the undertakings participating in the infringement, which is not a typical characteristic of simplified forms of infringements of competition rules. Whereas it suffices, for the criteria set in Articles 101 or 102 TFEU to be fulfilled, for a simple infringement of competition rules to be established; in the case of a single and continuous infringement, it is necessary for the behavior that would in and of itself represent an infringement of

¹ Judgment of 24 June 2015, Joined cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce*, EU:C:2015:416, para. 156.

² Judgment of 26 January 2017, Case C-609/13 P *Duravit and Others v Commission*, EU:C:2017:46, para. 117.

competition rules, to also share the single objective of a global anticompetitive plan.

This article aims to, firstly, highlight the specificity of the concept of a single and continuous infringement and the scope of responsibility of the inculcated undertakings. Secondly, it seeks to clarify the evidentiary rules applicable to single and continuous infringements developed in the case law of the Court of Justice of the EU. Thirdly, using the example of the *Areva* decision and the *Samsung* judgment, the article provides examples of those rules as applied in the practice of the Commission and EU Courts. Finally, the article addresses the use of the notion of a single and continuous infringement in national systems, using the example of the Croatian legal system. It examines if, despite the absence of the exact notion, the relevant authorities and courts apply the underlying logic of the notion of a ‘single and continuous infringement’ to the cases before them.

II. Particularities of a single and continuous infringement of EU competition rules

A single and continuous infringement of competition rules is a notion introduced by the Commission in order to avoid artificially dividing an infringement of competition rules into each individual infraction in cases where these infractions are connected to such an extent that they function as parts of a global plan sharing a single objective. EU courts accepted this legal construct while considering that it would be “artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of several separate infringements”³. Although it cannot be seriously asserted that such a definition does not make it easier for the Commission to prove an infringement of the competition rules (in pursuit of a specific policy, Riley, 2014, p. 294), it should be stressed that it is the complex and secretive operation of cartels that justifies this approach of EU Courts to the evidentiary rules (Idot, 2015). In any event, a possibility for the Commission to simply incriminate unrelated anticompetitive behaviors as a single and continuous infringement is effectively prevented by the criterion of a ‘single objective’ that always has to be fulfilled in cases of single and continuous infringements (Alexiadis, Swanson and Guerrero, 2016, p. 5).

A single objective that characterizes a single and continuous infringement is normally one of the classical anticompetitive objectives such as price

³ Judgment of 8 July 1999, Case C-49/92 P Commission v Anic Participazioni, EU:C:1999:356, para. 82.

control⁴ or market partitioning⁵. For the purposes of correctly classifying an infringement, it is extremely important to determine if certain activities share an identical objective, because it is possible that the same undertakings, acting within the auspices of two or more separate cartels, simultaneously commit two or more single and continuous infringements of competition rules⁶. For example, it is possible for five undertakings to engage in two single and continuous infringements that still do not form a unique infraction, because the objective of the first one is the partitioning of the market for a certain product, whereas the second infraction has as its objective the control of prices of different products produced by those same undertakings (for difference between a continuous and a repeated infringement see Themaat and Reude, 2018, pt. 13.19). In order for the different activities to be classified as a single and continuous infringement, it has to be ascertained whether there are “any elements characterizing the various instances of conduct forming part of the infringement which are capable of indicating that the instances of conduct in fact implemented by other participating undertakings do not have an identical object or identical anticompetitive effect and, consequently, do not form part of an ‘overall plan’ (Studt, 2017, p. 645) as a result of their identical object distorting the normal pattern of competition within the internal market”⁷. An important consequence of establishing this form of infringement of competition rules is a wider scope of responsibility of undertakings that engaged in the infringement. However, such a qualification also provides an opportunity to those undertakings to defend themselves, by alleging that their behavior does not share an object identical to that of the activities of other undertakings and, therefore, does not constitute a part of an overall plan underlying a single and continuous infringement. One practical consequence of successfully refuting an incrimination of a single and continuous infringement could be the amount of fine, because fines are normally higher for complex infringements due to taking into account of a higher percentage of the basic amount as a starting point for the calculation of the fine⁸.

⁴ Judgment of 26 September 2018, Case C-98/17 P Philips and Philips France v Commission, not published, EU:C:2018:774, para. 72.

⁵ Judgment of 5 December 2013, Case C-449/11 P Solvay Solexis v Commission, not published, EU:C:2013:802, para. 8.

⁶ Judgment of 18 January 2017, Case C-623/15 P Toshiba v Commission, not published, EU:C:2017:21, para. 6.

⁷ Judgment of 26 January 2017, Case C-609/13 P Duravit and Others v Commission, EU:C:2017:46, para. 121.

⁸ Judgment of 26 January 2017, Case C-618/13 P Zucchetti Rubinetteria v Commission, EU:C:2017:48, paras. 51–55.

III. Scope of responsibility

It is settled case law of the Court of Justice that “an undertaking which has participated in a single and complex infringement, by its own conduct, which meets the definition of an agreement or concerted practice having an anticompetitive object within the meaning of Article 101, paragraph 1, TFEU and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement”⁹. In order to establish the responsibility for the behavior of other participants (Alexiadis et al., 2016, p. 6), it is necessary to establish that “the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk”¹⁰. Contrary to that, it is likewise possible that an undertaking has directly taken part in one or more of the forms of anticompetitive conduct making up a single and continuous infringement, but it has not been proven that the undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel. In this case, if the undertaking “was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or if it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability for the conduct in which it had participated directly and also for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself”¹¹. However, this is conditional upon proof that “the undertaking was aware of the conduct of others or was able reasonably to foresee it and prepared to take the risk”¹².

Already in its early case law, the Court of Justice concluded that such a definition of responsibility is not contrary to the principle according to which the responsibility for such infringements is personal in nature. It found that the definition actually “fits in with widespread conception in the legal

⁹ Judgment of 26 September 2018, Case C-99/17 P Infineon Technologies v Commission, EU:C:2018:773, para. 172.

¹⁰ Judgment of 24 June 2015, Joined cases C-293/13 P and C-294/13 P Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce, EU:C:2015:416, para. 157.

¹¹ Judgment of 26 September 2018, Case C-99/17 P Infineon Technologies v Commission, EU:C:2018:773, para. 173.

¹² Judgment of 26 September 2018, Case C-99/17 P Infineon Technologies v Commission, EU:C:2018:773, para. 173.

orders of the Member State concerning the attribution of responsibility for infringements committed by several perpetrators”¹³. This is a good example of a situation where the Court complements its reasoning by referring directly to comparable instruments in national legal systems, thus strengthening its argument.

This peculiar definition of the scope of responsibility has influenced the evidentiary rules for proving a single and continuous infringement of EU competition rules.

IV. Proving a single and continuous infringement

It is undisputed that EU Competition Law does not exist only to ensure fair market competition, but it is also a mechanism of market integration¹⁴. This approach to competition policy resulted in a specific approach to the evidentiary rules in competition cases (de la Torre and Fournier, 2017). Given that it is normal for anticompetitive activities to take place in a clandestine fashion, for the meetings to be held in secret, and for the associated documentation to be reduced to a minimum¹⁵, the Court developed a rule very early on according to which “the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules”¹⁶. In practice, this notion encompasses any type of evidence, for example, the tables containing the fixed prices for a certain period, the minutes of meetings when the anticompetitive agreements were entered into or an exchange of emails fixing the time of these anticompetitive meetings.

Statements provided in leniency proceedings have significant value when it comes to shedding light on anticompetitive behaviors. Formally, these do not have an added value compared to other evidence, but they often facilitate the Commission’s understanding of an infringement, mechanisms of its implementation and its duration (Balasingham, 2016). Although having uncritical trust in statements given in leniency proceedings is not justified,

¹³ Judgment of 8 July 1999, Case C-49/92 P *Commission v Anic Partecipazioni*, EU:C:1999:356, para. 84.

¹⁴ Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 172.

¹⁵ Judgment of 7 January 2004, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, para. 55.

¹⁶ Judgment of 7 January 2004, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, para. 57.

because it can often happen that several of them are partially or totally contradictory, the parts in which they coincide, especially if supported by other evidence (Burhart and Maulin, 2011), can often become a key to putting an end to the anticompetitive activities.

One of the most interesting evidentiary problems, that directly influences the admissibility of evidence before EU courts, concerns the legality of the evidence gathered by national authorities and the transmission of such evidence to the Commission under Article 12 of Regulation 1/2003¹⁷. This problem arose in the case *FSL*, where the plaintiff alleged that the General Court failed to rule that the use of evidence transmitted to the Commission by the Italian customs and finance police was unlawful¹⁸, on the grounds that these were gathered in a national procedure the purpose of which was different from the procedure before the Commission. The Court held that the General Court was correct in stating that “the lawfulness of the transmission to the Commission, by a prosecutor or the national competition authorities, of information obtained in application of national criminal law is a question governed by national law” over which EU Courts have no jurisdiction¹⁹. It concluded that prohibiting the Commission from using evidence transmitted by national authorities which are not competition authorities, solely because these were gathered in procedures with a different aim from the one of a competition law infringement proceedings, would “excessively hamper the role of the Commission in its task of supervising the proper application of EU competition law”²⁰. It follows that one of the important mechanisms of cartel detection and prosecution is the cooperation between national authorities which do not necessarily have to be competition agencies, such as national tax or customs authorities. Establishing a line of communication should not be limited just to the Commission, but should also include the respective national competition watchdogs.

4.1. The *Areva* decision

The mechanisms of cartel functioning are at times so sophisticated that it is hard to imagine any institution being able to uncover a cartel by using ordinary methods of market surveillance or mere inquiries. A good example of methods

¹⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 001, 4 January 2003), p. 1.

¹⁸ Judgment of 27 April 2017, Case C-469/15 P *FSL and Others v Commission*, EU:C:2017:308, para. 26.

¹⁹ *Ibidem*, para. 32.

²⁰ *Ibidem*, paras. 35–36.

used to cover up cartel activities is the *Areva* case, where the cartel participants used encryption software when exchanging messages in which they discussed their anticompetitive activities²¹. An additional hurdle in this specific case was the fact that some of the cartel participants were simultaneously manufacturing the telecommunication devices used to engage in the clandestine communication²². In this case, had the Commission not procured the leniency statements²³, it would have been highly likely that the cartel's existence would not have been established (Riley, 2010). However, leniency statements are often criticized as unreliable evidence and even the Court held that an admission by one cartel participant, the accuracy of which is contested by several others, "cannot be regarded as constituting adequate proof of an infringement committed by the latter undertakings unless it is supported by other evidence"²⁴. Despite taking this cautious view, the Court is well aware that leniency statements have a certain value because the impulse to provide incorrect information about a cartel is somewhat deterred by the fact that providing inaccurate information can be sanctioned, amongst other measures, also by the loss of immunity granted in the leniency procedure²⁵. As a rule, the credibility of a leniency statement depends on other evidence that can be used to support the statement, such as usual written evidence namely the tables that contain prices or witness statements.

The *Areva* decision provides a particularly clear example of the evidentiary process for proving a single and continuous infringement because the Commission structured its reasoning into three parts, which alleviates the comprehension of each phase. In the first part, the Commission focused on proving the coherence of measures undertaken by the cartel participants and their focus towards a single purpose of restricting competition for gas insulated switchgear projects at the global and the European level. The specific evidence that the Commission cited were market partitioning arrangements and various mechanisms aiming to implement such arrangements²⁶. For the purposes of

²¹ Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – *Gas Insulated Switchgear*, paras. 170–176.

²² Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – *Gas Insulated Switchgear*, para. 176.

²³ Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – *Gas Insulated Switchgear*, paras. 88–104 and 263–264.

²⁴ Judgment of 26 January 2017, Case C-613/13 P *Commission v Keramag Keramische Werke and Others*, EU:C:2017:49, para. 28.

²⁵ Judgment of 19 December 2013, Joined cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens and Others v Commission*, not published, EU:C:2013:866, para. 138.

²⁶ Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – *Gas Insulated*

proving a single objective, the Commission put forward the following claims: i) the market partitioning agreements for the European and the global markets were contemporaneous; ii) the market partitioning agreement for the European market was subordinated to the one concerning the global market; iii) the European members were also members to the market partitioning agreement for the global market; and iv) the content and the implementation mechanisms for the two agreements were interlinked²⁷. In the second part, the Commission focused on proving the continuity of the single objective and of the crucial elements of the infringement. It is important to bear in mind that, once the Commission proves the single objective, the undertakings wishing to challenge the qualification of a single and continuous infringement then have to prove that their anticompetitive behavior is independent of a single objective pursued by the single and continuous infringement. This is a logical consequence of a more general evidentiary rule according to which, once the Commission lays out the evidence establishing the existence of an infringement, it is for the undertaking raising its defense to demonstrate that its defense is founded, so that the Commission will then have to resort to other evidence²⁸.

More specifically, in *Areva*, the undertakings alleged that in their case, the identity of the cartel participants changed, the mechanisms of cartel maintenance became rarer and that some of the participants no longer knew about all of the cartel activities, which is why the qualification of the infraction as ‘single and continuous’ was erroneous and should be re-qualified to two separate infringements²⁹. The Commission dismissed their arguments considering that “a) the object of the infringement remained the same; b) projects were notified, discussed, allocated; c) contacts and meetings took place at both management and working level; d) tenders were manipulated by organising bids and supporting tenders; e) price competition was avoided for projects not suitable for allocation; f) licensing of ‘uncontrolled’ outsiders was avoided; g) confidential information was regularly exchanged; h) compensation mechanisms were applied and retaliation mechanisms were put in place; i) measures to conceal the cartel were used; j) Japan and the European home countries were reserved, while projects won outside home countries were counted in the relevant quotas; and k) the individuals and

Switchgear, paras. 271–272.

²⁷ Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – *Gas Insulated Switchgear*, para. 274.

²⁸ Judgment of 26 January 2017, Case C-609/13 P *Duravit and Others v Commission*, EU:C:2017:46, paras. 56–57.

²⁹ Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – *Gas Insulated Switchgear*, para. 279.

companies participating in the cartel showed a high degree of continuity”³⁰. One of the indicia pointing to the cartel’s continuity was a review provision in the agreements providing that these continue to apply during any negotiations aimed at modifying those agreements; the challenge to the qualification of this infringement was not helped by the fact that several participants gave contradictory statements about the duration of the cartel activities, as well as about the participation time of certain undertakings³¹. It is important to stress that certain cartels, especially if they last for a long time period, begin to operate almost automatically and their anticompetitive practices begin to encompass the part of their business that was not originally covered by anticompetitive agreements. One additionally negative consequence of global cartels is that smaller undertakings, despite the fact that they do not necessarily participate directly in the cartel, can end up being forced to do business with a cartel on imposed terms because their market survival depends on it.

Finally, the third part of the Commission’s analysis concerns the interruption of the participation in the cartel of certain undertakings. This analysis is important because of the determination of responsibility. More specifically, if an undertaking has participated in a single and continuous infringement, then leaves the cartel and subsequently comes back, this constitutes a repeated participation in the same infringement³² and not two different infringements. It is questionable if these qualifications have a significant influence on the final amount of fines set in these cases because, although the duration of the participation is shortened, the fact that an undertaking repeated the infringement will normally lead to an increase in its fine due to recidivism³³.

4.2. The *Siemens* judgment

The *Areva* decision was appealed before the General Court and the judgment of that Court was likewise appealed before the Court of Justice. The *Siemens* judgment, which is a judgment relative to the *Areva* decision, brought to light an always-interesting question of the distortion of facts and evidence, which is often invoked by the parties in order to demonstrate their absence from the cartel or a shorter period of participation than the one suggested by

³⁰ Commission decision of 24 January 2007, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/38.899 – *Gas Insulated Switchgear*, para. 281.

³¹ *Ibidem*, paras. 282–294.

³² *Ibidem*, para. 297.

³³ Judgment of 5 March 2015, Joined cases C-93/13 P and C-123/13 P Commission and Others v Versalis and Others, EU:C:2015:150, para. 87.

the Commission. A distortion is, according to the case law of the Court, rather difficult to prove because the standard dictates that such a distortion must be “obvious from the documents in the Court’s file, without there being any need to carry out a new assessment of the facts and the evidence”³⁴. This high standard is, however, understandable because it facilitates the application of the classical criteria of admissibility according to which the Court, in principle, has no jurisdiction to establish the facts or examine the evidence which the General Court accepted in support of those facts³⁵. In practice, a distortion will normally be established if the paragraphs of the General Court’s judgment are contradictory, whereas, absent such contradiction, distortion pleas are usually viewed as an attempt to obtain a reexamination of facts and evidence, which the Court of Justice does not have jurisdiction to undertake³⁶.

In *Siemens*, the Court also reiterated its case law according to which, for the purposes of proving a single and continuous infringement, it is necessary to take into account “any circumstance capable of establishing or casting doubt on the existence of a the link between the anticompetitive behaviors and the single objective of the infringement, such as, the period of application, the content, including the methods used, and, correlatively, the objective of the various instances of conduct concerned”³⁷. It is interesting to note that the parties in this case tried to demonstrate that the qualification of the infringement as ‘single and continuous’ is not correct because there were periods in which the activities of the cartel were interrupted. The Court did not accept this thesis and, instead, held that the absence of evidence for certain specific periods “does not preclude the infringement from being regarded as having been established during a more extensive overall period, provided that such a finding is based on objective and consistent indicia”³⁸. It is therefore clear that cartel activities do not have to manifest continuously and it is irrelevant in that regard if there had been a period of inactivity between the anticompetitive behaviors, as long as those behaviors continue to pursue the same objective.

The *Siemens* judgment is a good example of the Court’s strict approach to the issue of admissibility of parties’ arguments and the scope of their review. More specifically, in the *Siemens* judgment, the Court examined only Toshiba’s, but not Mitsubishi’s, argument alleging the incorrect qualification of

³⁴ Judgment of 19 December 2013, Joined cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens and Others v Commission*, not published, EU:C:2013:866, para. 42.

³⁵ Judgment of 25 January 2007, Joined cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission*, EU:C:2007:52, para. 38.

³⁶ Judgment of 12 September 2006, Case C-131/03 P *Reynolds Tobacco and Others v Commission*, EU:C:2006:541, para. 50.

³⁷ Judgment of 19 December 2013, Joined cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens and Others v Commission*, not published, EU:C:2013:866, para. 247.

³⁸ *Ibidem*, para. 264.

the infringement, because Mitsubishi failed to raise that argument during the procedure before the General Court³⁹. Had Toshiba successfully demonstrated that the infringement was incorrectly qualified, it would have escaped the single and continuous infringement qualification, whereas Mitsubishi would remain responsible for that qualification regardless of Toshiba's success. Although it appears illogical, this rule is based on the case law of the Court according to which "an obligation for the General Court to state the reasons for its judgments does not in principle extend to requiring it to justify the approach taken in one case as against that taken in another case, even if the latter concerns the same decision"⁴⁰. The underlying logic is that the parties are not necessarily represented in the same way, which is why it would not be justified to treat their cases identically. One exception to this rule is a situation where the General Court itself raises an argument, in which case the parties can invoke or criticize such an argument on appeal, although they themselves did not raise it before the General Court⁴¹. Given that this exception was not applicable in the *Siemens* judgment, Mitsubishi's argument alleging an erroneous qualification was rejected as inadmissible. The Court is surely aware of the possibility that this approach might result in some problematic outcomes in cases when a Commission's decision establishing a single and continuous infringement would be annulled with regard to one participant and upheld with regard to other participants in the same cartel; still, the Court did not abandon this line of case law despite having many occasions to do so. The rules on the admissibility of arguments on appeal are widely discussed and even some Advocate Generals, such as Advocate General Wathelet, pleaded for them to be revised in certain, exceptional, cases⁴². Although the Court did not follow the opinion in the *Keramag* case on this specific point, it did annul the judgment of the General Court on other grounds. That judgment shows that the Court sometimes prefers judicial minimalism when deciding with appeals, especially in the domain of competition law where legal innovation does not necessarily guarantee favorable outcomes with regard to the effectiveness of enforcement.

³⁹ Judgment of 19 December 2013, Joined cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens and Others v Commission*, not published, EU:C:2013:866, paras. 239–241.

⁴⁰ Judgment of 26 January 2017, Case C-613/13 P *Commission v Keramag Keramische Werke and Others*, EU:C:2017:49, para. 107.

⁴¹ Judgment of 19 November 1998, Case C-252/96 P *Parliament v Gutiérrez de Quijano y Lloréns*, EU:C:1998:551, paras. 29–32.

⁴² Opinion of Advocate General Wathelet in joined cases C-609/13 P, C-613/13 P, C-625/13 P, C-636/13 P and C-644/13 P *Duravit and Duravit BeLux v Commission*, *Commission v Keramag Keramische Werke GmbH and Others* *Villeroy & Boch v Commission*, *Roca Sanitario v Commission* and *Villeroy et Boch v Commission*, EU:C:2015:785.

V. Practical consequences of the evidentiary rules pertaining to a single and continuous infringement of EU competition rules

Specific characteristics of a ‘single and continuous infringement’ reflect also on the methods of defense used to challenge the qualification that are usually geared towards proving that the anticompetitive activities of undertakings were independent of the single objective. This type of defense actually presupposes admitting to a simplified infringement because, to challenge the qualification, an undertaking has to prove that its anticompetitive behavior does not share the single objective characteristic for the single and continuous infringement.

Legally intriguing situations usually arise when one of the inculcated undertakings participating in the single and continuous infringement is a small company. One of the defense strategies used in these cases is to allege that the small undertaking was in a position of dependence towards the bigger undertakings participating in the cartel, which made it impossible for such a small undertaking to refuse doing business with the cartel⁴³. This line of arguments is not always unfounded because, in cases of global cartels, it is possible that an entire sector operates under the rules dictated by a cartel and the small undertakings, if they are even aware of the cartel’s existence, have no other option than to do business with the undertakings joined in a cartel. Even in these cases, undertakings often offer a second line of defense with consists in admitting to a simple infringement while arguing that such an infringement is, however, independent of a single objective shared by the undertakings participating in the cartel. If the Commission’s thesis about a single objective is successfully challenged, this qualification will be proven to be erroneous, which could even result, under certain conditions, in a complete exoneration.

This strategy was used successfully by a company called Soliver, which was one of the undertakings charged with a single and continuous infringement in the *Saint Gobain* case⁴⁴. This company admitted to having an ‘inappropriate contact’ with certain undertakings participating in a cartel⁴⁵, but it denied participating in any market partitioning arrangements of the said cartel. The General Court found that the Commission proved that Soliver entered into bilateral contacts of an anticompetitive nature with two undertakings

⁴³ Judgment of 27 March 2014, Joined cases T-56/09 and T-73/09 *Saint-Gobain Glass France and Others v Commission*, EU:T:2014:160, para. 20.

⁴⁴ Commission decision of 12 November 2008, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, Case COMP/F/39.125 – *Carglass*.

⁴⁵ Judgment of 10 October 2014, Case T-68/09 *Soliver v Commission*, EU:T:2014:867, paras. 43–44.

participating in the cartel⁴⁶. However, since the Commission failed to prove that Soliver was aware or should have been aware of the cartel's existence and its mechanisms, and, especially, of its single objective⁴⁷, the company managed to successfully topple the qualification of a 'single and continuous' infringement. In this specific case, the consequence was complete exoneration regardless of the fact that a simple infringement was established by the Commission and confirmed by the General Court. This outcome is due to the fact that the task of qualifying a reproached anticompetitive behavior belongs to the Commission and not EU Courts⁴⁸. Had the Commission alleged a subsidiary, simple violation of Article 101 TFEU, based on the findings of the General Court, Soliver would have been responsible for it. However, since the Commission failed to allege a subsidiary claim, such an additional incrimination could not have been added at the stage of the General Court's proceedings, neither by the Commission nor by the General Court.

The practical consequence of a successful challenge to the qualification of an infringement as a single and continuous one, is a possibility of a lower fine for an undertaking that managed to topple the qualification. When an infringement is found to be 'single and continuous', the coefficient reflecting the gravity of the infringement, which is usually set between 0–30%, will usually be set at the top end of that scale. In case of a simple infringement of competition law, especially if the charged undertaking is small and maybe even have been forced to do business with the cartel, the coefficient will probably be set at the lower end of that scale. Nevertheless, these general tendencies do not have to hold true in every case because the determination of fines depends on so many factors that it is sometimes jokingly referred to as alchemy (Forrester, 2009, p. 832). This procedure could more accurately be compared to the phenomenon of Schrödinger's cat (Schrödinger, 1935) because, although the criteria for fine determination are fixed in advance in EU legislation⁴⁹ and clarified by the Court's case law⁵⁰, nobody can predict with certainty what the outcome will be until the moment when the Commission renders its decision. Taking into account that EU Courts have unlimited jurisdiction which allows them not just to control the legality of the fine, but also to substitute their own

⁴⁶ *Ibidem*, paras. 80–81.

⁴⁷ *Ibidem*, paras. 90–103.

⁴⁸ *Ibidem*, paras. 113.

⁴⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 001, 4.1.2003), p. 1; Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.9.2006), pp. 2–5.

⁵⁰ Judgments of 11 July 2013, Case C-429/11 P Gosselin Group v Commission, not published, EU:C:2013:463, paras. 89–90 and of 26 January 2017, Case C-618/13 P Zucchetti Rubinetteria v Commission, EU:C:2017:48, para. 39.

appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or penalty payment imposed, it becomes clear that any and all guesses as to the final amount of a fine are pure speculations⁵¹.

VI. A single and continuous infringement in national practice: Croatian examples

At the outset, it should be noted that competent Croatian authorities do not use the notion of a ‘single and continuous infringement’ in their decisions. Even the most complex infringements are treated under the classical notion of infringement, which is covered by Article 8 of the Market Competition Protection Act⁵². The absence of evidence of the exact terminology should not, however, be interpreted as evidence of the absence of such types of infringements in the Croatian market.

A good example of what could have been qualified as a single and continuous infringement is the bus transporters cartel case where the Croatian Competition Agency⁵³ established, and the High Administrative Court confirmed⁵⁴, that bus transporters engaged in a series of anticompetitive behaviors in the territory of the entire county. These included an agreement on price fixing and market partitioning, as well as co-ordination with regards to the registration procedure for new buses and the joint participation in future public tenders for the school transportation services. Although the Agency and, subsequently, the High Administrative Court, correctly categorized the infringement as a restriction by object, in so far as the very agreement has a clear anticompetitive object, the notion of a ‘single and continuous infringement’ was not used. However, at the outset, it appears that all of the anticompetitive behaviors in this case shared a single objective: restriction of competition for public bus line transport on a defined territory. Moreover, it does not seem as if the behaviors of certain transporters had an objective distinct to the one shared by the cartel members, or that any of their behaviors deviated from what was agreed upon within the cartel.

It can only be speculated as to the reason why the Croatian Competition Agency does not engage in the qualification of infringements as ‘single and continuous’, but part of the problem might be the approach of the Croatian

⁵¹ Judgment of 8 December 2011, Case C-386/10 P Chalkor v Commission, EU:C:2011:815, para. 63.

⁵² Zakon o zaštiti tržišnog natjecanja, Official Gazette n° 79/09, 80/13.

⁵³ Decision of 27 December 2012, UP/I-030-02/11-01/024.

⁵⁴ Judgment of the High Administrative Court of 20 February 2014, UsII-65/2013-6.

courts to the domain of competition law in general, and the applicable evidentiary rules even in cases of simple infringements. In that regard, it should be stressed that the Croatian Constitutional Court annulled the above mentioned judgment of the High Administrative Court of 20 February 2014⁵⁵, on the grounds that the High Administrative Court failed to provide reasons as to why a specific legislation regulating road transport was not taken into account. As correctly observed by certain authors (Petrović, 2018, p. 9), in a series of cases related to the bus transporters cartel, the Croatian Constitutional Court did not dispute the factual findings of the Agency. However, the approach adopted by the Croatian Constitutional Court raises serious doubts as to its compatibility with EU Competition Law. EU Law requires national courts to apply EU and national competition law in parallel⁵⁶. Article 101(3) TFEU provides a list of exceptions to the applicability of Article 101(1). The approach of the Croatian Constitutional Court seems to imply that national special laws constitute exceptions to the applicability of competition rules. This approach would seriously undermine the effective application of EU Competition Law when applied by the national courts, because it would effectively allow for unilateral adding of additional exceptions to Article 101 TFEU by virtue of national legislation. Another problem that might influence the decision of the Competition Agency not to qualify infringements as ‘single and continuous’ might reside in the fact that the judiciary seems to struggle with evidentiary rules set in the established case law of the Court of Justice even in the cases of simple infringements (Petrović, 2018, pp. 14–16).

Setting the possible deficiencies aside, it seems that the Croatian Competition Agency operates with the relevant notions and applies the case law of the Court of Justice in the field of competition law even if it does not always use the exact terminology used in the Court’s case law. The practice of qualifying a series of anticompetitive agreements as a single agreement⁵⁷, a correct identification of hard-core restrictions of competition⁵⁸ or a correct application of evidentiary rules (Pecotić Kaufman, Butorac Malnar and Akšamović, 2019, p. 126), are some of the many examples demonstrating that the Agency follows the developments in EU Competition Law closely and applies the relevant notions in practice. Despite some hiccups along the road, courts have been slowly catching up with this trend. A positive development

⁵⁵ Judgment of the Constitutional Court of 21 April 2016, U-III-1678/2014.

⁵⁶ Judgment of 13 July 2006, Joined cases C-295/04 to C-298/04 *Manfredi and Others*, EU:C:2006:461, para. 38.

⁵⁷ Decision of the Croatian Competition Agency of 4 October 2004, *Mine Clearance Companies Cartel*, UP/I-030-02/2004-01/095.

⁵⁸ Decision of the Croatian Competition Agency of 19 July 2019, *Sewage Disposal Cartel*, UP/I-034-03/2017-01/019.

in that regard is a recent decision of the Croatian Constitutional Court in a case concerning Directive 98/5⁵⁹. The Constitutional Court annulled a judgment of the Supreme Court of Croatia on the grounds that the latter omitted to provide reasons explaining why it refused to initiate a preliminary rulings procedure in a case concerning EU legislation⁶⁰. Although the case at hand was not specifically related to EU Competition Law, this decision is a landmark judgment making it clear that EU Law has to be applied in Croatia and, in case of ambiguity as to its meaning, a preliminary rulings procedure has to be initiated. The same conclusion remains valid for the domain of competition law.

VII. Conclusion

A single and continuous infringement of EU Competition Law is a qualified form of a competition law infringement, introduced by the Commission and confirmed by the case law of EU Courts in order to facilitate the sanctioning of complex forms of EU Competition Law infringements. Taking into consideration the specific aim that competition law pursues in the European Union, namely, its aim of facilitating the integration of the Member States' markets, it becomes obvious why EU institutions have a vested interest in alleviating the difficult endeavor of proving complex infringements, in order to allow for an effective sanctioning thereof. Nevertheless, efficient application of EU Competition Law cannot be pursued at the expense of the rights of defense of the inculcated undertakings which, when faced with a qualification of a 'single and continuous' infringement, usually follow a similar pattern of defense before the Commission and EU Courts. The first attempt of every undertaking will most likely be to deny any involvement in the anticompetitive activities, in order to attain complete exoneration. In the case of a single and continuous infringement, it is highly unlikely that this strategy will prove to be very successful. More specifically, if the Commission inculcates an undertaking for a single and continuous infringement, this, in and of itself, usually means that the institution has very strong evidence of a simple infringement. Although a successful challenge to the qualification of an infringement as a single and continuous one can lead to a reduced fine, taking into account the methodology of determining fines, nobody can guarantee that such a reduction will in effect

⁵⁹ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, (OJ 77 L, 14 March 1998), pp. 36–43.

⁶⁰ U-III-2089/2017, 3 December 2019, paras. 9–10.

be granted at the end of the proceedings. Despite the fact that some of the coefficients might be set at a lower end of the scale, such a reduction could well be balanced out by the other relevant factors, that is, it could happen that an undertaking that successfully challenged the said qualification is actually a recidivist, which would then allow for an increase in fine.

A concept of a single and continuous infringement of competition law, like most of the instruments in this domain, has its proponents and its critics, but it is clear that, given the ever increasing complexity of modern cartels and their mechanisms, this form of infringement is becoming the most frequently established form of EU Competition Law infringement before the Commission and EU Courts.

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