

CPI EU News Presents:

The Commission's Burden of Proof in Article 101(1) TFEU: Evidentiary Shortcuts Cut Short?

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On November 28, 2019, the Seventh Chamber of the Court of Justice of the European Union partially annulled Commission Decision of April 2, 2014, which established an infringement and imposed fines on undertakings involved in the power cables cartel, as far as it concerns ABB Ltd. and ABB AB. The Commission committed an error of law by presuming that the scope of a cartel agreement could be extended to products for which no clear evidence existed of them being covered by the cartel.

The Power Cables Cartel in a Nutshell

Power cables play an important role in the transmission and distribution of electricity. They can be placed underground or under water (submarine cables) and are either low voltage, medium voltage or high/extra high voltage.² Although sold as separate products, power cables in practice are offered as part of a bigger “project,” which includes the cable itself, its installation, accessories, and (maintenance) services.³ That is also the case for high/extra-high voltage cables.⁴ Acting on the basis of an application for immunity introduced by ABB, the European Commission opened proceedings against a number of undertakings involved in the offering of such high/extra-high voltage power cable projects. The investigation,⁵ which resulted in the Infringement Decision of April 2, 2014, brought to light that various undertakings had conspired to allocate projects and refrain from competing directly with each other. More particularly, the Commission found that the allocation agreements related to “all types of underground power cables with a voltage of 110 kV and above and all types of submarine power cables with a voltage of 33 kV and above, including all products, works and services supplied to customers in connection with a sale of power cables, when such sales were part of a power cable project.”⁶

For having restricted competition in relation to those products, the various undertakings were imposed fines totaling 301,6 million euros. ABB, which as a successful leniency applicant obtained immunity, was not imposed a fine.⁷

Perhaps somewhat surprisingly at first sight, ABB nevertheless introduced an action for annulment against the Commission Decision.⁸ It essentially argued that the Commission had committed errors of law in defining the products covered by the cartel and as regards the duration of ABB’s involvement in the cartel. As to the products, ABB held that the Commission Decision covered all projects involving underground power cables with voltages of 110 kV and above (and not only projects involving underground power cables with voltages of 220 kV and above), whereas ABB argued that the products with voltages above 110 kV and below 220 kV were not part of the cartel agreement.⁹ At the hearing, ABB rightfully observed that “a lack of precision in the determination of the products or the duration of participation could have significant consequences in the context of actions for damages brought before national courts, which they claim are connected to the Commission’s decision.”¹⁰ If accepted, ABB could be held civilly liable for an infringement on the basis of the Commission Decision that was established on the basis of unsubstantiated evidence.

The Appeal in the Case at Hand

As mentioned above, ABB's action for annulment focused on the errors of law in defining the relevant product and timeframes of the cartel. Although the General Court initially rejected those grounds, the Court of Justice upheld the claim that the Commission had made an error of law by providing a sufficiently inaccurate definition of the relevant products involved in the cartel agreement. We will focus our analysis on that particular point.

ABB had argued that the Commission incorrectly inferred from a series of documents that the cartel agreement extended to products from 110 kV and below 220 kV and, in doing so, it had failed to discharge its burden of proof. The General Court, however, disagreed with that argument. It referred to a General Court precedent stating that it is "necessary to take account of the fact that anticompetitive activities take place clandestinely, that meetings are held in secret, that the associated documentation is reduced to a minimum, that the documents discovered by the Commission are normally only fragmentary and sparse, and accordingly, in most cases, the existence of an anticompetitive 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."¹¹ On top of that, "to determine the products covered by a cartel, the Commission is not required to define the relevant market on the basis of economic criteria. It is the members of the cartel themselves who determine the products which are the subject of their discussions and concerted practices."¹² Applying that case law to the case at hand, the General Court came to the conclusion that the Commission had relied on sufficient evidentiary materials to substantiate its claim.¹³

The Court of Justice disagreed with that analysis and argued that the General Court had committed an error of law in misapplying the rules relating to the burden of proof imposed on the Commission. According to the Court of Justice, "it should be borne in mind that, according to the case law of the Court of Justice, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement."¹⁴ That principle implies that the Commission has to prove the existence or extension of the cartel agreement to the particular products concerned.

In this case, however, the General Court based its finding, that aspects of the infringement at hand covered power cable accessories for underground power cable projects with voltages from 110 kV and below 220 kV, on a recital in the Commission decision which stated that most projects related to underground or submarine power cables were of a global nature, including cables, accessories, and related services. By principally referring to that condition, the General Court "did not adduce any concrete evidence to support the claim that the collective refusal to supply power cable accessories covered accessories for underground power cables with voltages from 110 kV and below 220 kV."¹⁵

Since the Commission's decisions contained no hard evidence to back up that conclusion, the Court of Justice had no choice but to arrive at the conclusion, while rendering a final judgment on the matter, that the "evidence is capable of raising doubts as to whether the collective refusal to supply power cable accessories covered accessories for underground power cables with voltages from 110 kV and below 220 kV."¹⁶ According to the case-law of the Court of Justice, "having regard to the presumption of innocence which applies to procedures relating to infringements of the competition rules that may result in the imposition of fines or periodic penalty payments, the benefit of any doubt must be given to the undertaking to which the decision finding an infringement was addressed."¹⁷ As a result, the Commission was considered to have failed in meeting the requisite standard of proof, resulting in the Commission Decision being annulled on that particular point.¹⁸

The Court limits the Commission's reliance on evidentiary shortcuts under Article 101(1) TFEU

The ABB judgment confirms that the Commission cannot simply infer that a restrictive agreement extends to another category of power cables projects on the basis that most projects in that category are of a similar global nature as the projects for which clear documentary evidence is available. It thereby overruled General Court precedents claiming that the clear definition of the products covered by the cartel agreement was not necessary.

In doing so, the judgment reconfirms the standard of proof underlying Article 101(1) TFEU and the burden placed upon the Commission to make a persuasive argument that this standard has been reached. In addition, the Court also raises questions as to the continued relevance of evidentiary shortcuts, both in the context of the enforcement of Article 101(1) TFEU and within the framework of EU antitrust law in general.

The Court reconfirms the Commission's standard and burden of proof when enforcing Article 101(1) TFEU

In its judgment, the Court held that the required standard to prove the existence of a restrictive agreement in terms of products covered had not been met. In doing so, the Court showed the interrelatedness between standard and burden of proof in the enforcement of Article 101 TFEU. As Advocate General Kokott eloquently summarized in her Opinion to the *T-Mobile* judgment,

The *standard of proof* determines the requirements which must be satisfied for facts to be regarded as proven. It must be distinguished from the *burden of proof*. The *burden of proof* determines, first, which party must put forward the facts and, where necessary, adduce the related evidence ([...] also known as the evidential burden); second, the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven [...].¹⁹

The standard of proof requires the Commission to offer elements allowing direct assessment and understanding of the products included in the restrictive agreement or practice covered by Article 101 TFEU. Per Article 2 of Regulation 1/2003, it is the

Commission which has to bring such evidence, bearing the burden of offering sufficiently persuading evidence as to the existence of a restrictive practice. The Commission thus bears the burden of showing the standard of proof is met.

The Court's judgment in this case confirmed²⁰ that, in order to meet the standard of proof, the Commission had to show by means of sufficiently concrete direct evidence - and not by way of inferences - that a particular product category was covered by the restrictive agreement or practice. From that point of view, the judgment is not surprising. EU Courts have held on previous occasions that the Commission cannot accept certain conclusions in an unsubstantiated way, implicitly shifting the burden to rebut those conclusions on to the undertakings concerned.²¹ This case confirmed that the basic principle of the Commission having to bring the evidence also applies to the determination of the material scope of an Article 101 TFEU infringement. If the Commission fails to prove that element, the risk of the issue remaining unresolved lies exclusively with the Commission when establishing the material scope of the cartel agreement is at stake.

The Commission cannot rely on evidentiary shortcuts when determining the material scope of a restrictive practice under Article 101(1) TFEU

The Court's confirmation of the principles regarding standard and burden of proof in EU competition law is not surprising. What is remarkable, however, is the Court's apparent or implicit reluctance to further promote the Commission's use of evidentiary shortcuts.

In general terms, an evidentiary shortcut would "enable enforcement authorities or private claimants to apply a prohibition rule, without having to make a conclusive argument that the behavior at stake indeed presented anticompetitive effects. Applying those [shortcuts], enforcement authorities and courts can effectively assume a specific kind of behavior to be in place and act as if it was in place."²² When such a shortcut is applied, it will subsequently fall upon the undertakings, which mostly have the evidence to prove the contrary more readily at their disposal²³, to counter the assumptions on which the shortcut evidentiary rules operate. Evidentiary shortcuts continue to be relied on elsewhere in the framework of Article 101 TFEU. Although neither Article 101 nor Regulation 1/2003 contain any references whatsoever to such shortcuts, the Court of Justice has allowed the Commission to rely on them in at least three circumstances related to Article 101(1) TFEU: (1) to presume that contacts between undertakings have caused ensuing coordination and, therefore, potentially anticompetitive behavior,²⁴ and (2) to presume that a parent company exercised decisive influence over the potentially anticompetitive decisions made by its subsidiary.²⁵ In each of those two scenarios, it is sufficient for the Commission to highlight the presence of certain elements (contacts between undertakings, a relationship of (full) control or ownership) to arrive at a legal conclusion (the existence of a concerted practice and/or parental liability).

Conclusion

In the case at hand, the Court did not recognize, as a matter of EU law, a similar evidentiary shortcut allowing the extension of the material scope of the products involved in a particular cartel agreement. As one is presumed innocent until proven guilty, it falls solely upon the Commission to determine the scope of the cartel agreement it seeks to end. From that perspective, the case shows above all that the Court is hesitant to extend the Commission's reliance on evidentiary shortcuts. In doing so, the Court seems to go in a similar direction as it did in other cases, requiring the Commission to prove all relevant elements instead of requiring undertakings to offer negative proof that they did not engage in a particular behavior.²⁶ In doing so, the Court seemingly also attaches ever-increasing importance to the presumption of innocence in the context of the Commission's enforcement proceedings, and uses that fundamental right to limit the Commission's evidentiary shortcut approach.

On a more general level, however, the Court also implicitly calls into question the continuing relevance of evidentiary shortcuts in the overall EU antitrust enforcement system. If the presumption of innocence is to be taken (more) seriously as a fundamental right, chances are this may have further impact upon existing evidentiary shortcuts already in place in EU competition law.

At first sight, the ABB judgment could be understood to indicate that those existing shortcuts may, at some point, also be called into question.²⁷ That point should not be exaggerated, however. The judgment analyzed here was not rendered by the Grand Chamber, and only touched upon an evidentiary presumption that had never before been validated by the Court of Justice. Not recognizing this evidentiary shortcut does not imply the end of all similar shortcuts recognized in case law. What the judgment does make clear, however, is that the Court seems unwilling to recognize other evidentiary shortcuts that would make the life of the European Commission easier. It is interesting to note in that respect that the European Commission, or at least Competition Commissioner Vestager,²⁸ seems to be pleading for a swifter reversal of the burden of proof in cases concerning digital markets.²⁹ If the Court decides to limit the reliance on evidentiary shortcuts, legitimate questions may be raised as to whether it would tolerate such future initiatives shaping the Commission's enforcement practice.

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- ² Recitals 2 and 4, Commission Decision of 2 April 2014 in CASE AT.39610 - Power Cables, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39610/39610_9899_5.pdf.
- ³ General Court, Case T-445/14, *ABB Ltd. and ABB AB v. European Commission*, EU:T:2018:449, para 2.
- ⁴ Recital 8 of Commission Decision of 2 April 2014 in CASE AT.39610 - Power Cables.
- ⁵ During which the scope of inspection decisions extending beyond high voltage power cables has been contested, resulting in the General Court limiting the Commission's inspection mandate to high voltage power cables, see General Court, Case T-135/09, *Nexans France SAS and Nexans SA v. European Commission*, EU:T:2012:596, confirmed by the Court of Justice in Case C-37/13, *Nexans France SAS and Nexans SA v. European Commission*, EU:C:2014:2030 and General Court, Case T-140/09, *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v. European Commission*, EU:T:2012:597.
- ⁶ Recital 13 of Commission Decision of 2 April 2014 in CASE AT.39610 - Power Cables.
- ⁷ See the Commission's press release, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_14_358.
- ⁸ Other undertakings also initiated actions for annulment, contesting their liability and the amount of the fine, complaints which have been rejected. See to that extent, General Court, Case T-438/14, *Silec Cable SAS and General Cable Corp v. European Commission*, EU:T:2018:447, confirmed on appeal by Court of Justice, Case C-599/18 P, *Silec Cable SAS and General Cable Corp v. European Commission*, EU:C:2019:966 and General Court, Case T-419/14, *The Goldman Sachs Group Inc. v. European Commission*, EU:T:2018:445 currently on appeal in Case C-595/18 P, *The Goldman Sachs Group Inc. v. European Commission*.
- ⁹ General Court, Case T-445/14, para 22.
- ¹⁰ General Court, Case T-445/14, para 29.
- ¹¹ General Court, Case T-445/14, para 35. The General Court also refers to Court of Justice, Case 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 55-57: that case does not, however, refer to the scope of products captured by a cartel agreement.
- ¹² General Court, Case T-445/14, para 36.
- ¹³ General Court, Case T-445/14, para 100.
- ¹⁴ Court of Justice, Case C-593/18 P, *ABB Ltd and ABB AB v. European Commission*, EU:C:2019:1027, para 38. The Court refers to Case C-90/15 P, *Hansen & Rosenthal and H&R Wax Company Vertrieb v. Commission*, EU:C:2017:123, para 17.
- ¹⁵ Court of Justice, Case C-593/18 P, *ABB Ltd. and ABB AB v. European Commission*, para 43.
- ¹⁶ Court of Justice, Case C-593/18 P, *ABB Ltd. and ABB AB v. European Commission*, para 100.
- ¹⁷ Court of Justice, Case C-593/18 P, *ABB Ltd. and ABB AB v. European Commission*, para 100.
- ¹⁸ Court of Justice, Case C-593/18 P, *ABB Ltd. and ABB AB v. European Commission*, para 101.
- ¹⁹ Opinion of Advocate General Kokott in Case C-8/08, *T-Mobile*, EU:C:2009:110, para 60.
- ²⁰ See for a general overview, Andriani Kalintiri, "The Allocation of the Legal Burden of Proof in Article 101 TFEU Cases: A 'Clear' Rule with Not-So-Clear Implications," 34 *Yearbook of European Law* (2015), 232-256.
- ²¹ By way of example, General Court, Case T-328/03, *O2 (Germany) GmbH & Co. OHG v. Commission of the European Communities*, EU:T:2006:116.
- ²² Pieter Van Cleynenbreugel, "Presumptions and short-cut rules in abuse regulation: (where) do EU and U.S. antitrust approaches meet?" in Rupprecht Podszun & Fabiana Di Porto (eds.), *Abusive practices in competition law* (Cheltenham, Edward Elgar, 2018).
- ²³ Cristina Volpin, "The Ball is in your court: evidential burden of proof and the proof-proximity principle in EU competition law" 51 *Common Market Law Review* (2014), 1159-1186.
- ²⁴ Court of Justice, Case C-199/92 P, *Hüls v. Commission*, para 162 and Case C-49/92 P *Commission v. Anic Participazioni*, EU:C:1999:356, para 121. It is important to note that the Court does not presume the presence of anticompetitive behavior in this case, only the presence of a link between coordination and contacts, see Andriani Kalintiri, *Evidence standards in EU competition enforcement. The EU approach* (Oxford, Hart, 2018), chapter 6, IV.
- ²⁵ Court of Justice, Case C-97/08 P, *Akzo Nobel*, EU:C:2009:536.
- ²⁶ One could draw parallels with Article 102 TFEU cases, where one witnesses a similar tendency. See to that extent

Court of Justice, Case C-413/14 P, *Intel v. European Commission*, EU:C:2017:632 and, among others, Cani Fernandez, “Presumptions and Burden of Proof in EU Competition Law: The *Intel* Judgment,” 10 *Journal of European Competition Law & Practice* (2019), 448-456.

²⁷ The Court will have a first opportunity to do so in the context of the appeal in Case C-595/18 P, *The Goldman Sachs Group Inc. v. European Commission*.

²⁸ See, to that extent, <https://www.competitionpolicyinternational.com/eu-vestager-considers-toughening-burden-of-proof-for-big-tech/>.

²⁹ For similar proposals, see the 2019 Report prepared by Experts on Competition Policy for the Digital Era, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.