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*By Inês Neves**

On November 18, 2021 the Court of Justice ("ECJ") delivered its judgment in case C-306/20 (*Visma Enterprise SIA v. Konkurences padome*) in proceedings following a reference for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") from the *Administratīvā apgabaltiesa* (Regional Administrative Court of Latvia), made by decision of June 4, 2020.[*]

The Court was called upon to interpret Article 101(1) and 101(3) TFEU in the light of an agreement between a producer and a number of distributors of its products (two accounting software programs), under which a distributor who has registered a potential customer transaction with the producer was given priority in the sale process with the customer concerned for six months from that registration, unless the customer objected. In particular, the ECJ had to assess whether such "priority" could be found to be a restriction of competition by object (or by effect), and if so, whether it might benefit from an exemption, including those relating to exclusive distribution systems.

The referring court asked the ECJ seven questions, which were considered in three successive stages (first, the ECJ addressed the first, fifth and sixth questions; then it proceeded to analyze the second, third and seventh questions and finally, it dealt with the fourth question).

In its decision the Court ruled that Article 101(1) TFEU must be interpreted as meaning that an agreement as in this case cannot be characterized as an *agreement having as its object* the prevention, restriction or distortion of competition, **unless**, having regard to its terms, objectives and context, it can be considered to reveal a sufficient degree of harm to competition that dispenses the competition authority with the need to examine its effects. In light of this evaluation and restraining approach towards restrictions by object, the ECJ then addressed the obligations of national courts when an agreement cannot be said to constitute a restriction of competition by object within the meaning of Article 101(1) TFEU. In such case the national court will have to examine whether, in light of all the relevant circumstances of the case at hand, namely, the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected and the actual conditions of operation and structure of the market in question, the agreement may be regarded as restricting competition to a sufficiently appreciable extent by reason of its actual or potential effects. As to the individual exemption of Article 101(3) TFEU, the Court recalled that the cumulative conditions set out therein must be interpreted strictly.

Finally, the ECJ stressed that the existence of an agreement infringing Article 101(1) TFEU is independent from the enforcement authority's assessment as to whether (all) the parties to that agreement are to be held responsible for the infringement. To put it in simple terms, the fact that the distributors could not be considered responsible for the alleged agreement between them and the producer did not have a bearing on the finding of an agreement withing the meaning of Article 101(1) TFEU.

The Jurisdiction of the Court to Rule on References for a Preliminary Ruling in Purely Internal Situations

Even though the agreement was considered not to affect trade between Member States, therefore encompassing a purely internal situation, the ECJ considered to have jurisdiction to rule on the reference for a preliminary ruling and to answer the questions referred in so far as they concerned the interpretation of Article 101(1) TFEU as well as Article 101(3) TFEU. In this respect the Court recalled its settled case-law on the need to ensure that the national law of a Member State

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that refers to the content of European Union ("EU") law provisions is interpreted in a way that forestalls future differences of interpretation, thereby ensuring uniformity and legal certainty by a predictable institutional and judicial practice. In other words, the jurisdiction of the Court may encompass situations where the facts of the case are outside the direct scope of European Union law. This will be the case whenever those EU provisions had been rendered applicable by domestic law which adopted, for internal situations, the same approach as that provided for under European Union law. Such a *normative mimicry* may be derived not only from the provision's letter, but also from the recitals, preamble or explanatory documents of the act (see, for instance, Judgment of the ECJ of March 14, 2013, in case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivata*, paras 17-23). Also, since the Court of Justice gives its preliminary ruling without, in principle, having to look into the circumstances in which the national courts were prompted to submit the questions, the division of judicial tasks between national courts and the ECJ is respected (see, among others, Judgment of the Court of October 18, 1990, in joined cases C-297/88 and C-197/89, *Massam Dzodzi v. Belgian State*, paras 29-43).

In sum, having considered that Article 11(1) of the Latvian Competition Act provides for a legal framework identical to that laid down in Article 101(1) TFEU, the Court concluded that it had to be interpreted in the same way as Article 101(1) TFEU. As a result, and as decided in other references for a preliminary ruling, the ECJ considered to have jurisdiction to interpret the provisions of EU Law even in a case like this.

On the contrary, as to the questions submitted concerning the interpretation of Regulation No 330/2010, the Court declined its jurisdiction. This was so, because it was not apparent from the order for reference that the Latvian legislature intended to adopt the same approach as that provided for under Regulation No 330/2010 for purely internal situations.

The Facts

By decision of December 9, 2013 the Competition Council of Latvia imposed a fine jointly and severally on FMS and FMS Software (the two companies that merged to form Visma Enterprise) for an infringement to Article 11(1) of the Latvian Competition Act. In its decision the Council considered that FMS Software, which owned the copyright to the accounting software Horizon and Horizon Start had entered into an anticompetitive agreement with its dealers, whereby an advantage was granted to the distributor that first registered a potential transaction with an end-user. Such an advantage was given in the form of a "six-month priority" in completing the sales transaction unless the end-user objected. Even though the Council had not objected to the creation of a database of potential customers, a "first-mover advantage" such as the one granted by clause 4.1 of the *cooperation agreement between FMS software and its distributors* would amount to a customer-based market allocation, restricting competition between the distributors of the accounting software. The Council did not however hold the distributors liable as co-participants in the prohibited agreement, on the grounds that *i)* they had not actively participated in the agreement's conclusion and *ii)* their respective market power *vis-à-vis* FMS Software was insignificant.

Visma Enterprise appealed to the Administrative Regional Court that, by judgement of May 8, 2015, partially upheld the application and ordered the Council to adopt a new decision on the imposition of a fine on FMS Software, excluding FMS's net turnover for the last financial year preceding the adoption of the contested decision from the calculation of the fine. Both Visma Enterprise and the Competition Council have appealed the judgement to the Supreme Court. By decision of June 16, 2017 the latter set aside the Regional Court's judgement and referred the case back to it for reconsideration. On September 13, 2018 the referring court again dismissed the appeal, refusing to consider the agreement's wording on the "end-user's non-objection" and holding, as a

result, that the contested decision was lawful and well-founded.

Having been called on to rule again on a point of law by decision of November 26, 2019, the Supreme Court likewise set aside the referring court's judgement of September 2018, on the grounds that the Regional Court's assessment had failed to consider important economic and legal aspects, in order to ascertain whether the agreement had restricted competition by object. In particular, the Court stressed that at the time when the end-user chose the distributor in question, competition had to a certain extent already taken place. As a result, even though further competition between distributors would still be possible, various circumstances would have to be thoroughly considered, such as *i)* the fact that the end-user had already come to the distributor in question; *ii)* the fact that under normal circumstances the distributor is not prevented from doing everything possible to retain the same end-user; *iii)* the circumstance that the product at stake is specifically customizable for a particular end-user and that such customization requires a significant amount of time (which might influence the customer's decision to turn to another distributor), among others. Furthermore, the Supreme Court has also underlined that the part of the agreement providing end-users with the possibility of objecting to the "priority" could not be disregarded, since it revealed the conditionality of the advantages conferred on the distributor. According to the Court, such dependency on the end-user's choice or behavior could compensate for a lack of competition between distributors. In light of this and having concluded that the referring court had failed to fully ascertain the agreement's economic context and, in particular, the manner in which distributors generally sell the product (that is, whether they normally take active steps to sell the product or whether passive sales are the rule), a proper examination of the restriction of competition was not conducted. As a result of this judgement, the case was referred back to the Administrative Regional Court for a new hearing. It was in the light of this factual background that the latter decided to stay the proceedings and to refer several questions to the Court of Justice for a preliminary ruling.

The Judgement of the Court of Justice

The Court of Justice addressed the referred questions in three groups.

As to the qualification of the agreement as restrictive of competition by object or by effect, the ECJ started by recalling that it is upon the national court to assess whether, having regard to all of the information relevant to the situation in the main proceedings, as well as the economic and legal context surrounding the agreement, it can be characterized as capable of preventing, restricting or distorting competition within the meaning of Article 101(1) TFEU. The principle of the separation of powers does not, however, preclude the Court from providing some clarifications intended to guide the referring court's interpretative exercise (in particular, when the essential legal criterion to identify a restriction of competition by object derives from settled case-law). In brief, it is the degree of the behavior's intrinsic harmfulness and its inherent restrictive nature that justify relieving the competent authority of the burden of examining its restrictive effects. This being said, and while acknowledging that vertical agreements tend to present themselves as less harmful to competition, the Court stressed that nothing prevents a vertical agreement from qualifying as a restriction by object. That will be the case when it reveals such an inherent restrictive potential that its concrete ability to restrict competition is clearly established.

The qualification of an agreement as a *restriction by object* rests, nevertheless, on a prior and necessary analysis on *i)* the content of its provisions; *ii)* the objectives it seeks to achieve as well as *iii)* the economic and legal context in which it is placed, the latter encompassing a consideration of the goods or services affected, as well as of the structure and actual conditions of operation of the market(s) in question. Following this theoretical background, the ECJ proceeded to the analysis of the "priority clause" embedded in the agreement between the company and its dealers. In this

respect, the Court began by noting that it was far from clear what the alleged "priority" consisted of. Besides, the purpose and objectives of the agreement were also disputed by the parties. Finally, the national court could not dispense with analyzing the agreement's economic and legal context to classify it as a restriction by object.

It is only when such a conclusion is not supported on that analysis, that the national court will then, according to the Court, have to examine the agreement's actual and potential effects on competition. In this respect, several factors will also need to be addressed, always with the view of considering the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, elements such as *i)* the nature and quantity, limited or otherwise, of the products covered by the agreement, *ii)* the position and importance of the parties on the market for the products concerned, and *iii)* the agreement's isolated nature or, alternatively, its position in a series of agreements, should be considered. While reverting to the national court the competence to undertake such analysis, the ECJ seems to have endorsed the Commission's allegation that vertical agreements are, in principle, less harmful to competition than horizontal agreements. As a result, a restriction of competition between distributors of the same brand (intra-brand competition) is, in principle, only problematic where effective competition between different brands in the relevant market (inter-brand competition) is weakened. As to the case at hand, and while stressing the national court's jurisdiction to determine such conditions, the Court did not fail to list Visma's market share (which, according to the wording of the questions referred, did not exceed 30 percent) in the elements to be considered by the national court, in order to determine the relevant market's structure as well as Visma's position. In addition, the fact that distributors are not informed in advance of the "reservation" and that the final customer is not informed as well of the possibility of objecting to it, along with the duration of the reservation, should be considered in an examination of the agreement's economic context and restrictive effects.

As to the possibility of the agreement benefiting from an exemption under paragraph 3 of Article 101 TFEU, the Court referred to the cumulative conditions of that paragraph, while also underlying that the improvement, within the meaning of the first condition, cannot be mistaken with all the advantages which the parties obtain from the agreement in their production or distribution activities. On the contrary, the improvement must display appreciable objective advantages capable of offsetting the resulting disadvantages for competition. Since the examination of the four conditions laid down in Article 101(3) TFEU must be undertaken in the light of *i)* the factual arguments and evidence adduced by the undertakings along with *ii)* the characteristics and specificities of the sector concerned, the national court would have to consider the arguments provided by the company in conducting such analysis.

Finally, in addressing the relationship between assessing the existence of an agreement and determining who is liable for it, the Court clearly differentiated the two questions, while acknowledging that the same factual elements might prove relevant for both assessments. As a result, it is perfectly possible that, after having concluded that there has been an anticompetitive infringement, the enforcement authority decides whether to hold only one or some of the parties liable for such conduct, without this differentiated assessment meaning that the existence of an agreement is excluded. So, **while the expression of a joint intention to behave in the market in a certain way is sufficient to find an agreement within the meaning of Article 101(1) TFEU, the question of who is responsible for the infringement and subject to a possible fine may have a different subjective scope**. In sum, while the finding of an infringement is a prerequisite of liability, the latter does not have any bearing on the former.

In light of the above, the Court concluded in favor of a restrictive interpretation of the qualification as a *restriction of competition by*

object as well as of the four conditions laid down in Article 101(3) TFEU, in order for an agreement to be exempted. Besides, it has also reiterated the legitimacy of a differentiated assessment of the existence of an agreement, on the one hand, and the responsibility of the parties, on the other.

Commentary

While the burden of proving an infringement of competition rules rests, without doubt, on the authority alleging the restrictive behavior, the standard of proof is something that has always divided competition authorities and undertakings. In any case, the truth is that *i)* after having agreed on **who** has to prove what and *ii)* before disputing **what standard of proof** or types of evidence are accepted, one has to be sure of *iii)* **what exactly needs to be ascertained**.

The alternative *restriction by object* and *restriction by effect* and the consequences it entails is a clear example of the importance of establishing a clear legal framework capable of explaining what must be proven in order to ascertain the verification of one of these two alternatives. In this respect, two approaches were conceivable: *i)* a casuistic or individual approach encompassing a detailed and thorough examination of the actual and potential anticompetitive effects of the conduct of undertakings, and *ii)* a more standardized or formal approach that distinguishes between restrictions of competition by object and by effect (see, among others, Opinion of Advocate General Bobek, delivered on September 5, 2019, in case C-228/18, *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others*, para 40ff, and Opinion of Advocate General Wahl, delivered on March 27, 2015, in case C-67/13 P, *Groupement des cartes bancaires (CB) v. European Commission*, para 27ff). In light of the former's disadvantages (in terms of deterrence and procedural economy, but also predictability and legal certainty), recourse to the object/effect dichotomy is now the adopted approach.

According to this "procedural device" (Opinion of Advocate General Bobek, cit., para 27), it is normally acknowledged that where the anticompetitive object of an agreement is established, it is not necessary to examine its effects on competition (see, *inter alia*, Judgment of the Court of 20 January 2016, in case C 373/14 P, *Toshiba Corporation v. Commission*, para 25). This does not preclude, however, that the same anticompetitive conduct is regarded as having as both its object and its effect a restriction of competition. Indeed, while the alternative nature of that requirement leads, first of all, to the need to consider the precise object of the agreement, as a result of which the competent authority or court having jurisdiction may be relieved of the need to examine the effects of that restriction, this in no way rules out that they undertake such an examination where they consider it to be appropriate (Judgement of the Court of April 2, 2020, in case C-228/18, *Gazdasági Versenyhivatal v. Budapest Bank Nyrt. and Others*, paras 33-44). Nevertheless, and as correctly stated "the existence of alternative legal boxes is no licence for vagueness, in particular when imposing heavy administrative sanctions." (Opinion of Advocate General Bobek, cit., para 30). As a result, "accepting, as a conceptual possibility, that an agreement might amount to both types of restriction certainly does not liberate the appropriate competition authority from the requirement to, first, adduce the necessary evidence for both types of restriction and, second, evaluate and clearly subsume that evidence under the appropriate legal categories" (Opinion of Advocate General Bobek, cit., para 29).

The judgement of the ECJ under analysis is important, as a reiteration of something that should appear as an old maxim: *one must always look at the agreement's (legal and economic) context*. Indeed, an analysis of the "precise purpose of the agreement, in the economic context in which it is to be applied" (Judgement of the Court of June 30, 1966, in case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)*) is no longer sufficient.

As a matter of fact, while it is true that for certain agreements experience shows us that they lead to reductions in production and price increases, resulting in a misallocation of resources to the detriment of consumers, the intrinsic harmfulness of a behavior cannot be based on a mere allusion to its alleged nature. On the contrary, it needs to be ascertained in light of several factors from the content of its provisions and the objectives it seeks to achieve to the legal and economic context in which it is placed. Otherwise, "a purely formal assessment of an agreement, completely detached from reality, could lead to condemning innocuous or procompetitive agreements. There would be no legal or economic justification for prohibiting an agreement that, despite conforming to a category of agreements that is usually considered anticompetitive, is nonetheless, because of some specific circumstances, outright incapable of producing any deleterious effect in the marketplace, or is even procompetitive" (Opinion of Advocate General Bobek, cit., para 45). As a result, a "formalist approach is thus conceivable only in the case of (i) conduct entailing an inherent risk of a particularly serious harmful effect or (ii) conduct in respect of which it can be concluded that the unfavourable effects on competition outweigh the pro-competitive effects. To hold otherwise would effectively deny that some actions of economic operators may produce beneficial externalities from the point of view of competition" (Opinion of Advocate General Wahl, cit., para 55).

In light of the above, a two-step analysis must be conducted by the competent authority. First, it must consider the content of the provisions of the agreement and its objectives. Secondly, even where experience supports a presumption in favor of the agreement's intrinsic harmful nature, a double-check will be needed. In particular, the competent authority will have to verify that "the presumed anticompetitive nature of the agreement, determined on the basis of a merely formal assessment of it, is not called into question by considerations relating to the legal and economic context in which the agreement was implemented" (Opinion of Advocate General Bobek, cit., para 43).

It follows that, while competition authorities are much more comfortable when the infringement that they prosecute amounts to a *restriction by object*, mainly because of the lesser stringent standard of proof, the latter may only be justified and considered to be proportionate and legitimate, when the concrete capability of producing anticompetitive effects is proven and based on a serious previous analysis, that considers both the text (when a formal agreement exists) and rationale of the agreement, as well as the characteristics of the market, the idiosyncrasies of its operation, and many other dimensions of the economic and legal context surrounding the agreement.

Besides, while accepting that this analysis will be all the more relevant and pressing in light of a peculiar agreement which has not yet been considered and qualified as a *restriction by object* in the case law of the Court or reiterated decision-making practice of competition authorities, such procedure must always apply, even when, in its appearance, the behavior seems to be of an imminently restrictive nature (Opinion of Advocate General Wahl, cit., paras 40-45). In simple terms, economics and experience (the latter understood as what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law – see, among others, Opinion of Advocate General Wahl, cit., para 79) are, of course, points of reference. However, decision-making practice will not always support an irrebuttable presumption of harm. This will particularly be the case where the agreement, having regard to its context, shows to have ambivalent effects on the market (for instance because, while reducing price competition, it increases competition in relation to factors other than price, or because it opens up or creates a new market, or even because it produces ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition - see, among others, Judgment of the Court of October 13, 2011, in case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, para 40, and Judgment

of the Court of January 28, 1986, in case 161/84, *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis*, paras 14-17).

In sum, it is truth that some judgements may be read as supporting the *prima facie* harmful nature of an agreement as an alternative to the need for a concrete and individual examination of its content, objective, legal and economic context (for instance, Judgment of the General Court of December 12, 2018, in case T-682/14, *Mylan Laboratories Ltd and Mylan, Inc. v. European Commission*, para 161). However, claims on the existence of a restriction by object *on its face* are to be rejected. On the contrary, a proper analysis of the agreement's surrounding context cannot be waived. In other words, "not even when dealing with forms of conduct like price fixing, market sharing or export bans, which are generally recognised to be particularly harmful to competition, can the economic and legal context be totally ignored" (Opinion of Advocate General Bobek, cit., para 46)

In this respect, while hard-core restrictions on competition do not depend on a customer's behavior, the latter may impact and influence the concrete capability of the agreement to produce restrictive effects on competition, and cannot, therefore, be neglected. In particular, and for the case in question, the final consumer's behavior as well as the other distributors' (allegedly disadvantaged by the priority clause) freedom of action needed to be considered when analyzing the intrinsic harmfulness of the behavior. Otherwise, the proportionality that supports the lower standard of proof required in restrictions by object will be at stake, since a similar approach will be applied to different restrictions. Finally, such a cautious approach does not immunize certain conduct by exempting it from the competition rules. This is so because the "competition authority will still be able to censure it after a more thorough examination of its actual and potential anticompetitive effects on the market" (Opinion of Advocate General Wahl, cit., para 62).

As to vertical agreements in particular, since, as a general rule subject to exceptions, Article 101(1) TFEU does not apply to them, the identification of an object restrictive of competition will be even more complex (Opinion of Advocate General Cruz Villalón, delivered on October 25, 2012, in case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal*, para 69). In this regard, apart from the imposition of minimum resale prices, the prohibition of parallel trade between Member States through the establishment of absolute territorial protection, and clauses prohibiting distributors from using the internet to sell certain products, the need for a proper analysis of the agreement's legal and economic context, as well as of its underlying objectives is reinforced. While also being important in cases where solid experience allows for a presumption on the agreement's inherently anticompetitive nature, such analysis will be of the utmost importance on a *stand-alone* basis (this is, in relation to *atypical* behavior).

Still on the subject of the agreement's legal and economic context, it should be possible for the parties to advance a "countervailing hypothesis that is not implausible at first sight and that challenges, in the context of the individual case, the general conventional wisdom" (Opinion of Advocate General Bobek, cit., para 79). This means that the competent authority must properly address an eventual procompetitive rationale alleged by the parties, without promoting this into the background of Article 101(3) TFEU. As the Advocate General Bobek puts it, "there are two key elements to this: first, the countervailing explanation must seem plausible enough at first sight to warrant further examination. Second, however, the standard is that of a reasonable countervailing hypothesis. It does not need to be fully established, argued, and proven: that is a matter for the fully fledged effects analysis" (Opinion of Advocate General Bobek, cit., para 79).

As to the parties' intention, it should be conceived only on a subsidiary or supplementary basis. This means that even if an intention to breach the prohibition laid down in Article 101(1) TFEU is substantiated by circumstantial evidence, it "cannot replace a detailed examination of the terms and the objectives of the conduct in question" (Opinion of Advocate General Wahl, cit., para 109). This

is a result of the objective (while concrete) analysis that must be conducted in this respect.

So, many are the questions that need to be resolved in a case like this. As to the agreement's content and objectives: are distributors informed of a customer's reservation? Are they prevented from submitting offers to an already registered customer? Are there any external circumstances to the agreement that show a system of penalties or other coercive or punitive measures that in practice incite the distributors to refrain from making an offer to a "reserved" final customer? Can a customer enter into a contract with a distributor who has not been the first to register him? What is the rationale of the agreement? Is such "priority" needed to ensure a more effective distribution system and deliver a better product to the final customer? Wouldn't the mere registration of the transaction– without the priority - be sufficient to ensure such purpose? What justification underlies the "priority clause"? What does it consist of? For how long does the priority apply?

As to the economic and legal context: how does the market for the distribution of accounting software normally function? Do distributors take active steps to sell the product, or do they sell it only as passive sales? Is this a product that requires active collaboration between the software's supplier and its distributors (although the system does not exactly amount to either an exclusive or a selective distribution system)? Is it possible that such intervention occurs only when the end user has agreed to start using the marketed software or is it necessary to identify potential customers at an early stage?

It is clear from all the questions referred to above that this is different from an analysis of the agreement's effects. Indeed, we are not asking whether the agreement has been implemented or whether its implementation has actually restricted or even eliminated competition among distributors. It is merely a question of analyzing whether, in light of the legal and economic context, one can speak of an inherently harmful restriction of competition. However, competition authorities quite often confuse an analysis of the agreement's content, objectives and economic and legal context with the assessment of the agreement's implementation and its actual or potential effects on competition. The problem appears intensified when, on the basis of such confusion, they dispense themselves from an analysis of the agreement's context, claiming to be exempted from proving its effects. Such scenario cannot be accepted. It is one thing to establish the existence of a restriction by object, which, in light of its potential consequences (notably concerning the presumption of effects and appreciable nature of the restriction of competition), needs to remain a residual category and be interpreted restrictively. Unlike a *de facto* verification of the agreement's effects, the analysis of its legal and economic context is justified by the need to avoid that innocuous or procompetitive agreements are caught by a formal and abstract analysis, that does not consider specific circumstances or special features of the relevant market(s) that might either *i)* indicate that the case at hand could constitute an exception to the experience-based rule, or at least *ii)* cast doubt on the presumed harmful nature of the agreement in question (Opinion of Advocate General Bobek, cit., para 48).

In our view, the judgement of the ECJ in this case confirms the cautious approach that all competition authorities (as well as the national courts and the Courts of the European Union) should adopt. Otherwise, they risk seeing their conviction and analysis crumble, because of a too fragile or inexistent theory of harm.

Finally, as to the side issue on the conditions for establishing the existence of an agreement, on the one hand, and the liability of the parties to the agreement, on the other hand, the Court's conclusion is unobjectionable. As a matter of fact, this part of the judgement is, in our view, particularly relevant when assessing the liability for alleged agreements or concerted practices where a unilateral dimension stands out. In such scenarios, a mismatch between the participants in the alleged agreement and those responsible for the infringement may be perfectly legitimate.

However, it is important to stress the need for a certain consistency between the theory of harm

and the *selection* of undertakings which are held liable for the infringement. In particular, a differentiated assessment must not rest (at least individually) on factors such as the **amount** of evidence collected that mentions or relates to those undertakings. Indeed, when there is proof of their participation in conduct which is in all respects similar and of the same intensity as those on the basis of which other undertakings were held liable, a quantitative factor cannot supersede the qualitative nature of the evidence. Otherwise, some undertakings would be penalized by the greater or lesser degree of diligence of the authority on searches and seizures. Also, such approach could amount to an implicit invitation to the destruction of evidence.

As in all other problems relating to competition law, the ECJ has again drawn everyone's attention to the need for caution and consistency. Without these two ingredients, no enforcement will be sustainable.