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Readoption by the European Commission of cartel decisions annulled on procedural grounds by the EU courts

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Article

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ABSTRACT

This paper deals with the readoption by the European Commission of decisions imposing fines on undertakings found to have participated in cartels in violation of Article 101 TFEU (cartel decisions) following the annulment of those decisions by the EU courts (General Court and Court of Justice) on procedural grounds. The paper gives an overview of the cases in which such readoption has taken place and analyses the applicable legal principles and policy considerations.

Cet article traite de la ré-adoption par la Commission européenne de décisions Infligeant des amendes à des entreprises qui ont participé à des cartels en violation de l'article 101 TFUE suite à l'annulation de ces décisions par les juridictions de l'Union (Tribunal et Cour de justice) pour des motifs procéduraux. L'article examine les affaires dont lesquelles une telle ré-adoption a eu lieu et analyse les principes juridiques applicables et les considérations d'opportunité pertinentes.

I. Introduction: Commission decisions and their review by the EU courts

1. This paper deals with the readoption by the European Commission of decisions imposing fines on undertakings found to have participated in cartels in violation of Article 101 TFEU (cartel decisions) following the annulment of those decisions by the EU courts (General Court and Court of Justice) on procedural grounds.

2. Article 101 TFEU prohibits agreements between undertakings that may affect trade between EU Member States and restrict competition without redeeming virtue,[1] including in particular cartels.[2]

3. Regulation 1/2003,[3] the main regulation giving effect to Article 101 TFEU, entrusts both the European Commission and the competition authorities of the

*All views expressed in this paper are strictly personal, and should not be construed as reflecting the opinion of the European Commission.
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1 This prohibition was previously contained in Article 85 of the Treaty establishing the European Economic Community (EEC), in Article 81 of the Treaty establishing the European Community (EC), and, for the coal and steel sector, in Article 65 of the Treaty establishing the European Coal and Steel Community (ECSC). An equivalent provision is contained in Article 53 of the Agreement on the European Economic Area (EEA).

2 Article 2(14) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1–19, defines "cartel" as "*an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.*" *See generally* C. Argenton, D. Geradin and A. Stephan, *EU Cartel Law and Economics* (Oxford UP, 2020) and my paper The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years (2016) 39 *World Competition* 327, also accessible at http://ssrn.com/author=456087.

3 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1–25, last amended by Council Regulation (EC) No. 1419/2006, OJ L 269, 28.9.2006, pp. 1–3.

EU Member States (national competition authorities), forming together the European Competition Network (ECN), with the task of pursuing infringements of Article 101 TFEU.[4] This paper only deals with cartel decisions adopted by the European Commission.

4. The European Commission's main decisional powers are set out in Articles 7 and 23 of Regulation 1/2003. Article 7 empowers the European Commission to adopt decisions finding infringements of Article 101 TFEU and ordering the termination of such infringements. In cases concerning cartels, decisions pursuant to Article 7 are invariably combined with a decision pursuant to Article 23(2)(a), which empowers the Commission to impose fines to penalise the infringement found.

5. The procedural rules governing the Commission's administrative proceedings leading to cartel decisions are laid down in the EU treaties and Charter of Fundamental Rights, Council Regulation 1,[5] Council Regulation 1/2003,[6] Commission Regulation 773/2004,[7] various Commission notices or guidelines, and the case law of the EU courts.[8]

6. Pursuant to Article 263 TFEU, the addressees of decisions adopted by the European Commission can bring an action for annulment of the decision before the EU courts, more precisely before the General Court, with the possibility of a further appeal only on points of law before the Court of Justice.[9]

7. According to the case law, "*the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Article 101 TFEU* (. . .) *which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the appellants* (. . .) *and taking into account all the elements submitted by the latter, whether those elements pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as those elements are* relevant *to the review of the legality of the Commission decision*."[10]

8. One of the grounds for annulment listed in Article 263 TFEU is "*infringement of an essential procedural requirement*."[11] Not every procedural irregularity thus constitutes a ground for annulment.[12] A procedural irregularity in the administrative proceedings resulting in the Commission's decision will constitute a ground for the annulment of that decision "*only if the Court of Justice or the General Court finds that in the absence of the irregularity in question the contested* [decision] *might have been substantially different, that the irregularity makes judicial review impossible, or that, on account of the irregularity* [that] *it contains, the* [decision] *in question breaches a fundamental institutional rule*."[13]

9. According to the case law, "*the EU Courts cannot, in the context of the review of legality referred to in Article 263 TFEU, substitute their own reasoning for that of* [the Commission]".[14] If the application for annulment is well-founded, the court can thus not correct the Commission's decision, but must declare it void, as required by Article 264 TFEU, to the extent that the action is well founded.[15] It is then for the Commission to draw the necessary consequences, as required by Article 266 TFEU.

10. An important exception to this impossibility for the court to correct the Commission's decision concerns the determination of the amount of the fine. According to the case law: "*The review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union* [are] *afforded by* (. . .) *Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out*

4 Apart from the public enforcement by the European Commission and the competition authorities of the EU Member States, Article 101 is also invoked in litigation between private parties in the courts of the EU Member States (private enforcement); *see further* my paper Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future (2017) 40 *World Competition* 3, also accessible at http://ssrn.com/author=456087.

5 Council Regulation No. 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, pp. 385–386 (English Special Edition 1952–1958, p. 59), last amended by Council Regulation (EU) No. 517/2013, OJ L 158, 10.6.2013, pp. 1–71.

6 As note 3 above.

7 Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, pp. 18–24.

8 *See further* E. Rousseva (ed.), *EU Antitrust Procedure* (Oxford UP, 2020) and L. Ortiz Blanco (ed.), *EU Competition Procedure* (4th ed., Oxford UP, 2021), and my papers EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights (2011) 34 *World Competition* 189, and Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network (2020) 43 *World Competition* 5, both also accessible at http://ssrn.com/author=456087.

9 *See further* K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford UP, 2014), C. Naômé, *Appeals Before the Court of Justice of the European Union* (Oxford UP, 2018), and my papers The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights (2010) 33 *World Competition* 5, and The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker (2014) 37 *World Competition* 5, both also accessible at http://ssrn.com/author=456087.

10 Judgment in *Galp Energía España and Others v. Commission*, case C-603/13 P, EU:C:2016:38, at para. 71.

11 According to J. Schwarze, Judicial Review of European Administrative Procedure (2004) 68 *Law and Contemporary Problems* 85 at 97, "*procedural requirements can hardly be classified as essential or unessential: what is meant, instead, is the essential or unessential infringement of the same provision*."

12 A similar distinction between procedural irregularities that can or that cannot affect the substantive outcome can also be found in Article 58 of the Statute of the Court of Justice of the European Union, which limits appeals against judgments of the General Court on the ground of breaches of procedure before that court to breaches of procedure which adversely affect the interests of the appellant, and in Article 4(2) of Protocol No. 7 to the European Convention on Human Rights, which allows for the reopening of criminal cases following a final acquittal or conviction where there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. *See further* text accompanied by notes 100 and 135 below.

13 K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford UP, 2014), at 371, with multiple references to judgments of the Court of Justice.

14 Judgment in *Galp Energía España and Others v. Commission*, case C-603/13 P, EU:C:2016:38, para. 73.

15 *See* judgments in *Commission v. Verhuizingen Coppens*, case C-411/11 P, EU:C:2012:778, paras. 34 to 54, and in *Soliver v. Commission*, case T-68/09, EU:T:2014:867, paras. 107 to 113.

a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed."[16]

11. However, "*the scope of that unlimited jurisdiction is strictly limited, unlike the review of legality provided for in Article 263 TFEU, to determining the amount of the fine.*"[17]

II. Overview of readoption cases

12. By the end of 2020, the European Commission had readopted annulled cartel decisions in eleven cases.

1. *PVC*

13. The first readoption took place in July 1994 in the *PVC* case. The Commission had adopted an initial decision in December 1988, fining fourteen PVC producers for their participation in a cartel.[18] In so far as it concerned twelve of these fourteen undertakings,[19] this initial decision was annulled by the Court of Justice in June 1994 for infringement of an essential procedural requirement within the meaning of Article 173 EEC (now Article 263 TFEU) on the ground that the Commission had failed to carry out the authentication of its decision in accordance with the Commission's own Rules of Procedure.[20] Six weeks after this annulment, without taking any further procedural steps, the Commission adopted the new decision, identical to the initial decision but now duly authenticated, addressed to the twelve undertakings for whom the first decision had been annulled.[21] The twelve undertakings brought actions for annulment against the readopted decision, contesting in particular on various grounds the legality of such readoption. These actions were ultimately rejected by the Court of Justice in the *PVC II* judgment of October 2002, the leading judgment on readoption of antitrust decisions.[22]

16 Judgment in *Chalkor v. Commission*, case C-386/10 P, EU:C:2011:815, para. 63.

17 Judgment in *Galp Energía España and Others v. Commission*, case C-603/13 P, EU:C:2016:38, para. 76.

18 Commission Decision 89/190/EEC of 21 December 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.865 – *PVC*), OJ L 74, 17.3.1989, pp. 1–20.

19 One of the undertakings did not bring an application for annulment of the first decision, and another undertaking's application was declared inadmissible by the General Court as it was time-barred. For these two undertakings, the initial decision thus became final; *see* judgment in *Commission v. AssiDomän and Others*, case C-310/97 P, EU:C:1999:407.

20 Judgment in *Commission v. BASF and Others*, case C-137/92 P, EU:C:1994:247.

21 Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865 – *PVC*), OJ L 239, 14.9.1994, pp. 14–35. *See also* European Commission, Press release IP/94/732 of 27 July 1994.

22 Judgment in *Limburgse Vinyl Maatschappij and Others v. Commission*, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582 ("*PVC II* judgment"), confirming the judgment of the General Court in *Limburgse Vinyl Maatschappij and Others v. Commission*, joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80.

2. *Soda ash*

14. The Commission readopted in December 2000 three decisions in the *Soda ash* cases. In December 1990, the Commission had adopted four decisions, imposing fines on Solvay and ICI for an infringement of Article 85 EEC, on Solvay and a German undertaking for another infringement of Article 85 EEC, on Solvay for an infringement of Article 86 EEC, and on ICI for an infringement of Article 86 EEC.[23] Upon applications for annulment brought by Solvay and ICI, the General Court annulled in June 1995 the third and fourth decisions, as well as the second decision in so far as it concerned Solvay, on the same ground as the annulments of the initial decision in *PVC*—namely, failure of authentication of the decisions.[24] These annulments were confirmed on appeal by the Court of Justice in April 2000.[25] Eight months later, without taking any further procedural steps, the Commission readopted the third and fourth decisions, as well as the second decision in so far as it concerned Solvay.[26] Solvay brought applications for annulment against the two readopted decisions concerning it. After the General Court had upheld these two readopted decisions in December 2009,[27] the Court of Justice annulled these decisions in October 2011, on the ground of infringement of the rights of the defence, in that Solvay had not been granted full access to the file during the administrative proceedings preceding both the initial and the readopted decisions.[28] The Commission did not subsequently attempt to readopt a second time these twice annulled decisions.[29] While the judgments of the Court of Justice in *Soda ash* do not dwell on the question of the readoption of decisions, the opinions of

23 Commission Decision 91/297/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133–A: *Soda-ash – Solvay, ICI*; OJ L 152, 15.6.1991, pp. 1–15), Commission Decision 91/298/EEC of 19 December 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.133-B: *Soda-ash – Solvay, CFK*; OJ L 152, 15.6.1991, pp. 16–20), Commission Decision 91/299/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133–C: *Soda-ash – Solvay*; OJ L 152, 15.6.1991, pp. 21–39), and Commission Decision 91/300/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133–D: *Soda-ash – ICI*; OJ L 152, 15.6.1991, pp. 40–53).

24 Judgments in *Solvay v. Commission*, case T-32/91, EU:T:1995:117, in *ICI v. Commission*, case T-37/91, EU:T:1995:119, and in *Solvay v. Commission*, case T-case 31/91, EU:T:1995:116. The first decision was also annulled, but on a different ground, namely, infringement of the rights of the defence in that Solvay and ICI had not been granted full access to the file during the administrative procedure; *see* judgments in *Solvay v. Commission*, case T-30/91, EU:T:1995:115, and in *ICI v. Commission*, case T-36/91, EU:T:1995:118. The German undertaking did not bring an action for annulment against the second decision, which thus became final in so far as it concerns that undertaking.

25 Judgments in *Commission v. ICI*, case C-286/95 P, EU:C:2000:188, and in *Commission v. Solvay*, joined cases C-287/95 P and C-288/95 P, EU:C:2000:189.

26 Commission Decision 2003/6/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/33.133–C: *Soda-ash – Solvay*; OJ L 10, 15.1.2003, pp. 10–32), Commission Decision 2003/7/EC of 13 December 2000 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/33.133–D: *Soda-ash – ICI*; OJ L 10, 15.1.2003, pp. 33–50) and Commission Decision 2003/5/EC of 13 December 2000 relating to a proceeding under Article 81 of the EC Treaty (COMP/33.133–B: *Soda-ash – Solvay, CFK*; OJ L 10, 15.1.2003, pp. 1–9). *See also* European Commission, Press release IP/00/1449 of 13 December 2000.

27 Judgments in *Solvay v. Commission*, case T-57/01, EU:T:2009:519, and in *Solvay v. Commission*, case T-58/01, EU:T:2009:520. The General Court only slightly reduced the amounts of the fines.

28 Judgments in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:686, and in *Solvay v. Commission*, case C-110/10 P, EU:C:2011:687.

29 *See further* text accompanied by notes 97 and 144 below.

Advocate General Kokott are of interest in particular on the compatibility of readoptions with the fundamental right to have a matter adjudicated within a reasonable duration.[30]

3. *Steel beams (Arbed/Arcelor)*

15. The Commission readopted in November 2006 a decision concerning one of the undertakings in the *Steel beams* case. In February 1994, the Commission had imposed fines on fourteen producers and distributors of steel beams for infringements of Article 65 ECSC, including a fine of ECU 11,200,000 on Arbed SA.[31] Upon an action for annulment brought by Arbed SA, the General Court in March 1999 partially annulled the decision, on the ground that Arbed's participation in one of the infringements had not been established, and, in the exercise of its unlimited jurisdiction, fixed the amount of the fine at EUR 10,000,000.[32] Upon appeal brought by Arbed SA, the Court of Justice in October 2003 annulled the entire decision in so far as it concerned Arbed SA, on the ground of violation of the rights of the defence, in that the statement of objections had not been addressed to Arbed SA but rather to its daughter company TradeArbed SA and had not indicated that a fine would be imposed on Arbed SA.[33] Following this annulment, the Commission reopened its proceedings as regards Arbed SA. It sent in March 2006 a statement of objections to Arcelor Luxembourg SA, the legal successor of Arbed SA, and two other Arcelor companies. In their responses to this statement of objections, the Arcelor companies did not contest the infringement as upheld by the General Court. The new decision imposed on the Arcelor companies the same fine of EUR 10,000,000 as fixed by the General Court.[34] The Arcelor companies did not bring an application for annulment against this readopted decision.

4. *Alloy surcharge (ThyssenKrupp)*

16. The Commission readopted in December 2006 a decision concerning one of the undertakings in the *Alloy surcharge* case. In January 1998, the Commission had adopted an initial decision imposing fines on six stainless steel producers, including ThyssenKrupp Stainless, for an infringement of Article 65 ECSC.[35] Upon an application for annulment brought by ThyssenKrupp Stainless, the General Court partially annulled the initial decision in so far as it held ThyssenKrupp Stainless responsible for the participation of Thyssen Stahl in the cartel infringement, on the ground of violation of the rights of the defence, because the statement of objections preceding the initial decision had not indicated that ThyssenKrupp Stainless would also be held liable for Thyssen Stahl's participation in the cartel. The General Court, furthermore, in the exercise of its unlimited jurisdiction, reduced by 20% (the remainder of) the fine imposed on ThyssenKrupp Stainless because of its cooperation with the Commission's investigation.[36] Following this partial annulment, the Commission sent in April 2006 a new statement of objections to ThyssenKrupp Stainless and, after ThyssenKrupp Stainless had responded in writing and at an oral hearing, adopted in December 2006 a new decision, fining ThyssenKrupp Stainless for Thyssen Stahl's participation in the cartel. In this new decision, the Commission applied a 20% fine reduction identical to the reduction which the General Court had granted for the other part of ThyssenKrupp Stainless's fine.[37] The application for annulment brought against this new decision was rejected by the EU courts.[38]

5. *Reinforcing bars*

17. The *Reinforcing bars* case is unique in that it has led to two successive readoptions, in September 2009 and in July 2019. In December 2002, the Commission had adopted an initial decision imposing fines on eight undertakings for taking part in a concrete reinforcing bar cartel in Italy, in violation of Article 65 ECSC.[39] Upon applications for annulment by the eight undertakings, the General Court annulled in October 2007 this initial decision because the legal basis used in it—namely, Article 65 ECSC—was no longer in force at the

30 Opinions of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, and in *Solvay v. Commission*, case C-110/10 P, EU:C:2011:257. *See further* text accompanied by notes 111 to 128 below.

31 Commission Decision 94/215/ECSC of 16 February 1994 relating to a proceeding pursuant to Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams, OJ L 116, 6.5.1994, pp. 1–62. *See also* European Commission, Press release IP/94/134 of 16 February 1994.

32 Judgment in *Arbed SA v. Commission*, case T-137/94, EU:T:1999:46.

33 Judgment in *Arbed SA v. Commission*, case C-176/99 P, EU:C:2003:524.

34 Commission Decision of 8 November 2006 relating to a procedure under Article 65 of the ECSC Treaty in case COMP/C.38.907 – *Steel beams*, OJ C 235, 13.9.2008, pp. 4–6. *See also* European Commission, Press release IP/06/1527 of 8 November 2006.

35 Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding pursuant to Article 65 of the ECSC Treaty (case IV.350814 – *Alloy surcharge*), OJ L 100, 1.4.1998, pp. 55–71. *See also* European Commission, Press release IP/98/70 of 21 January 1998.

36 Judgment in *Krupp Thyssen Stainless and Acciai speciali Terni v. Commission*, joined cases T-45/98 and T-47/98, EU:T:2001:288, confirmed on appeal by judgment in *ThyssenKrupp Stainless v. Commission*, joined cases C-65/02 P and C-73/02 P, EU:C:2005:454.

37 Commission Decision 2007/486/EC of 20 December 2006 relating to a procedure under Article 65 of the ECSC Treaty (case COMP/F/39.234 – *Alloy surcharge* – readoption), OJ L 182, 12.7.2007, pp. 31–32. *See also* European Commission, Press release IP/06/1851 of 20 December 2006.

38 Judgment in *ThyssenKrupp Stainless v. Commission*, case T-24/07, EU:T:2009:236, confirmed on appeal by judgment in *ThyssenKrupp Nirosta v. Commission*, case C-352/09 P, EU:C:2011:191.

39 Commission Decision 2006/894/EC of 17 December 2002 relating to a proceeding under Article 65 of the ECSC Treaty against Alfa Acciai SpA, Feralpi Siderurgica SpA, Ferriere Nord SpA, IRO Industrie Riunite Odolesi SpA, Leali SpA, Acciaierie e Ferriere Leali Luigi SpA in liquidazione (in liquidation), Lucchini SpA, Siderpotenza SpA, Riva Acciaio SpA, Valsabbia Investimenti SpA, Ferriera Valsabbia SpA and the association of undertakings Federacciai (Federazione delle Imprese Siderurgiche Italiane) (case C.37.956 – *Reinforcing bars*), OJ L 353, 13.12.2006, pp. 1–4. *See also* European Commission, Press release IP/02/1908 of 17 December 2002.

time of its adoption.[40] Following this annulment, the Commission adopted in September 2009 a new, second decision, largely identical to the initial decision, but now with Articles 7 and 23(2) of Regulation 1/2003 as legal basis.[41] All eight undertakings brought again applications for annulment against this second decision before the General Court, which in December 2014 upheld the second decision, with only small fine reductions for two undertakings.[42] Five of the eight undertakings brought a further appeal to the Court of Justice, which in September 2017 annulled the second decision in so far as it concerned those five undertakings, on the ground of infringement of an essential procedural requirement flowing from Regulation 773/2004, in that no oral hearing had been held on the substance of the case to which the competition authorities of the Member States had been invited.[43] Following this second annulment, and after a new oral hearing in April 2018, to which the competition authorities of the Member States were invited,[44] the Commission adopted in July 2019 a new, third decision re-imposing fines on the five undertakings for whom the second decision had been annulled.[45] The new fines are, however, significantly lower than the fines imposed in the first and second decisions. Indeed, in recognition of the long duration of the overall proceedings before the Commission and the courts, the Commission reduced the fines by 50%. The Commission also copied the two small fine reductions granted by the General Court.[46] Finally, as one of the undertakings was in the meantime in liquidation, and had no longer any turnover, its fine was set at zero, in application of Article 23(2), second subparagraph, of Regulation 1/2003, which limits fines to 10% of the overall turnover of the undertaking concerned in the business year preceding the Commission's decision.[47] The four undertakings on whom an above-zero fine was imposed have brought applications for annulment of this third decision before the General Court.[48]

6. *Carbonless paper (Bolloré)*

18. The Commission readopted in June 2010 a decision concerning one of the undertakings in the *Carbonless paper* case. In December 2001, the Commission had imposed fines on eleven undertakings for an infringement of Article 81 EC in the carbonless paper sector, including a fine of EUR 22.68 million on Bolloré.[49] Upon the application for annulment before the General Court and the subsequent appeal before the Court of Justice brought by Bolloré, the Court of Justice in September 2009 annulled this initial decision in so far as it concerned Bolloré, on the ground of violation of the rights of the defence, in that the initial decision held Bolloré liable both for its own direct participation in the cartel and, as parent company, for the participation of one its subsidiaries in the cartel, whereas the statement of objections preceding the initial decision had only mentioned Bolloré's liability as parent company.[50] Following this annulment, the Commission sent in December 2009 a new statement of objections to Bolloré, now also covering its direct participation in the cartel. After Bolloré had responded to the statement of objections in writing and at an oral hearing, the Commission adopted in June 2010 a new decision addressed to Bolloré, finding the same infringement as in the initial decision but imposing a slightly lower fine of EUR 21.26 million, in recognition of Bolloré's cooperation in that Bolloré during the readoption proceedings no longer contested the participation of its subsidiary in the cartel.[51] Bolloré's application for annulment against this new decision was rejected by the courts.[52]

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40 Judgments in *SP*, *Leali*, *Acciaierie e Ferriere Leali Luigi*, *IRO*, *Lucchini*, *Ferriera Valsabbia*, *Valsabbia Investimenti* and *Alfa Acciai v. Commission*, joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, EU:T:2007:317; *Riva Acciaio v. Commission*, case T-45/03, EU:T:2007:318; *Feralpi Siderurgica v. Commission*, case T-77/03, EU:T:2007:319; *Ferriere Nord v. Commission*, case T-94/03, EU:T:2007:320. The ECSC Treaty was signed in 1952 for a duration of 50 years and expired on 23 July 2002.

41 Commission Decision C(2009) 7492 final of 30 September 2009 relating to an infringement of Article 65 of the ECSC Treaty (case COMP/37 956 – *Reinforcing bars*, re-adoption), as modified by Commission Decision C(2009) 9912 final of 8 December 2009 relating to a proceeding under Article 65 of the ECSC Treaty (case COMP/37 956 – *Reinforcing bars*, re-adoption), OJ C 98, 30.3.2011, pp. 16–19. *See also* European Commission, Press release IP/09/1389 of 30 September 2009.

42 Judgments in *Leali and Acciaierie e Ferriere Leali Luigi v. Commission*, joined cases T-489/09, T-490/09 and T-56/10, EU:T:2014:1039; *IRO v. Commission*, case T-69/10, EU:T:2014:1030; *Feralpi v. Commission*, case T-70/10, EU:T:2014:1031; *Riva Fire v. Commission*, case T-83/10, EU:T:2014:1034; *Alfa Acciai v. Commission*, case T-85/10, EU:T:2014:1037; *Ferriere Nord v. Commission*, case T-90/10, EU:T:2014:1035; *Lucchini v. Commission*, case T-91/10, EU:T:2014:1033; *Ferriera Valsabbia and Valsabbia Investimenti v. Commission*, case T-92/10, EU:T:2014:1032. The General Court granted a 3% fine reduction to Riva Fire and a 6% fine reduction to Ferriere Nord.

43 Judgments in *Feralpi Holding v. Commission*, case C-85/15 P, EU:C:2017:709; *Ferriera Valsabbia*, *Valsabbia Investimenti v. Commission*, case C-86/15 P, and *Alfa Acciai v. Commission*, case C-87/15 P, EU:C:2017:717; *Ferriere Nord v. Commission*, case C-88/15 P, EU:C:2017:716; *Riva Fire v. Commission*, case C-89/15 P, EU:C:2017:713. Indeed, the competition authorities of the Member States had not been invited to participate in the first oral hearing of 13 June 2002, which concerned the substance of the case and which took place before the expiry of the ECSC Treaty. Such participation was not provided for in the ECSC Treaty, under which the Commission had exclusive competence to apply the competition rules. They were invited to the second oral hearing of 30 September 2002, but that oral hearing dealt only with the legal consequences of the expiry of the ECSC Treaty for the continuation of the proceedings. On the oral hearing in competition proceedings, *see generally* my paper The Oral Hearing in Competition Proceedings before the European Commission (2012) 35 *World Competition* 397–430, updated version accessible at http://ssrn.com/author=456087.

44 While the invitation of the competition authorities of the Member States constitutes an essential procedural requirement, there is no obligation for the competition authorities of the Member States to attend the oral hearing; *see* Judgment in *Servier v. Commission*, case T-691/14, EU:T:2018:922, para. 163.

45 Commission Decision of 4 July 2019 relating to a proceeding under Article 65 of the ECSC Treaty (case AT.37956), OJ C 312, 21.9.2020, pp. 13–18. *See also* Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, and European Commission, Daily News 04/07/2019.

46 *See* note 42 above.

47 *See* note 3 above.

48 Cases T-655/19 – *Ferriera Valsabbia and Valsabbia Investimenti v. Commission*, T-656/19 – *Alfa Acciai v. Commission*, T-657/19 – *Feralpi v. Commission*, and T-667/19 – *Ferriere Nord v. Commission*, all currently pending.

49 Commission Decision 2004/337/EC of 20 December 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (case COMP/E-1/36.212 – *Carbonless paper*), OJ L 115, 21.4.2004, pp. 1–88.

50 Judgment in *Papierfabrik August Koehler, Bolloré and Divipa v. Commission*, joined cases C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paras. 34 to 48.

51 Commission Decision of 23 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 EEA (case COMP/36.212 – *Carbonless paper*), OJ C 138, 7.5.2011, pp. 21–22. *See also* Final Report of the Hearing Officer, OJ C 138, 7.5.2011, pp. 19–20, and European Commission, Press release IP/10/788 of 23 June 2010.

52 Judgment in *Bolloré v. Commission*, case T-372/10, EU:T:2012:325, confirmed on appeal by judgment in *Bolloré v. Commission*, case C-414/12 P, EU:C:2014:301.

7. *Gas insulated switchgear (Mitsubishi and Toshiba)*

19. The Commission readopted in June 2012 a decision concerning two of the undertakings in the *Gas insulated switchgear* case. In January 2007, the Commission had imposed fines on eleven European and Japanese undertakings for their participation in a cartel for gas-insulated switchgear projects, in violation of Article 81 EC, including a fine of EUR 113,925,000 on Mitsubishi, a fine of EUR 86,250,000 on Toshiba, and a fine of EUR 4,650,000 on Mitsubishi and Toshiba jointly and severally.[53] Upon applications for annulment by Mitsubishi and by Toshiba, the General Court in July 2011 confirmed the finding of the infringement of Article 81 EC but annulled the fines imposed on those two undertakings, on the ground of infringement of the principle of equal treatment, in that the Commission had used a different reference year for the calculation of the fines imposed on the Japanese undertakings than the one used for the calculation of the fines imposed on the European producers. The General Court did not use its unlimited jurisdiction to set new fines.[54] Following these annulments, the Commission sent in February 2012 letters to Mitsubishi and to Toshiba expressing its intention to re-impose fines and setting out the parameters of the new calculation. After having received Mitsubishi's and Toshiba's written comments, the Commission adopted in June 2012 a new decision imposing a fine of EUR 74,817,000 on Mitsubishi, a fine of EUR 56,793,000 on Toshiba (both lower than the initial fines), and a fine of EUR 4,650,000 on Mitsubishi and Toshiba jointly and severally (identical to the initial fine).[55] Mitsubishi's and Toshiba's applications for annulment against this new decision were rejected by the EU courts.[56] The courts rejected in particular Toshiba's plea that the Commission should have sent a new statement of objections before imposing the new fine.[57]

8. *Heat stabilisers (GEA and Akzo)*

20. The Commission readopted in June 2016 two decisions concerning two of the undertakings in the *Heat stabilisers* case. In November 2009, the Commission had imposed fines on eleven undertakings, including GEA and Akzo, for participation in one or two cartel infringements in violation of Article 81 EC relating to two categories of heat stabilisers.[58] GEA and Akzo both brought applications for annulment of this initial decision. The General Court rejected GEA's application,[59] and, in the exercise of its unlimited jurisdiction, reduced the fines imposed on Akzo by 1%.[60] In the initial decision, another company, ACW, was held jointly and severally liable with GEA for part of the fines imposed on GEA. Similarly, another company, Elementis, was held jointly and severally liable with Akzo for part of the fines imposed on Akzo. In February 2010, the Commission adopted a decision amending the initial decision, reducing the amount of the fines for which ACW was held jointly and severally liable with GEA, because the higher amount in the initial decision exceeded the ceiling of 10% of ACW's turnover in the business year preceding the initial decision, in violation of Article 23(2) of Regulation 1/2003.[61] In June 2011, the Commission adopted a second decision amending the initial decision, removing the joint and several liability of Elementis for parts of the fines imposed on Akzo, on the ground that the Commission's powers to impose fines on Elementis had been time-barred at the time of the initial decision.[62] Upon applications for annulment brought by GEA and Akzo respectively, the General Court in July 2015 annulled the two decisions amending the initial decision, on the ground of violation of the right to be heard, in that GEA had not been heard before the adoption of the first amending decision and Akzo had only been granted a few days to provide its views on the second amending decision.[63] Following these two annulments, and after having heard GEA and Akzo in writing, the Commission in June 2006 adopted two new decisions amending the initial decision, identical to the two annulled amending decisions, while also taking into account the 1% fine reduction which the

53 Commission Decision of 24 January 2007 relating to a proceeding under Article 81 EC and Article 53 EEA (case COMP/F/38.899 – *Gas Insulated Switchgear*), OJ 2008 C 5/71. *See also* European Commission, Press release IP/07/80 of 24 January 2007.

54 Judgments in *Toshiba v. Commission*, case T-113/07, EU:T:2011:343, paras. 280 to 297, and in *Mitsubishi v. Commission*, case T-133/07, EU:T:2011:345, paras. 264 to 280. The appeals brought by Toshiba and Mitsubishi against these judgments of the General Court, in so far as these judgments confirmed the finding of infringement of Article 81 EC, were rejected by the Court of Justice by judgment in *Siemens AG and Others v. Commission*, joined cases C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866.

55 Commission Decision of 27 June 2012 amending Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 EC (now Article 101 TFEU) and Article 53 EEA to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation (case COMP/39.966 – *Gas Insulated Switchgear* – Fines), OJ C 70, 9.3.2013, pp. 12–13. *See also* European Commission, Press release IP/12/705 of 27 June 2012.

56 Judgment in *Mitsubishi v. Commission*, case T-409/12, EU:T:2016:17, and judgment in *Toshiba v. Commission*, case T-404/12, EU:T:2016:18, confirmed on appeal by judgment in *Toshiba v. Commission*, case C-180/16 P, EU:C:2017:520/559.

57 Judgment in *Toshiba v. Commission*, case T-404/12, EU:T:2016:18, paras. 37 to 87, confirmed on appeal by judgment in *Toshiba v. Commission*, case C-180/16 P, EU:C:2017:520/559, paras. 21 to 34.

58 Commission Decision of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 EEA (case COMP/38.589 – *Heat Stabilisers*), OJ C 307, 12.11.2010, pp. 9–12. *See also* European Commission, Press release IP/09/1695 of 11 November 2009.

59 Judgment in *GEA Group v. Commission*, case T-45/10, EU:T:2015:507.

60 Judgment in *Akzo Nobel and Others v. Commission*, case T-47/10, EU:T:2015:506, paras. 329 and 330, confirmed on appeal by judgment in *Akzo Nobel and Others v. Commission*, case C-516/15 P, EU:C:2017:314.

61 Commission Decision C(2010) 727 of 8 February 2010 modifying Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 EEA (case COMP/38.589 – *Heat Stabilisers*).

62 Commission Decision of 30 June 2011 modifying Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 EEA (case COMP/38.589 – *Heat Stabilisers*). That the Commission powers had been time-barred had become apparent following the interpretation of Article 25(6) of Regulation 1/2003 in the judgment of 29 March 2011 in *ArcelorMittal v. Commission* and *Commission v. ArcelorMittal*, joined cases C-201/09 P and C-216/09 P, EU:C:2011:190.

63 Judgments in *GEA v. Commission*, case T-189/10, EU:T:2015:504, and in *Akzo v. Commission*, case T-485/11, EU:T:2015:517.

General Court had granted to Akzo.[64] GEA brought an application for annulment against the first of these new amending decisions, which, following a first judgment of the General Court in October 2018 that was annulled by the Court of Justice in November 2020,[65] is currently pending before the General Court.[66]

9. *Airfreight*

21. The Commission readopted in March 2017 a decision in the *Airfreight* case. In November 2010, the Commission had adopted an initial decision imposing fines for an infringement of Article 101 TFEU, Article 53 EEA and Article 8 of the EU/Switzerland Agreement on Air Transport committed by twelve air cargo carriers.[67] All but one of the air cargo carriers brought an application for annulment of this initial decision. In December 2015, the General Court held that the initial decision was vitiated by a defective statement of reasons. Depending on the forms of order sought before the General Court, that vice entailed the annulment in full or in part in respect of the various parties that had challenged the initial decision.[68] Following these annulments, and after having heard the parties concerned on its intention to adopt a new decision, the Commission adopted in March 2017 a new decision in respect of the parties for whom the initial decision had been annulled.[69] For one of the air carriers, Martinair, the fine imposed by the new decision is lower than the initial fine, in application of Article 23(2), second subparagraph, of Regulation 1/2003, which limits fines to 10% of the overall turnover of the undertaking concerned in the business year preceding the Commission's decision, as Martinair's turnover was lower in 2016 than in 2009.[70] On the other hand, for those air carriers for whom the fine had been capped at 10% of their turnover in the initial decision but whose turnover had since increased, the Commission did not impose a higher fine in the new decision but rather imposed again the same fine as in the initial decision.[71] Applications for annulment against this new decision are currently pending before the General Court.[72]

10. *Envelopes (Printeos/Tompla)*

22. The Commission readopted in June 2017 a decision concerning one of the undertakings in the *Envelopes* case. In December 2014, the Commission had imposed fines on five envelopes producers. Under the Commission's cartel settlement procedure,[73] all five undertakings had recognised their liability for the infringement, and received a 10% fine reduction on this ground.[74] One of the five undertakings, Printeos/Tompla, brought an action against this initial decision before the General Court, seeking annulment only of the fine, not of the finding of infringement. In December 2016, the General Court annulled the fine imposed on Printeos/Tompla, on the ground of failure to state adequate reasons as to the relative amounts of the fines imposed on the five undertakings.[75] Following this annulment, and after having heard Printeos/Tompla on its intention to adopt a new decision, the Commission adopted in June 2017 a new decision, reimposing the same fine on Printeos/Tompla, with additional reasoning.[76] Printeos/Tompla's application for annulment of this new, second decision was rejected by the General Court.[77] Following the initial

64 Commission Decisions C(2016) 3920 and C(2016) 3933 of 29 June 2016 modifying Decision C(2009) 8682 final of 11 November 2009 relating to a proceeding under Article 81 EC and Article 53 EEA (case COMP/38.589 – *Heat Stabilisers*). *See also* European Commission, Daily News 29/06/2016.

65 Judgments in *GEA v. Commission*, case T-640/16, EU:T:2018:700 and *Commission v. GEA*, case C-823/18 P, EU:C:2020:955.

66 Case T-640/16 – *RENV*.

67 Commission Decision of 9 November 2010 relating to a proceeding under Article 101 TFEU, Article 53 EEA and Article 8 of the Agreement between the European Community and the Swiss Confederation on air transport (case C.39258 – *Airfreight*), OJ C 371, 18.10.2014, pp. 11–16. *See also* European Commission, Press release IP/10/1487 of 9 November 2010.

68 Judgments in *Air Canada v. Commission*, case T9/11, EU:T:2015:994; *Koninklijke Luchtvaart Maatschappij v. Commission*, case T28/11, EU:T:2015:995; *Japan Airlines v. Commission*, case T-36/11, EU:T:2015:992; *Cathay Pacific v. Commission*, case T-38/11, EU:T:2015:985; *Cargolux Airlines v. Commission*, case T-39/11, EU:T:2015:991; *Latam Airlines Group and Lan Cargo v. Commission*, case T-40/11, EU:T:2015:986; *Singapore Airlines and Singapore Airlines Cargo v. Commission*, case T-43/11, EU:T:2015:989; *Deutsche Lufthansa and Others v. Commission*, case T-46/11, EU:T:2015:987; *British Airways v. Commission*, case T-48/11, EU:T:2015:988; *SAS Cargo Group and Others v. Commission*, case T-56/11, EU:T:2015:990; *Air France-KLM v. Commission*, case T62/11, EU:T:2015:996; *Air France v. Commission*, case T-63/11, EU:T:2015:993; and *Martinair Holland v. Commission*, case T-67/11, EU:T:2015:984.

69 Commission Decision of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 EEA and Article 8 of the Agreement between the European Community and the Swiss Confederation on air transport (case AT.39258 – *Airfreight*), OJ C 188, 14.6.2017, pp. 14–19. *See also* Final Report of the Hearing Officer, *Airfreight* (re-adoption) (AT.39258), OJ C 188, 14.6.2017, pp. 10–13, and European Commission, Press release IP/17/661 of 17 March 2017.

70 European Commission Press release IP/17/661 of 17 March 2017.

71 Commission Decision of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 EEA and Article 8 of the Agreement between the European Community and the Swiss Confederation on air transport (case AT.39258 – airfreight), OJ C 188, 14.6.2017, pp. 14–19, para. 27 of the summary. *See also* Final Report of the Hearing Officer, *Airfreight* (re-adoption) (AT.39258), OJ C 188, 14.6.2017, pp. 10–13, para. 21.

72 Cases T-323/17 – *Martinair Holland v. Commission*, T-324/17 – *SAS v. Commission*, T-326/17 – *Air Canada v. Commission*, T-334/17 – *Cargolux Airlines v. Commission*, T-337/17 – *Air France KLM v. Commission*, T-338/17 – *Air France v. Commission*, T-340/17 – *Japan Airlines v. Commission*, T-341/17 – *British Airways v. Commission*, T-342/17 – *Deutsche Lufthansa and Others v. Commission*, T-343/17 – *Cathay Pacific Airways v. Commission*, T-344/17 – *Latam Airlines Group and Lan Cargo v. Commission*, and T-350/17 – *Singapore Airlines and Singapore Airlines Cargo v. Commission*.

73 *See* Article 10a of Regulation 773/2004, as inserted by Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171, 1.7.2008, pp. 3–5; Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167, 2.7.2008, pp. 1–6, amended by Communication from the Commission – Amendments to the Commission Notice on the conduct of settlement procedures, OJ C 256, 5.8.2015, p. 2; and my paper The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles (2008) 31 *World Competition* 335, also accessible at http://ssrn.com/author=456087.

74 Commission Decision of 10 December 2014 relating to a proceeding under Article 101 TFEU and Article 53 EEA (case AT.39780 – *Envelopes*), OJ C 74, 3.3.2015, pp. 5–7. *See also* European Commission, Press release IP/14/2583 of 11 December 2014.

75 Judgment in *Printeos v. Commission*, case T-95/15, EU:T:2016:722.

76 Commission Decision of 16 June 2017 amending Decision C(2014) 9295 final relating to a proceeding under Article 101 TFEU and Article 53 EEA (case AT.39780 – *Envelopes*), OJ C 39, 2.2.2018, pp. 10–12. *See also* Final Report of the Hearing Officer, *Envelopes* (re-imposition of a fine) (AT.39780), OJ C 39, 2.2.2018, p. 9, and European Commission, Daily News 16/06/2017.

77 Judgment in *Printeos v. Commission*, case T-466/17, EU:T:2019:671. While the defect was not sufficient to lead again to an annulment, the General Court did, however, criticise the reasoning of the amount of the fine in the second decision, and on this ground exceptionally condemned the Commission to the costs, in application of Article 135 of the Rules of Procedure of the General Court; *see* paras. 175 to 177 of the judgment.

decision, and while its application for annulment was pending before the General Court, Printeos/Tompla had in March 2015 provisionally paid the fine. Following the annulment of the initial fine, the Commission repaid in February 2017 the fine, while rejecting Printeos/Tompla's claim for payment of interest. Upon an action brought by Printeos/Tompla against this refusal to pay interest, the General Court and the Court of Justice in February 2019 and January 2021 ordered the Commission to pay Printeos/Tompla default interest calculated from the day of the provisional payment at a standard rate.[78]

11. *Retail food packaging (CCPL/Coopbox)*

23. The Commission readopted in December 2020 a decision concerning one of the undertakings in the *Retail food packaging* case. In June 2015, the Commission had imposed fines on ten undertakings for cartels in the retail food packaging sector, including fines of EUR 33,694,000 on CCPL/Coopbox for participation in three cartels.[79] In July 2019, the General Court annulled this initial decision in so far as it imposed these fines on CCPL/Coopbox, on the ground of insufficient reasoning as to the percentage of reduction of the fine on account of inability to pay.[80] Following this annulment, and after having heard CCPL/Coopbox on the new fine calculation, the Commission adopted in December 2020 a new decision, imposing new fines of EUR 9,441,000 on CCPL/Coopbox. The much lower amount of the new fine results from the application of Article 23(2), second subparagraph, of Regulation 1/2003, which limits fines to 10% of the overall turnover of the undertaking concerned in the business year preceding the Commission's decision, as CCPL/Coopbox's turnover in 2019 was much lower than in 2014.[81] CCPL/Coopbox have brought an application for annulment of this new decision.[82]

78 Judgments in *Printeos v. Commission*, case T-201/17, EU:T:2019:81, and in *Commission v. Printeos*, case C-301/19 P, EU:C:2021:39.

79 Commission Decision of 24 June 2015 relating to a proceeding under Article 101 TFEU and Article 53 EEA (case AT.39563 – *Retail food packaging*), OJ C 402, 4.12.2015, pp. 8–14. *See also* European Commission, Press release IP/15/5253 of 24 June 2015.

80 Judgment in *CCPL and Coopbox v. Commission*, case T-522/15, EU:T:2019:500.

81 *See* European Commission, Daily News 17/12/2020, Antitrust: Commission re-adopts decision and fines CCPL €9.44 million for its participation in retail food packaging cartels.

82 Case T-130/21, currently pending before the General Court.

III. Analysis

1. A natural consequence of Articles 263, 264 and 266 TFEU...

24. The phenomenon of readoption by the European Commission of decisions annulled by the EU courts is, at first analysis, a natural consequence of Articles 263, 264 and 266 TFEU. As already mentioned above,[83] the EU courts cannot, in the context of the review of legality under Article 263 TFEU, substitute their own reasoning for that of the Commission.[84] If an application for annulment is well-founded, the court can thus not correct the Commission's decision, but must declare it void, as required by Article 264 TFEU, to the extent that the action is well-founded.[85] It is then for the Commission to draw the necessary consequences, as required by Article 266 TFEU.

25. Furthermore, according to well-established case law, annulment of a decision does not necessarily affect the preparatory acts, and the procedure for replacing an annulled decision may, in principle, be resumed at the very point at which the illegality occurred.[86]

26. In the *PVC* and *Soda ash* cases, in which the illegality consisted in the failure to authenticate the decision in accordance with the Commission's own Rules of Procedure,[87] the Commission could thus, without taking any further procedural steps, literally "readopt" its decision, with proper authentication.[88]

27. In those cases where the illegality occurred at an earlier stage, what the Commission did was not simply "readopt" the initial decision, but rather resume its administrative proceedings at the point where the illegality occurred. For instance, in the *Steel beams (Arbed/Arcelor)*, *Alloy surcharge (ThyssenKrupp)* and *Carbonless paper (Bolloré)* cases, where the illegality had occurred at the point of the statement of objections, the Commission resumed its proceedings with a new statement of objections.[89] The fact that the term "readoption" is commonly used to describe such resumption of the proceedings should not deflect from the reality of what happens.[90]

83 Text accompanied by notes 14 to 17 above.

84 Judgment in *Galp Energía España and Others v. Commission*, case C-603/13 P, EU:C:2016:38, para. 73.

85 *See* judgments in *Commission v. Verhuizingen Coppens*, case C-411/11 P, EU:C:2012:778, paras. 34 to 54, and in *Soliver v. Commission*, case T-68/09, EU:T:2014:867, paras. 107 to 113.

86 Judgments in *Spain v. Commission*, case C-415/96, EU:C:1998:533, para. 31 and 32; in *Limburgse Vinyl Maatschappij and Others v. Commission*, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582 ("*PVC II* judgment"), para. 73; and in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:686, paras. 66 to 68.

87 *See* text accompanied by notes 20 and 24 above.

88 *See* text accompanied by notes 21 and 26 above, and judgment in *Limburgse Vinyl Maatschappij and Others v. Commission*, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582 ("*PVC II* judgment"), para. 75.

89 *See* text accompanied by notes 34, 37 and 51 above.

90 *See also* judgment in *Bolloré v. Commission*, case T-372/10, EU:T:2012:325, paras. 74 to 77.

2. …but also a matter of discretion

28. While the Commission may, in principle, following an annulment, resume its proceedings at the point where the illegality occurred, with a view to adopting a new decision, it is, however, under no obligation to do so.

29. Indeed, according to well-established case law, in order to perform effectively its task of ensuring application of the principles laid down in Article 101 TFEU, the Commission has a broad discretion to select the cases that it investigates and in which it continues the proceedings up to the stage of a final decision.[91]

30. Following the annulment of its initial decision, the Commission has thus also, in principle, a discretion whether or not to resume proceedings and whether or not to adopt a new decision.[92]

31. In its press statements at the occasion of the adoption of new decisions following the annulment of the initial decision, the Commission has stated that "*the Commission will correct any procedural mistake made so that companies rest assured that they will not escape cartel fines for procedural reasons*,"[93] that "*the decision confirms that the Commission will not let cartels go unpunished*" because "[c]*artels are illegal and cause consumers and business*[es] *to suffer*,"[94] or that "[t]*he re-adoption of this decision is based on the public interest in pursuing an effective and deterrent enforcement against cartels*."[95]

32. In this respect, the General Court has held that "*the Commission's assertion that it is determined that the members of anti-competitive cartels should not escape, on procedural grounds, the penalties applicable under EU law, is not a manifestation of bias but merely the assertion of a clear intention, wholly consistent with the task entrusted to the Commission, of making good, on a case-by-case basis, the procedural irregularities found, in order not to undermine the effectiveness of EU competition law*."[96]

33. The Commission has however not always resumed proceedings in cases where it could in principle have done so. As already mentioned above, the Commission did not attempt to readopt a second time the twice annulled decisions in *Soda ash*.[97]

3. The principle of *ne bis in idem*

34. The main limitation on the possibility to readopt a decision or resume proceedings after the annulment of an initial decision results from the principle of *ne bis in idem*.[98] This general principle of EU law is enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, which reads as follows: "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*"

35. According to the explanations to the Charter, to which according to Article 6(1) TEU due regard must be given, this provision "*corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States*."[99]

36. Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) reads as follows:

"*1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*

2. The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."[100]

37. As the Court of Justice held in the *PVC II* judgment, the principle of *ne bis in idem* thus "*precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.* (. . .) *On the other hand, it does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where*

91 Judgments in *Masterfoods*, case C-344/98, EU:C:2000:689, para. 46; in *Ufex and Others v. Commission*, case C-199/97 P, EU:C:1999:116, paras. 88 and 89; and in *IECC v. Commission*, case C-449/98 P, EU:C:2001:275, paras. 35 to 37. *See further* my paper Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement (2011) 34 *World Competition* 353, also accessible at http://ssrn.com/author=456087.

92 Judgment in *Limburgse Vinyl Maatschappij and Others v. Commission*, joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paras. 148 to 154.

93 European Commission, Press release IP/06/1851 of 20 December 2006, concerning the *Alloy surcharge (ThyssenKrupp)* case; *see similarly* European Commission, Press release IP/09/1389 of 30 September 2009, concerning the first readoption in the *Reinforcing bars* case.

94 European Commission, Press release IP/17/661 of 17 March 2017, concerning the *Airfreight* case.

95 European Commission, Daily News 04/07/2019, concerning the second readoption in the *Reinforcing bars* case.

96 *See* judgment in *Bolloré v. Commission*, case T-372/10, EU:T:2012:325, para. 73.

97 *See* text accompanied by note 29 above.

98 *See further* my paper The Principle of *Ne Bis In Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis (2003) 26 *World Competition* 131, also accessible at http://ssrn.com/author=456087.

99 Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, pp. 17–35, at 34.

100 *See further* text accompanied by notes 134 to 136 below.

the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an 'acquittal' within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them."[101]

38. The Commission can thus not resume proceedings and adopt a new decision if the initial decision has been annulled on substantive grounds, in that the EU courts found that the Commission had failed to establish, in law or in fact, the alleged infringement of Article 101 TFEU in the initial decision.[102]

39. Resumption of proceedings and adoption of a new decision is also precluded by the principle of *ne bis in idem* if the EU courts have annulled the fine, including for procedural reasons, but have then exercised their unlimited jurisdiction under Article 261 TFEU to set a new amount of the fine. Indeed, once the EU courts have actually exercised their unlimited jurisdiction, the Commission definitively loses its power.[103]

40. The *Butadiene rubber (Eni/Polimeri/Versalis)* case provides an illustration of this last point. In November 2006, the Commission had imposed fines on five undertakings for an infringement of Article 81 EC and Article 53 EEA, including a fine of EUR 272,250,000 on Eni/Polimeri/Versalis.[104] The latter fine included a 50% increase of the basic amount of the fine on account of recidivism.[105] In July 2011, the General Court confirmed the finding of infringement but annulled the initial decision in so far as it imposed the fine on Eni/Polimeri/Versalis, on the ground that the Commission had not provided sufficient detailed and precise evidence in the initial decision that the same "undertaking" within the meaning of Article 81 EC had repeatedly infringed the cartel prohibition. In the exercise of its unlimited jurisdiction, the General Court set the amount of the fine at EUR 181,500,000.[106] In March 2013, the Commission sent a new statement of objections to Eni/Polimeri/Versalis with a view to re-imposing the 50% uplift for recidivism,[107] in apparent breach of the principle of *ne bis in idem*. Eni/Polimeri/Versalis immediately brought actions before the General Court to stop this reopening of proceedings. The Commission later withdrew the new statement of objections and closed the case, with the result that the actions before the General Court became without object.[108]

4. Prescription

41. In some cases, resumption of proceedings and adoption of a new decision following the annulment of the initial decision may be impossible because of prescription.

42. Article 25 of Regulation 1/2003 lays down the limitation periods for the imposition of fines.

43. It follows from Article 25(1)(b), (2) and (5) that the limitation period for imposing fines for an infringement of Article 101 TFEU expires at the latest ten years after the infringement ceases. This time limit is extended by the time during which the decision of the Commission is the subject of proceedings pending before the EU courts.

44. The length of the proceedings before the EU courts against the initial decision does thus not affect the possibility for the Commission to reopen proceedings and adopt a second decision after the annulment of the initial decision.[109]

45. However, if the initial decision had been adopted close to the end of the limitation period, not enough time may remain after the annulment to adopt a new decision, in particular in cases where the illegality occurred at a relatively early stage of the proceedings, for instance at the stage of the statement of objections, and many procedural steps thus need to be taken before a new decision can be adopted.[110]

5. The fundamental right to have a matter adjudicated within a reasonable duration

46. Undertakings targeted by cartel investigations have a fundamental right to have their case dealt with within a reasonable time, a right recognised in the case law of the Court of Justice as a general principle of European

101 *PVC II* judgment, as note 22 above, paras. 59 and 62.

102 For a dissenting view, *see* P. A. Biolan, Reopening EU Competition Investigations After Judicial Annulment; Beyond Procedural Errors (2017) 8 *Journal of European Competition Law & Practice* 83.

103 *PVC II* judgment, as note 22 above, para. 693.

104 Commission Decision of 29 November 2006 relating to a proceeding under Article 81 EC and Article 53 EEA (case COMP/F/38.638 – *BR/ESBR*), OJ C 7, 12.1.2008, pp. 11–14. *See also* European Commission, Press release IP/06/1647 of 29 November 2006.

105 *See further* my paper Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis (2012) 35 *World Competition* 5, also accessible at http://ssrn.com/author=456087.

106 Judgments in *Eni v. Commission*, case T-39/07, EU:T:2011:356, and in *Polimeri Europa v. Commission*, case T-59/07, EU:T:2011:361. The appeals brought by Eni and Versalis against these judgments of the General Court were rejected by the Court of Justice by judgments in *Eni v. Commission*, case C-508/11 P, EU:C:2013:289 and in *Versalis v. Commission*, case C-511/11 P, EU:C:2013:386.

107 *See* European Commission, Press release IP/13/179 of 1 March 2013, Antitrust: Commission sends second statement of objections to ENI and Versalis in synthetic rubber cartel after General Court judgment.

108 *See* Orders of the General Court of 7 March 2014 in *Eni v. Commission*, joined cases T-240/12 and T-211/13, OJ C 135, 5.5.2014, pp. 36–37, and in *Versalis v. Commission*, joined cases T-241/12 and T-210/13, OJ C 135, 5.5.2014, pp. 37–38.

109 As the Court of Justice pointed out in the *PVC II* judgment, as note 22 above, para. 151, the suspension of the limitation period while court proceedings are pending "*merely protects the Commission from the effects of the annulment for a period the duration of which is not attributable to it.*"

110 *See* text accompanied by notes 86 to 90 above.

Union law and enshrined in Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights.

47. The Court of Justice has held that the reasonableness of the duration of proceedings must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the parties concerned, its complexity and the conduct of the parties and of the competent authorities, the list of relevant criteria not being exhaustive.[111] It follows that the fact that the limitation period for the imposition of penalties as laid down in Article 25 of Regulation 1/2003 has not yet expired is not decisive.[112]

48. The unreasonableness of the duration of the proceedings can result not only from the excessive duration of one or several individual stages of the proceedings but also from the overall length of the administrative and judicial proceedings taken together.[113] In some readoption cases, the absolute length of the proceedings, taking into account all stages of the administrative and judicial proceedings, becomes particularly long.

49. The *Reinforcing bars* case,[114] for instance, started with inspections by the Commission between October and December 2000. By the time the Commission adopted its third decision in July 2019, more than 18 years had already passed. Given that in the judgments of September 2017, the Court of Justice has not dealt with a number of grounds of appeal raised against the judgments of the General Court to the extent that the latter judgments confirmed the Commission's second decision, it could be expected that at least some of the undertakings concerned will exercise their right to have the third Commission decision again reviewed by the General Court and the Court of Justice.[115] Assuming that this third round of judicial review will put a definitive end to the administrative and judicial proceedings, it is foreseeable that 22 or 23 years could easily have passed by then.[116] There is undeniably a real risk in this case that the Court of Justice may consider that the overall duration of the proceedings, including the two stages before the General Court following the Commission's first and second decisions, is unreasonably long.[117] The question then arises whether this should have precluded the Commission from adopting a third decision.

50. According to the European Court of Human Rights, a failure to adjudicate within a reasonable time must, as a procedural irregularity constituting the breach of a fundamental right, give rise to an entitlement of the party concerned to an effective remedy granting him appropriate relief.[118]

51. The Court of Justice has often been confronted with the question of what remedy the General Court or the Court of Justice itself should grant if the General Court or the Court of Justice finds that the administrative and/or judicial proceedings in an antitrust case have been unreasonable long. The Court of Justice has consistently held that the General Court or the Court of Justice can only annul a Commission's decision finding an infringement of Articles 101 or 102 TFEU and imposing fines for such an infringement if it has been proven that the unreasonable duration of the administrative and/or judicial proceedings has adversely affected the ability of the undertakings concerned to defend themselves in the administrative and/or judicial proceedings. Abstract and imprecise claims by the undertakings concerned that their rights of the defence were breached are not sufficient.[119] What must be proven is a concrete adverse effect on the undertaking's ability to defend itself, for instance in that the individuals within the undertaking that would be able to provide exculpatory explanations of the evidence in the Commission's file were no longer alive or available at the time the undertaking was granted belated access to the Commission's file, whereas those individuals would have been available if the access to the file had not been belated.[120]

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111 *See* Opinion of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, para. 237, and the case law referred to therein, and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 14.

112 *See* Opinion of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, para. 347, and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 15.

113 *See* Opinion of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, paras. 238 and 239, and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 16. It cannot be argued that the Commission should only assess the duration of its own proceedings. Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights are but two expressions of the same fundamental right of the parties to have their case done with within a reasonable time. From the point of view of the undertakings concerned, all that matters is when their "affair" is finally adjudicated upon by an impartial authority; *see* Opinion of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, para. 240, and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 17. The Commission cannot absolve itself from all responsibility for the overall duration of the proceedings, including the judicial stages, because the compatibility with fundamental rights of the system in which the Commission acts both as investigator and first-instance decision-maker in antitrust cases is dependent on the parties having the possibility to have the Commission's decisions reviewed by the EU courts; *see* judgment in *Schindler v. Commission*, case C-501/11 P, EU:C:2013:522, para. 34, and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 18; *see further* my paper The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker (2014) 37 *World Competition* 5, also accessible at http://ssrn.com/author=456087.

114 *See* text accompanied by notes 39 to 48 above.

115 Four actions are indeed currently pending before the General Court; *see* (text accompanying) note 48 above.

116 *See* Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 13.

117 Ibid., para. 19.

118 *See* judgment in *Kudla v. Poland*, Application No. 30210/96, paras. 150–156; *see also* judgment in *Groupe Gascogne v. Commission*, case C-58/12 P, EU:C:2013:770, para. 72, and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 20.

119 *See* judgment in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, case C-105/04 P, EU:C:2006:592, paras. 42 and 43; Opinion of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, paras. 250 to 262; and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, paras. 21 and 22.

120 *See* judgment in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, case C-105/04 P, EU:C:2006:592, paras. 56 and 49; Opinion of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, paras. 312 to 320; and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 23; *see also* judgment in *Xellia Pharmaceuticals and Alpharma v. Commission*, case T-471/13, EU:T:2016:460, paras. 357 to 371.

52. In the absence of a proven concrete adverse effect on the undertaking's ability to defend itself, the Court of Justice has always held that the General Court or the Court of Justice could only grant financial compensation. Whereas older case law considered that this compensation could be granted by the General Court or the Court of Justice in the form of a reduction of the fine applied by the court in the exercise of its unlimited jurisdiction within the meaning of Article 261 TFEU,[121] the more recent case law considers that the appropriate remedy is for the undertaking concerned to bring a separate action for damages under Article 268 TFEU in conjunction with the second paragraph of Article 340 TFEU.[122]

53. This case law concerns the remedy the General Court or the Court of Justice should grant if the General Court or the Court of Justice finds that the administrative and/or judicial proceedings in an antitrust case have been unreasonably long, whereas the question the Commission was confronted with in the *Reinforcing bars* case was the different question whether it should continue proceedings and adopt a new, third decision, which, with the ensuing judicial review, to which the undertakings are fully entitled, would easily prolong the already very long proceedings by another four or five years.[123] An essential difference is that the Commission is under no obligation to resume proceedings after an annulment on procedural grounds of an earlier decision finding an antitrust infringement and imposing fines, nor under any obligation to continue such resumed proceedings until the adoption of a new decision.[124]

54. The undertakings concerned by the *Reinforcing bars* case argued that, in a situation where there is a real risk that the Court of Justice may consider that the overall duration of the proceedings is already unreasonably long, the Commission would necessarily lose all discretion and would automatically be obliged to discontinue the proceedings.[125] This view appears wrong in that it puts too one-sidedly all weight on the need to protect the undertakings' rights under the Charter of Fundamental Rights to have their case dealt with within a reasonable time, while neglecting entirely the importance of the implementation of the EU competition rules, which is a fundamental aim of the EU treaties.[126]

55. The correct position rather appears to be that, in such a situation, the Commission is under an obligation, in the exercise of its discretion whether or not to resume proceedings and to continue such proceedings up to the adoption of a new decision finding an antitrust infringement and imposing fines, to consider and give due weight to the possible breach of the undertakings' fundamental right to have their case dealt with within a reasonable time that has already occurred as well as to the further impact of its decision on the protection of the undertakings' fundamental right. This means that, before adopting a new decision, the Commission must examine, taking into account all the circumstances of the case, whether the contribution which the adoption of such a new decision makes to the attainment of the aim of the implementation of the EU competition rules would not be outweighed by the impact of this course of action on the protection of the undertakings' rights under the Charter of Fundamental Rights. If the outcome of the balancing exercise is that the contribution which the adoption of a new decision makes to the attainment of the aim of the implementation of the EU competition rules outweighs the impact of this course of action on the respect for the undertakings' fundamental right under the Charter, the Commission can adopt such a third decision. To remedy the possible breach of the undertakings' fundamental right, the Commission must then, in my view, grant a reduction in the amount of the fines. The size of the reduction must reflect the specificities of the case, including the fact that the excessive duration as a result of the annulment of earlier decisions is not attributable to the conduct of the undertakings.[127]

56. A similar approach has been taken by the Commission in the *Reinforcing bars* case. As explained in the summary of the third decision adopted in July 2019:

"*In the present case, the Commission's discretion to adopt a decision must be exercised by weighing up the public interest in obtaining effective enforcement of the competition rules against the interest of the addressees in obtaining the fullest possible remedy for the alleged infringement of their fundamental rights owing to the lengthy duration of the proceedings.*

The outcome of the Commission weighing up the respective interests shows that, in the present case, the adoption of a decision imposing fines will avoid impunity of the parties by ensuring a deterrent effect and consistent and effective application of the competition rules. At the same time, the specific circumstances of this case were taken into consideration by the Commission for the purposes of setting the fines applicable to the addressees of the Decision. The addressees will therefore be able to benefit from an appropriate reduction of the fines otherwise applicable, in order to mitigate the potential consequences of procedural errors committed by the Commission.

(. . .) *the Commission concludes that a reduction of the fines of 50% as an extraordinary attenuating circumstance*

121 Judgment in *Baustahlgewebe v. Commission*, case C-185/95 P, EU:C:1998:608, para. 48.

122 Judgments in *Der Grüne Punkt – Duales System Deutschland v. Commission*, case C-385/07 P, EU:C:2009:456, para. 195; *Groupe Gascogne v. Commission*, case C-58/12 P, EU:C:2013:770, paras. 81–83; *Bolloré v. Commission*, case C-414/12 P, EU:C:2014:301, para. 106; and *CEPSA v. Commission*, case C-608/13 P, EU:C:2016:414, para. 71.

123 *See* text accompanied by notes 144 to 117 above and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 28.

124 *See* text accompanied by notes 91 to 97 above and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, paras. 29 and 30.

125 *See* Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 31.

126 *See* Opinion 2/13 (Accession of the EU to the ECHR) of the Court of Justice, EU:C:2014:2454, para. 172; Opinion of Advocate General Kokott in *Solvay v. Commission*, case C-109/10 P, EU:C:2011:256, para. 328; and Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, para. 31.

127 *See* Final Report of the Hearing Officer, case AT.37956 – *Reinforcing bars*, OJ C 312, 21.9.2020, pp. 7–12, paras. 32 to 34.

may be granted in order to mitigate the negative consequences for the addressees of this Decision arising from the lengthy duration of the proceedings."[128]

6. Further legal and policy considerations

57. At various occasions,[129] concerns have been expressed about the EU law and practice concerning readoption of cartel fining decisions following annulments for procedural reasons: What is the point of judicial review if, following an annulment, the same decision can be readopted? What incentives remain for the Commission to respect the procedural rules? And is this EU law and practice compatible with the case law of the European Court of Human Rights?

58. Such questioning could be enlarged to cover also the EU (case) law according to which not all procedural irregularities constitute grounds for annulment but only those in the absence of which the contested decision might have been substantially different (sometimes referred to in the literature as the "harmless error principle").[130] According to the Court of Justice, "[t]*hat rule makes good sense since it would be a manifestly disproportionate and wrong result if a decision correct as to its content were to be struck down owing to a flaw in the procedure leading to its adoption which, however, had no effect on the content of the decision*."[131]

59. Both the "harmless error principle" and the possibility of readoption of decisions annulled on procedural grounds reflect a predominantly instrumental conception of procedural rules. The underlying idea is that procedural rules predominantly exist to ensure the correctness of the substantive outcomes.[132]

60. The EU law on readoption of cartel fining decisions annulled on procedural grounds appears fully compatible with the European Convention on Human Rights and the case law of the European Court of Human Rights.[133]

61. As already apparent from the above analysis on the principle of *ne bis in idem*,[134] Article 4(1) of Protocol No. 7 ECHR limits the prohibition of a second procedure or second punishment to the situation where the defendant "*has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*." As clarified by the *PVC II* judgment, this is not the case for a European Commission cartel fining decision that has been annulled by the EU courts on procedural grounds, and without the EU courts having exercised their unlimited jurisdiction.[135] Moreover, Article 4(2) of Protocol No. 7 ECHR provides that the prohibition of a second procedure or second punishment "*shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned,* (. . .) *if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*"

62. In the same spirit, the European Court of Human Rights has a "*settled case-law to the effect that when* [the] *applicant has suffered an infringement of his rights guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be the reopening of the proceedings*."[136]

63. Fears about the lack of incentives for the Commission to respect procedural rules do not appear justified either. As an institution charged with guarding EU law,[137] the Commission is naturally inclined to respect procedural rules. It has also created in its internal organisation the function of Hearing Officer for competition proceedings, whose general mission is to safeguard the effective exercise of procedural rights throughout competition proceedings before the Commission.[138]

64. In any event, even in those cases where the Commission can subsequently resume its proceedings and adopt a new decision, the annulment of the initial decision is never without cost for the Commission. First, annulments on procedural grounds cause reputational damage. Secondly, when annulling the initial decision, the EU

128 Commission Decision of 4 July 2019 relating to a proceeding under Article 65 of the ECSC Treaty (case AT.37956), OJ C 312, 21.9.2020, pp. 13–18, paras. 24, 25 and 45 of the summary.

129 *See*, for instance, the panel discussion And so what? Procedural violations in EU Competition Law, at the 4th Chillin' Competition Conference (Brussels, 28 November 2018; https://chillingcompetition.com), and L. Idot, *Europe*, 2012, comm. 330, Reprise d'une decision annulée en matière de cartels, and *Europe*, 2014, comm. 305, Reprise d'une décision annulée et délai raisonnable.

130 *See* (text accompanied by) notes 11 to 13 above; judgments in *Infineon Technologies v. Commission*, case C-99/17 P, EU:C:2018:773, paras. 77 and 78, and in *ICF v. Commission*, case C-467/13 P, EU:C:2014:2274, paras. 26 to 29; Opinion of Advocate General Wahl in *SKW Metallurgie v. Commission*, case C-154/14 P, EU:C:2015:543; H. P. Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing, 1999) at 97; and E. Barbier de La Serre, *UPS/TNT*: Taking the Right to be Heard Seriously (2017) 8 *Journal of European Competition Law & Practice* 502.

131 Judgment in *Hercules v. Commission*, case C-51/92 P, EU:C:1999:357, para. 68.

132 *See* P. Craig, *EU Administrative Law* (3rd ed.; Oxford UP, 2018) at 361–362; Opinion of Advocate General Ruiz-Jarabo Colomer in *Aalborg, Portland and Others v. Commission*, case C-204/00 P, EU:C:2003:85, para. 30 ("*In short, defects in the procedure do not have a life of their own in isolation from the substance of the case*"); H.P. Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing, 1999) at 98, footnote 254 (referring to the German concept of *dienende Funktion* ("serving function") of administrative procedure); E. Barbier de La Serre, Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends (2006) 12 *European Public Law* 225; and my paper Fundamental Procedural Rights and Effective Enforcement of Articles 101 and 102 TFEU in the European Competition Network (2020) 43 *World Competition* 5, also accessible at http://ssrn.com/author=456087, text accompanied by footnotes 44 to 73.

133 The "harmless error principle" also appears perfectly in line with the case law of the European Court of Human Rights; *see*, for instance, judgment of 15 February 2007 in *Verdu Verdu v. Spain*, Application No. 43432/02, paras. 27 and 28.

134 *See* text accompanied by notes 98 to 100 above.

135 *See* text accompanied by notes 101 to 103 above.

136 Judgment of 23 October 2018 in case of *Produkcija Plus storitveno podjetje d.o.o. v. Slovenia*, Application No. 47072/15, para. 65.

137 *See* Article 17(1) TEU.

138 *See* Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in competition proceedings, OJ L 275, 20.10.2011, pp. 29–37, and my paper The Role of the Hearing Officer in Competition Proceedings before the European Commission (2012) 35 *World Competition* 431, updated version accessible at http://ssrn.com/author=456087.

courts invariably condemn the Commission to the costs of the court proceedings.[139] Third, reopening proceedings and adopting a new decision consume administrative resources. Finally, when, following an annulment, the Commission reimburses a provisionally paid fine, it must pay default interest calculated from the day of the provisional payment at a standard rate.[140] Indeed, in its judgment confirming this obligation, the Court of Justice specifically mentioned its incentive effect: "*the obligation, in the event of annulment of a decision entailing the provisional payment of an amount such as a fine imposed for infringement of competition rules, to repay the amount paid together with default interest calculated from the date of payment of that amount is an incentive for the institution concerned to pay particular attention when adopting such decisions, which may entail an obligation for an individual to pay a considerable amount immediately*."[141]

65. As to the incentives for addressees of cartel fining decisions to raise procedural pleas before the EU courts, there is no indication that such pleas have been raised less frequently since the *PVC II* judgment of October 2002, which made the possibility of readoptions fully clear.[142] Furthermore, as discussed above, the Commission cannot always resume proceedings after an annulment on procedural grounds,[143] and has not always done so in cases where it could in principle have resumed proceedings.[144] Finally, when readoption has happened, the newly imposed fines have in several cases been lower than the initial fines,[145] while they have never exceeded the initial fines.[146] ■

139 As already mentioned in note 77 above, in the *Envelopes (Printeos/Tompla)* case, the General Court even condemned the Commission again to the costs when rejecting the application for annulment brought against the second decision.

140 *See* text accompanied by note 78 above.

141 Judgment in *Commission v. Printeos*, case C-301/19 P, EU:C:2021:39, para. 86.

142 *See* (text accompanied by) note 22 above.

143 *See*, in particular, the example of the *Butadiene rubber (Eni/Polimeri/Versalis)* case, text accompanied by notes 103 to 108 above, and the issue of prescription, text accompanied by notes 109 and 110 above.

144 *See* the example of the *Soda ash* case, text accompanied by notes 29 and 97 above.

145 *See* text accompanied by notes 46 and 47, 51, 55 and 81 above.

146 *See*, in particular, text accompanied by notes 70 and 71 above on the asymmetric application of cap of 10% of turnover in the last business year preceding the (re-) adoption of the decision.

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