

Single continuous infringement

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The concept of 'single and continuous infringement' (SCI) enables the European Commission (and national competition authorities more generally) to lump a series of infringements of Article 101 TFEU together under the heading of the same cartel conduct, on the ground that they pursue a single overall plan.

References:

Article 101 TFEU

Rationale behind the SCI concept

Where a complex cartel of a long duration is at issue, its scope, form and membership may change throughout time. This may pose the following problems, amongst others, for the Commission:

- o a higher evidentiary threshold, as the Commission would need to identify and prove:
 - o the existence of a series of distinct anti-competitive agreements and/or concerted practices, and
 - o the parties involved in each of them
- o a potential time-bar as regards the older of such distinct anti-competitive agreements and/or concerted practices.

To address such problems, the Commission has adopted the SCI concept which has been upheld by the EU Courts.

The SCI concept made its first appearance in Europe in the *Polypropylene* decision in 1986. The Commission found that 15 petrochemical producers had set up a complex system of informal contacts, meetings, price-fixing and market-sharing arrangements--all aimed at controlling the price of polypropylene in Europe between 1977 and 1982. Instead of treating such infringements separately, the Commission considered that they were interlinked by their common goal and, therefore, had to be regarded as an SCI. The General Court upheld this finding and endorsed the SCI concept, noting that '*[t]hose schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of a number of separate infringements*'.

References:

Case IV/31.149-Polypropylene

Case T-6/89 Enichem Anic SpA v Commission, paragraph 204

Finding of an SCI

According to the case-law, for a set of agreements and/or concerted practices to be regarded as an SCI, they must be interlinked by:

References:

Case C-49/92 P Commission v Anic Partecipazioni SpA, paragraph 8

- o an objective link, ie the existence of an overall objective, and
- o a subjective link, ie the awareness as to the participation in a wider conspiracy.

The objective link

In order to establish the existence of an overall objective that interlinks a set of anti-competitive practices, the Commission must prove that:

References:

Joined Cases T-101/05 and T-111/05 BASF AG and UCB SA v Commission, paragraphs 180-181

- o they share common features, ie there is a link of identity, and
- o they are complementary in nature, ie there is a link of complementarity.

Identify link

Although a series of actions will need to share identical features to qualify as an SCI, an analysis of SCI cases shows that the Commission occasionally has a somewhat flexible and extensive interpretation of what would constitute identical features. As a result, it is a common criticism that the criteria for finding an identity link are rather 'opaque'.

When assessing the existence of an identity link, the case law has considered the following criteria:

References:

Joined Cases T-147/09 and T-148/09 Trelleborg Industrie SAS and Trelleborg AB V Commission, paragraph 60

Identical nature of the objectives of the practices at issue

Where the nature of the objectives of the practices at issue is identical, a common overall plan may be found to exist.

In *BASF*, the General Court found that the identical nature of the objectives of the practices at issue cannot be determined by a general reference to the distortion of competition in the relevant product market, '*since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes a substantial element of any conduct covered by Article [81(1) EC]*'.

References:

Joined Cases T-101/05 and T-111/05 BASF AG and UCB SA v Commission, paragraph 180

In *Toshiba*, the General Court ruled that the practices at issue shared an identical objective, namely the establishment of a system for sharing the worldwide market for GIS projects and allocating those projects among the various participants. On appeal, the Court of Justice ruled that such finding did not amount to a general reference to a distortion of competition in the relevant product market.

References:

Case T-113/07 Toshiba v Commission, paragraph 228

Joined Cases C-239/11 P, C-489/11 P and C-498/11 P Siemens AG, Mitsubishi Electric Corp. and Toshiba Corp. v Commission, paragraph 246

Identical nature of the goods and/or services concerned

Where the nature of the goods and/or services concerned is identical, a common overall plan may be found to exist.

However, in the past, the Commission also found agreements and/or concerted practices relating to different goods to form part of a common overall plan.

In *Bleaching Chemicals*, the Commission found that cartels relating to two different products (one being used as a raw material for the other) shared a common objective.

References:

Case COMP/38.620-Hydrogen Peroxide and Perborate, paragraph 98

Identical nature of the participating undertakings

Where the number of common undertakings between two cartels is limited, no overall plan may be found.

References:

Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission, paragraph 120

However, a change in the number or the identity of the participating undertakings does not necessarily rule out the finding of an identity link.

It was found on a number of occasions that '*Members may join or leave the cartel from time to time without it having to be treated as a new 'agreement' with each change in participation*'.

References:

Case IV/35.691-Pre-insulated Pipes, paragraph 134

Identical nature of the rules of implementation

Where very specific rules of implementation have been put in place in a number of territories, a common overall plan may be found to exist.

In *Dansk Rørindustri*, the '*evident continuity in terms of method and practices*' led to the conclusion that a common overall plan existed.

References:

Case T-21/99 Dansk Rørindustri A/S v Commission, paragraph 65

Identical geographic scope of the practices at issue

Where the geographic scope of the anti-competitive practices at issue is identical, a common overall plan may be found to exist.

However, in the past, the fact that the conduct at issue took place in separate local markets has been deemed irrelevant, on the ground that '*having regard to the interdependence of the various national markets, any action on one market might spread to the most distant markets*'.

References:

Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95--Cimenteries CBR and Others v Commission, paragraph 4122

Identical timeline of the practices at issue

The continuity of a practice throughout time is an essential feature of an SCI. Yet, the issue of how to assess such continuity is no easy task. In the context of an overall plan extending over many years, a gap of several months between the various manifestations of the plan may be immaterial. However, the assessment of such time gap is highly fact-specific.

In *Marine Hoses*, an 18 month period in the course of the cartel, for which there was no evidence of anti-competitive contacts between the undertakings, was regarded as breaking the continuity of the overall plan.

References:

Joined Cases T-147/09 and T-148/09 Trelleborg Industrie SAS and Trelleborg AB V Commission, paragraph 68

In contrast, in *Alloy Surcharge*, a single meeting was regarded as the basis of a four-year overall plan in view of the fact that the reference values fixed at this single meeting were used throughout that four year period in the calculation formula of the alloy surcharge.

References:

Joined Cases C-65/02 P and C-73/02 P ThyssenKrupp Stainless GmbH and ThyssenKrupp Acciai speciali Terni SpA v Commission, paragraph 39

Complementarity Link

In a number of judgments, the General Court has found that the practices at issue must not only share a common purpose, but must also be complementary in nature. The General Court has annulled a number of Commission decisions on the basis of this criterion.

In *Almamet*, the General Court defined the complementarity link as the fact that '*each [practice at issue] is intended to deal with one or more consequences of the 'normal pattern' of competition and [to contribute] through interaction, to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of a global plan having a single objective*'.

References:

Case T-410/09 Almamet GmbH Handel mit Spänen und Pulvern aus Metall, paragraph 154

In *Vitamins*, the Commission considered two sets of agreements and concerted practices as regards collusion on the choline chloride market:

- o one operating at global level, and
- o one being limited to Europe.

The Commission found the two levels to be '*closely linked*', because they both provided for a mutual withdrawal from the European and North American markets--therefore ensuring that European producers would face no competition from North American producers in the European market. However, the General Court reversed this finding, on the ground that the global cartel had come to an end before the start of the European one. As a result, the latter could not take advantage of what had been agreed at global level. Hence, no complementarity could be found between them.

References:

Joined Cases T-101/05 and T-111/05 BASF AG and UCB SA v Commission, paragraph 182

It is unclear, further to recent case law, whether fulfilment of the complementarity criterion is still necessary in order to establish the existence of an overall plan.

In *Gas insulation switchgear*, the Court of Justice explicitly ruled out the need for the complementarity criterion to be fulfilled.

References:

Joined Cases C-239/11 P, C-489/11 P and C-498/11 P Siemens AG, Mitsubishi Electric Corp. and Toshiba Corp. v Commission, paragraph 248

The subjective link

In addition to the existence of an overall objective (objective link), characterising the existence of an SCI requires a showing of the participants' awareness that they participate in a wider conspiracy. This criterion covers two aspects:

- o whether the undertaking intends to contribute by its own conduct to the overall objective pursued by the participants to the infringement, and
- o whether the undertaking is aware of the illicit acts of the other participants in view of the same objective, or could reasonably have foreseen that such illicit acts would have occurred.

Intention to Contribute to the Overall Objective Pursued

The Commission can infer an undertaking's intention to contribute to the overall objective pursued from the participation of the undertaking to **at least one** element of the relevant conduct.

In *Cement*, an SCI was found to exist on the ground that '*[e]ach party whose participation in the Cembureau agreement is established contributed, at its own level, to the pursuit of the common objective by participating in one or more of the implementing measures referred to in the contested decision*'.

References:

Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others v Commission, paragraph 4123

Furthermore, participation need only be minimal in order to demonstrate involvement in an SCI. The fact that the participation of an undertaking was limited to minor aspects of the infringement does not affect its liability for the conduct of other undertakings in the context of the infringement throughout the period of its participation in the infringement--as long as the undertaking was aware of the illicit acts of the other participants, in view of the common overall plan.

References:

Case C-441/11 P Commission v Verhuizingen Coppens NV, paragraph 42

Limited involvement in the SCI may be taken into account at a later stage, when assessing the gravity of the infringement in order to determine the level of the fine.

Awareness of Illicit Acts by Other Participants

The requirement of awareness is subject to a rather low standard of proof: the mere reasonable foreseeability of illicit acts by the other participants is deemed to fulfil this requirement.

In *Seamless tubes*, the Commission fined several undertakings for an SCI involving two market sharing agreements:

References:

Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 JFE Engineering Corp., formerly NKK Corp., Nippon Steel Corp., JFE Steel Corp. and Sumitomo Metal Industries Ltd v Commission, paragraph 371

- o one between European and Japanese producers
- o one among European producers.

The General Court upheld the Commission's finding, stating that '*[a]lthough the exclusion of the European producers from the Japanese market logically constituted the feature of [the SCI] which was of interest to the Japanese producers, the latter knew, or ought necessarily to have understood that that principle was applicable as much at intra-community level as at inter-continental level*'

In this regard, the concept of 'public distancing' may be key. An undertaking can end its liability by '*distanc[ing] itself openly and without equivocation from the cartel, so that the other participants are aware that it no longer supports the general objectives of the cartel*'.

References:

Joined Cases T-147/09 and T-148/09 Trelleborg Industrie SAS and Trelleborg AB V Commission, paragraph 68

However, the concept of public distancing is subject to a narrow interpretation and is, therefore, rarely applied.

In *Westfalen Gassen Netherlands*, it was held that the fact that an undertaking leaves a meeting does not amount to public distancing because it does not show a '*firm and unambiguous disagreement*'.

References:

Case T-303/02 Westfalen Gassen Nederland BV v Commission, paragraph 126

Controversial implications of the SCI concept

Where the conditions explained above are met, each undertaking may be held liable for the entire infringement (although, of course, its liability would be limited to the duration of its participation in the infringement), regardless of the extent of its involvement in it (which shall only be taken into account when determining the level of the fine).

References:

Case C-49/92 P Commission v Anic Partecipazioni SpA, paragraph 90

It has been argued that an SCI finding may actually be beneficial for an undertaking: a single fine will be imposed on it--as opposed to one fine per infringement. In practice, however, the finding of an SCI is generally more likely to result in:

- o the imposition of a significantly higher fine, and
- o a wider exposure to follow-on damage claims.

In view of this, the SCI concept may prove highly controversial in certain cases and is often litigated in EU courts. Objections concern the following issues, among others:

Standard and burden of proof

Although the General Court has ruled that '*considerable importance must be attached to the fact that competition cases of this kind are in reality of a penal nature, which naturally suggests that a high standard of proof is required*', it has also admitted that, in the case of an SCI, the Commission will only find '*fragmentary and sparse [evidence], so that it is often necessary to reconstitute certain details by deduction*'.

References:

Case C-407/08 P Knauf Gips KG v Commission, paragraph 49

It has been argued that such a rule can reverse the burden of proof, which is shifted on the companies. However, the General Court has rejected such claims, reiterating that the burden of the proof is indeed borne by the Commission, but also stressing that '*the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged*'.

References:

Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland A/S, paragraphs 78-79

It remains that one of the primary interests of the SCI concept for the Commission is that it somehow lowers the evidential burden resting on its shoulders and that its use must therefore be carefully monitored.

Responsibility for the overall cartel

The fact that an undertaking may face responsibility--albeit limited to the duration of its participation--for aspects of the SCI in which it did not directly take part has been challenged on a number of occasions, on the ground that it infringes the principle of individual responsibility. However, the General Court has rejected this argument by stating that the responsibility for the overall cartel '*has its origin in a widespread conception in the legal orders of the Member States concerning the attribution of responsibility for infringements committed by several perpetrators according to their participation in the infringement as a whole*'.

References:

Joined Cases T-101/05 and T-111/05 BASF AG and UCB SA v Commission, paragraph 160

Limitation period

In the framework of an SCI, the five-year limitation period set out in Article 25 of Regulation 1/2003 starts running as of the end of the SCI. As a result, old conduct that would have been time-barred absent the SCI will

be included in the scope of the infringement, therefore extending its duration and leading to potentially more significant fines.

References:
Regulation 1/2003, art 25

Consequences of the annulment by the EU Courts of a finding of SCI

While a number of Commission decisions finding an SCI have already been challenged before the EU Courts, it is still unclear whether the Commission decision should be annulled entirely or only in part, in case the EU Courts find that a company did not participate in all aspects of the infringement.

In *Coppens*, where the General Court found that the appellant had only participated in one aspect of the SCI and was not aware of the other, the following rules of thumb were set:

References:
Case T-210/08 Verhuizingen Coppens NV v Commission

- o partial annulment is only possible when the element sought to be annulled could be severed from the remainder of the decision (otherwise, the decision should be annulled in full)
- o a Commission decision is severable only if:
 - during the administrative procedure, the undertaking in question was put in the position to understand that it was alleged to have engaged in each of the forms of conduct comprised in the SCI, and
 - the Commission decision is sufficiently clear in that regard.

Yet, no consistent application of these rules has been made so far. Despite the fact that the General Court ruled in *Coppens* and *Aalberts* that an annulment of the Commission decision in its entirety was appropriate, the Court of Justice reached opposite conclusions on appeal despite the situations in these cases bearing resemblance. In one case it ruled that the General Court was wrong to annul the Commission decision in its entirety with regard to the respondents, while in the other case it ruled that an annulment in full was appropriate.

References:
Case T-210/08 Verhuizingen Coppens NV v Commission
Case C-441/11 P Commission v Verhuizingen Coppens NV
Case T-385/06 Aalberts Industries NV and Others v Commission
Case C-287/11 P Commission v Aalberts Industries NV and Others

More recently, in *Soliver*, the General Court ruled once more that the entire annulment of the Commission decision was possible.

References:
Case T-68/09 Soliver NV v Commission

Arguably, such inconsistencies in the case-law may put pressure on the Commission to ensure that its statements of objections and decisions not only establish the existence of an overall SCI, but also explicitly qualify each strand of conduct which forms part of the SCI as a separate infringement of Article 101 TFEU.