

Hybrid Settlements, the Presumption of Innocence and the Principles of Impartiality and Equal Treatment - Pometon SpA (C-440/19 P)

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On March 18, 2021, in a hybrid settlement case, the Court of Justice of the European Union (CJEU) partially annulled the judgment of the General Court of the European Union (GC) for violating the obligation to state reasons and the principle of equal treatment in the calculation of the fine. The CJEU compared the situation of Pometon, the company that did not participate in the settlement, to one of the cartelists that settled with the Commission. Both undertakings had played a limited role in the cartel and had limited sales in the EEA, the geographic area of the cartel. Contrary to the 75% reduction applied by the GC, the CJEU followed Advocate General Hogan (AG) and applied a 83% discretionary reduction of Pometon's fine.

Next to the CJEU's findings on the principle of equal treatment, the case is particularly interesting because the Court applied its case law on the principle of impartiality and the presumption of innocence to hybrid settlements. The CJEU clarified that the Commission is allowed to reference a non-settling party's conduct in a settlement decision provided that this reference is necessary to establish the liability of the settling parties, and the Commission takes sufficient precautions in drafting.

Background of the case

The Commission Decision

The Commission investigation was triggered in 2010 when Ervin revealed the cartel's existence to the Commission - remember when leniency applications were still a thing? Early on, the five parties to the alleged steel abrasive cartel expressed their willingness to engage in settlement discussions. The case ended up in a hybrid settlement scenario: four cartelists (Ervin, Winoa, MTS and Würth) settled with the Commission in exchange for reduced fines in 2014. Pometon withdrew from the settlement procedure and was ultimately fined on May 25, 2016, following the standard procedure for price coordination.

In the contested decision against Pometon, the Commission found that the cartelists (i) had introduced a uniform method of calculation that would enable them to achieve a coordinated increase in the price of steel abrasives based on scrap metal price indices, and (ii) had agreed to coordinate their behaviour with regard to the selling prices of steel abrasives to individual customers. According to the Commission, Pometon had participated in the cartel from October 3, 2003 until May 16, 2007.

The Commission imposed a fine of EUR 6 197 000 on Pometon. In the fine calculation, the Commission already gave the company a 10% reduction to the basic amount of the fine on account of mitigating circumstances, since it had participated to a lesser extent than the other undertakings in part (ii) of the above-mentioned infringement. On that adapted basic amount, Pometon was granted a further reduction of 60% under point 37 of the [Guidelines on the method of setting fines](#), which gives the Commission discretion to deviate from the fining guidelines conditional on the duty to state reasons.

The General Court

Pometon subsequently appealed the decision with the GC. It relied on five pleas in law, that the Commission:

1. Infringed the principle of a fair trial, the principle of the presumption of innocence and the rights of the defence, in so far as the Commission ascribed specific conduct to the applicant in the settlement decision itself, thus influencing the claims subsequently made against it in the contested decision,
2. Incorrectly applied the rules on the burden of proof and the presumption of innocence, in so far as the Commission ascribed to Pometon, without evidence, participation in a cartel,
3. Incorrectly found that the cartel constituted a restriction of competition by object,
4. Incorrectly calculated Pometon's duration of participation in the cartel,
5. Infringed the obligation to state reasons and of the principles of proportionality and equal treatment, as regards the discretionary reduction of 60% pursuant to point 37 of the Guidelines on the method of setting fines.

In 2019, the GC dismissed the pleas except for the last one contesting the 60% discretionary reduction. It compared Pometon's individual liability and situation with the individual liability and situation of the settlement decision's addressees (GC, para 376). Other cartelists, who played a limited role like Pometon, had received a much higher reduction (GC, paras 390 - 392). In exercise of its unlimited jurisdiction, the GC granted Pometon a 75% reduction and imposed a fine of EUR 3 873 375.

The appeal

Pometon further appealed with the CJEU and essentially relied on the same pleas in law while dropping plea 3 regarding the restriction of competition by object.

In October 2020, AG Hogan proposed to again dismiss the grounds of appeal except the one contesting the now 75% discretionary reduction. He suggested a 83% reduction of fine (AG, para 131), which the CJEU picked up in its decision of March 18, 2021.

The decision of the CJEU

The presumption of innocence and the principle of impartiality

The interesting part of the CJEU's judgment did not lead to an annulment of the GC's decision.

Following the applicant's arguments, the CJEU first referred to the case-law of the European Court of Human Rights in *Karaman* and its own case-law in *AH* (paras 62, 63). These cases involved complex criminal proceedings with several accused who could not be tried together. The CJEU stressed that, in such proceedings, reference to the participation of separately prosecuted persons might be necessary in order to determine the level of criminal responsibility of the persons on trial. There is a chance that the presumption of innocence could, in theory, be infringed by statements made against a suspect under investigation in the course of criminal proceedings against separately prosecuted co-suspects. Therefore, it is extremely important for criminal courts to remain within the bounds of what is necessary to determine the guilt of the persons on trial while introducing statements of facts involving third parties and making a careful choice of words while drafting the decisions.

The Court applied this case-law *mutatis mutandis* to hybrid settlement cases in competition law proceedings (para 64). Meaning: the Commission must (i) take sufficient drafting precautions in the settlement decision to avoid a premature judgment as to the non-settling party's participation in the cartel, and (ii) must only refer to the non-settling party where necessary. In the opinion of the CJEU, the GC rightfully held that the Commission complied with these prerequisites and dismissed this ground of appeal.

Particularly concerning point (ii), the judgment has important implications given the need for necessity in disclosing information about the non-settling party during the settlement procedure. The question of "necessity" is a matter of facts and circumstances in each specific case (paras 66, 86). The CJEU stated that the applicants, therefore, could not rely on the ICAP case-law, as "the question whether the Commission disregarded the presumption of innocence depends on the settlement decisions specific to each case, including their reasoning, and the particular circumstances in which those decisions have been adopted". This is a hint to the fact that the ICAP case law only applies to the specific ICAP-situation (surprisingly, the CJEU only mentioned the [ICAP GC judgment](#) and not its own decision in the [ICAP appeal](#)). In this case, it can be said that references in the settlement decision to particular conduct of Pometon were indispensable to establish the circumstances of the case as a whole and did not amount to a finding of its guilt (paras 79, 83).

Duty to state reasons and principle of equal treatment

Pometon won the fourth ground of appeal relating to the duty to state reasons and principle of equal treatment.

The Court considered the method of arriving at fine and held that the GC did not provide sufficient information about the method used and factors taken into consideration while arriving at a rate of 75% (para 152). A comparison must be drawn here to the *HSBC* case law of the GC (HSBC, paras 336 - 354). There, the GC stated that care must be taken while providing motivating factors behind the reasoning used for setting up of fine. These factors enable one to determine the gravity and duration of the infringement and explain those factors' weighting and assessment. A sufficient explanation for departing from a standard method of calculation of fines will display compliance with the principle of equal treatment and enable judicial review. However, it is also pertinent that the Commission's fining considerations must not overpower the right to defence of undertakings.

Determination of fine

In the present case, the CJEU used Article 61 of the Statute of the CJEU and gave a final judgment in the matter. It exercised its unlimited jurisdiction to substitute its own appraisal for that of the Commission and reduced the fine imposed (para.159).

The Court considered the relative position of the cartel participants and identified that the proportion of participation of Pometon was not equivalent to Winoa, as its turnover was not even one-third of the total turnover of Winoa (paras 150, 165). Even though the turnover of Pometon was more than the one of MTS, their participation was comparable, given that both of them played a limited role in the cartel (para 163). Here, the Court noted that even though the turnover of an undertaking is of high importance since it gives an estimation of the size and economic power of the undertaking, it must not be given disproportionate importance as compared to other relevant factors - some examples might be the volume of commerce, market share, or illicit gain (para 164).

Like the Advocate General, the CJEU set the reduction at 83%, which corresponds to a EUR 2 633 895 fine for Pometon.

Conclusion

The judgment has demonstrated that EU Courts are ready to take a strict approach in cases where there is a risk of unequal treatment. However, it cannot be denied that hybrid cartels pose a challenge to fundamental rights. This judgment provides guidance for the operation of hybrid settlement procedures in the nature of a need for 'necessity' and 'drafting precautions' during the settlement stage.