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Optical Disk Drives and the Single and Continuous Infringement Doctrine

Christian Bergqvist (University of Copenhagen) · Thursday, August 25th, 2022

Case law has given rise to the concept of a Single and Continuous Infringement, providing for consolidating all actions and undertakings supporting an infringement. Including those with a marginal affiliation or effect, providing a doctrine of immense practical relevance. However, while the doctrine allows for solving practical issues, it does not dispense with the obligation to provide reasons for seeing an infringement in the first place. An essential qualification recalled by the Court of Justice's *Optical Disk Drives* ruling from 16 June 2022, confirming the availability of the doctrine but also its fundamentals and limitations.

While infringements of Article 101 in the forms of horizontal actions can take many forms, it is not unusual that as the years pass, large conspiracies see members joining or leaving and new markets being added to the infringement. Some undertakings might even serve a more limited role or not be privy to the complete plan and, in retrospect, of marginal affiliation. To capture this dynamic of one and the same cartel across its lifetime, it has been accepted that infringements of Article 101 may result from isolated agreements or a series of acts or continuous conduct if linked by a single objective giving rise to what is known as the Single and Continuous Infringement doctrine. This has provided for a doctrine of immense practical implications. Not only by allowing for the inclusion in the case of any contributing undertakings if informed, but also by simplifying the evidential burden of infringements, often of a most clandestine nature and deduced from evidence of a fragmented and incomplete nature.

The Court of Justice has provided more content

The Court of Justice has not only allowed for the rise of the concept of a Single and Continuous Infringement, but also offered a more operative content by explaining how responsibility of an undertaking for more than its direct infringements may be allotted (Joined cases C-293/13P and C-294/13P – *Fresh Del Monte Produce*, paragraph 157) when "*… it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk.*" By this, content and an operative definition has been offered, embedded in i) *knowledge* of the large infringements, ii) *active contribution* to them, and how iii) *separate actions are linked* by serving a single (anti-competitive) objective. Moreover, the doctrine can be a

mix of a *single infringement* where two or more infringements, e.g., across separate products, are consolidated, and a *continuous infringement* where the infringement has evolved in scope and coverage, perhaps even experienced brakes or collapses. It "only" rests upon the enforcers to establish **i**) the existence of an overall anti-competitive understanding **ii**) meeting the definition of an agreement or concerted practice that is **iii**) not entirely unknown to the possible members, and **iv**) how these have engaged or endorsed relevant elements, e.g., meetings, without necessarily knowing or accepting the full extent of the infringement. The enforcers also enjoy the discretion of whether to proceed against the entire single and continuous infringement or only part of it, provided this does not run contrary to the facts of the case. The doctrine has become so prominent that it forms the backbone of almost all EU decisions rendered in the last decade, and if modified by the Courts in an unfavorable direction, even mature cases are closed without issues.

A single and continuous infringement does not prove separate infringements

While separate but linked infringements can be consolidated into one single and continuous infringement, it should not be taken for granted that separate violations could also be deduced from this unless substantiated separately. However, in *Optical Disk Drive*, DG COMP nevertheless allowed for this not only infringing the parties fundamental right to be heard (as touched upon in another recent post) but also stretching the concept a bride too far. In *Optical Disk Drive*, five companies active in manufacturing optical disks (e.g., CDs, DVDs, or Blu-ray) had colluded when submitting bids to PC manufacturers. During the administrative procedure, DG COMP aggregated the different bids into a single and continuous infringement, but then, in the final decision, also referred to this as discrete, separate violations of Article 101. A significant but logical move as a single and continuous infringement in principle is nothing more than the consolidation of several distinct violations linked by a single purpose. While the General Court did not object, the Advocate General preparing the case did (recitals 100-111), recalling how the doctrine allows for resolving practical issues such as how to prove a complex and continuous collusive conduct, but not the obligation to provide reasons. Moreover, this had only been provided in connection with finding a single and continuous infringement, but not discrete, separate infringements.

The Court of Justice did in four separate (but linked) rulings, delivered on 16 June 2022, concur with the Advocate General. More specifically did the Court explain (see, e.g., C-699/19 P – *Quanta Storage*, paragraph 59) that "*…. While a complex of practices may be legally characterized…, as a single and continuous infringement, it cannot be deduced therefrom that each of those practices must, in itself and taken in isolation, necessarily be characterised as a separate infringement…*". Instead, it rested upon DG COMP to identify and legally describe the different practices allegedly defying Article 101 and submit adequate evidence in support of this. Or, in short. Infringements could not be assumed in the abstract, but only through a careful presentation of proper and convincing evidence linking the restriction of competition with the alleged culprits. Moreover, the latter had to be allowed ample opportunities to rebut this, making it problematic that the issue had only been brought up in the final decision.

The rise and proliferation of an essential doctrine

The rise and proliferation of the Single and Continuous Infringement doctrine have vested

enforcers (both at the EU level and in the member states) with a powerful instrument. Under this, several potential minor infringements can be consolidated into one if linked by an overall strategy. Moreover, this could include all undertakings affiliated with any of these if informed about the full infringement and contributor to this. However, it does not dispense with the need to meet the fundamental requirements of Article 101, including sketching out an anti-competitive understanding covering the alleged culprits. A reminder offered by the Court of Justice on 16 June 2022, confirming the availability of an essential doctrine, but also how it came with limitations and some fundamental requirements.

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