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No Interest in a U-Turn: ECJ Affirms the Right to Interest on Overpaid Antitrust Fines

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The European Court of Justice has issued its [judgment in *Deutsche Telekom*](#) confirming that the European Commission must pay “a standard rate” of interest to companies that have been awarded a reduction or annulment of their antitrust fine on appeal. The European Commission must now apply this clear ruling to a number of claims for interest on overpaid antitrust fines.

Background

In 2014, the European Commission (EC) imposed a fine (approximately EUR 31 million) on Deutsche Telekom for an antitrust infringement (abuse of dominance). Three months after the EC’s infringement decision, Deutsche Telekom provisionally paid to the EC the full fine.

In 2018, following an appeal of the EC’s infringement decision, the EU General Court reduced the EC’s fine by approximately EUR 12 million. A few months after the General Court judgment, the EC refunded this amount to Deutsche Telekom. The EC did not provide any interest on this amount, paying the nominal value only. The amount had yielded a negative return while the money was invested by the EC in a financial asset fund.

Deutsche Telekom requested that the EC pay default interest of approximately EUR 12 million, running from the date it provisionally paid the sum to the date that the EC refunded the sum (a period of over four years). Relying on the 2019 General Court judgment in *Printeos* (which was later upheld by the ECJ), Deutsche Telekom claimed default interest based on the applicable ECB rate for its refinancing operations, plus 3.5 percentage points. The EC refused this request to pay default interest, and Deutsche Telekom appealed this refusal before the General Court.

In January 2022, the EU General Court strictly applied the principles set out in the *Printeos* judgment. The General Court annulled the EC’s decision to refuse payment of default interest and awarded to Deutsche Telekom compensation of approximately EUR 1.75 million, calculated on the basis of a default interest rate of 3.55 per cent (0.05 per cent ECB refinancing rate, plus 3.5 per cent).

The EC appealed this General Court judgment before the Court of Justice (ECJ). The EC requested that the appeal be assigned to the Grand Chamber of the Court to re-examine the approach that the

ECJ had taken in its 2021 *Printeos* judgment, observing that the judgment had been delivered by a Chamber of five judges without the benefit of a hearing or an Opinion of an Advocate-General. The EC was in effect arguing that the ECJ should do a U-turn and overrule a recent judgment – something that is very rare in ECJ jurisprudence.

The *Deutsche Telekom* Ruling

The ECJ dismissed the EC's appeal in its entirety, and chose not to follow the opinion of Advocate General Collins in the case that had partially sided with the EC. The ECJ rejected in clear terms the EC's request for a reversal of its own *Printeos* judgment that dates from only three years ago.

The ECJ made the following key findings.

- In the event of an annulment or reduction of a fine imposed by the EC for an antitrust infringement, the EC must repay all or part of the fine provisionally paid, together with interest for the period from the date of the provisional payment of that fine to the date of its repayment. This is because under the first paragraph of Article 266 TFEU, the institution whose act has been declared void must take the necessary measures to comply with that judgment with *ex tunc* (retroactive) effect.
- Where the EC is obliged, under the first paragraph of Article 266 TFEU, to refund a sum together with interest, the EC has no discretion as to whether it is appropriate to pay that interest, so that the mere infringement of EU law, consisting in the refusal to pay that interest, is sufficient to establish the existence of a sufficiently serious breach of EU law capable of giving rise to the EU's non-contractual liability.
- The EC must pay a rate of interest that compensates the company in question "at a standard rate" for the loss of enjoyment of that amount. The obligation to pay interest at a standard rate exists even when the returns on the investment by the EC are zero, or even negative.
- This interest has in the past been described as "default" interest. The ECJ clarified that this label (whose use it did not call into question) should not be taken as implying the existence of a delay in payment by a debtor and to an intention to penalize that debtor. Indeed, the ECJ confirmed that the obligation to pay interest at a standard rate clearly arises from the caselaw, whatever label one applies to it.
- The obligation to refund money unduly collected with interest applies not only to the EC, but also to the institutions, bodies, offices and agencies of the European Union and the authorities of the Member States.
- The EC is not able to argue that the payment of interest from the date of the provisional receipt of the fine undermines the deterrent effect of fines. This is because the EC cannot rely on an act declared to be unlawful. The deterrent function of fines must be reconciled with the requirements of effective judicial protection.
- The General Court was right to assess the applicable interest rate to be the ECB refinancing rate increased by 3.5 per cent and to apply by analogy the rate laid down by Article 83 (2) (b) of Delegated Regulation No 1268/2012 (which covers the situations of late payment). This rate applied by analogy does not appear unreasonable or disproportionate in the light of the purpose of the interest at issue.

The ECJ specifically rejected the EC's alternative claim that the amount of interest should be capped at 1.55 per cent. The EC should not be placed in a more favourable position than that in which Deutsche Telekom would have found itself if its action had been dismissed after having chosen, rather than making a provisional payment, to provide a bank guarantee pending the outcome of the proceedings. The bank guarantee route would have exposed Deutsche Telekom to interest calculated at 1.55 per cent (in accordance with Article 83(4) of Delegated Regulation No 1268/2012) in addition to the costs of providing that bank guarantee.

The ECJ commented that it is open to the EC to revise its current regulatory provisions to address specifically the annulment or partial annulment of antitrust fines. However, the ECJ warned that any new method cannot be *“limited to compensating for the depreciation of the value of money which occurred during the period in respect of which interest must be paid, without covering the compensation at a standard rate to which the undertaking that paid that fine is entitled by reason of the fact that it was deprived for a certain period of time of the use of the funds corresponding to the amount unduly collected by the EC”*.

Outlook

Following certain high-profile annulments and fine reductions in EC antitrust cases, a number of interest claims were lodged before the General Court, some for substantial amounts. Those cases were stayed pending the outcome of the *Deutsche Telekom* proceedings. The EC must now comply with the *Deutsche Telekom* ruling (which reaffirms the previous ECJ judgment in *Printeos*) – and pay interest to those who fulfil the test set out in those rulings.

Going forward, with interest rates today much higher than in the past decade, the impact of the ruling may be less important than the EC has claimed. The period of negative interest rates on government (or EC bonds) is now over. Nevertheless, the ruling may cause the EC to consider whether it is appropriate to impose high fines for antitrust infringements that are based on novel theories of harm of the sort that are more vulnerable to successful challenge before the EU courts.

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