



UNIVERSITY OF HELSINKI

<https://helda.helsinki.fi>

It ain't over until it's over – when do infringements of EU competition law end?

Koivusalo, Jussi Antero

2024-08

Taylor and Francis Ltd.

<http://hdl.handle.net/10138/567208>

Koivusalo, J A 2024, 'It ain't over until it's over – when do infringements of EU competition law end?', *European Competition Journal*, vol. 20, no. 2, pp. 243–273. <https://doi.org/10.1080/17441056.2023.2280324>

Downloaded from Helda, University of Helsinki institutional repository. <https://helda.helsinki.fi>
This is an electronic reprint of the original article.
This reprint may differ from the original in pagination and typographic detail.
Please cite the original version.



It ain't over until it's over – when do infringements of EU competition law end?

Jussi Koivusalo

To cite this article: Jussi Koivusalo (08 Nov 2023): It ain't over until it's over – when do infringements of EU competition law end?, European Competition Journal, DOI: [10.1080/17441056.2023.2280324](https://doi.org/10.1080/17441056.2023.2280324)

To link to this article: <https://doi.org/10.1080/17441056.2023.2280324>



© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 08 Nov 2023.



Submit your article to this journal [↗](#)



Article views: 230



View related articles [↗](#)



View Crossmark data [↗](#)

It ain't over until it's over – when do infringements of EU competition law end?

Jussi Koivusalo

Doctoral Researcher, University of Helsinki, Faculty of Law, Helsinki, Finland

ABSTRACT

The duration of infringements of Articles 101 and 102 TFEU has significant implications on the enforcement of those rules and those subject to enforcement. This article examines the European Court of Justice's case law on the assessment of the duration of an infringement of Article 101 TFEU after the conduct constituting the infringement has ended. While earlier case law focused on continuing market conduct corresponding to the original infringing conduct, more recent case law appears to bring forth an approach centred on the restriction of competition resulting from the conduct. The judgment in *Kilpailu- ja kuluttajavirasto* suggests that a complete assessment of an infringement's duration should consider the scrutinized conduct's restrictive effects on the competition that it distorts. That judgment also suggests that any price effects or other damages suffered by the infringers' customers do not affect the infringement period's length.

ARTICLE HISTORY Received 30 August 2023; Accepted 30 October 2023

KEYWORDS Article 101 TFEU; restriction of competition; infringement period; duration of infringement

Introduction

A beginning of an anticompetitive agreement is usually quite recognizable, but how does one tell when it ends? While the substantive assessment for considering what kind of market conduct constitutes an infringement of Articles 101 or 102 TFEU (alternatively together the EU competition rules) has been and continues to be widely discussed, the identification of the factors relating to the assessment of the duration of such infringements has not attracted similar interest. Several general treatises on EU competition law do not engage with the topic in much detail – the question is usually confined to a statement that Article 101

CONTACT Jussi Koivusalo  jussi.koivusalo@helsinki.fi

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.

TFEU may apply to a discontinued agreement if it continues to produce its effects¹ – and other scholarly interest specifically discussing the duration of infringements of the EU competition rules remains limited.² While the exact limits between assessing the existence of an infringement on the one hand and assessing its duration on the other might not be so far apart from a theoretical viewpoint, the correct definition of the latter carries with it many practically significant aspects.

First, the duration of an infringement is one of the central aspects affecting the size of the fine to be imposed for infringements of the EU competition rules. Both Regulation 1/2003³ and the ECN + Directive⁴ state that when the European Commission (EC) or the National Competition Authorities (NCAs) assess the proper amount of a fine for infringements of Articles 101 or 102 TFEU, both the gravity and the duration of the infringement should be considered.⁵ In the EC's fining practice, duration significantly affects the size of a fine, since the EC uses duration as a multiplier when determining the basic amount of the fine.⁶ The EC formerly rounded up any periods less than six months to half a year, but since the General Court (GC) considered in *Total Raffinage Marketing* that such approach might result in unreasonable outcomes for infringement periods significantly less than six months, the EC has modified its approach to more correctly reflect the actual duration of the infringement.⁷ In its recent practice, the EC has defined the infringement's duration in days and used that in calculating the multiplier.⁸ Whatever the exact approach, it is clear that a precise

¹See e.g. Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (Oxford University Press 2014) 216–17; David Bailey and Laura Elizabeth John (eds), *Bellamy & Child European Union Law of Competition* (Oxford University Press 2018) 116 and 133; Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law: Texts, Cases and Materials* (Oxford University Press 2019) 167; Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2021) 105.

²See e.g. Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar 2017) 103–07.

³Council 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, [2003] OJ L1/1 (Regulation 1/2003).

⁴Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3 (ECN+ Directive).

⁵Regulation 1/2003, art 23(3); ECN+ Directive, art 14(1).

⁶Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210/02, para 24.

⁷Case T-566/08 *Total Raffinage Marketing v Commission*, ECLI:EU:T:2013:423, paras 548–543; Éric Barbier de La Serre and Eileen Lagathu, 'The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings' (2015) 6(7) *Journal of European Competition Law & Practice* 530, 536.

⁸See for example Case AT.40099 Commission decision of 18 July 2018, paras 1461–1462; Case AT.3986 Commission decision of 26 November 2020, para 1374. Several settlement decisions show that the EC has calculated the number of days between the start and end dates of the infringement and divided it with 365 and has used the resulting figure as the multiplier. See for example Case AT.39881 Commission decision of 22 November 2017, paras 81 and 120–121; Case AT.39920 Commission decision of 21

definition of an infringement's duration is important when determining an appropriate fine.

Second, the end date of an infringement is relevant for defining the limitation periods for both the imposition of fines by the EC and the NCAs as well as bringing actions for damages in national courts. In the case of penalties imposed by the EC for continuing or repeated infringements, a fine is time-barred if the EC does not act within five years from "the day on which the infringement ceases".⁹ The ECN + Directive does not impose exact limitation periods for the imposition of penalties by NCAs or regulate when such periods should begin to run. The ECN + Directive merely dictates that any limitation periods should follow the principle of effectiveness in that they do not make the effective enforcement of the EU competition rules "practically impossible or excessively difficult".¹⁰ Any national rules on limitations in public enforcement proceedings must moreover balance this requirement with ensuring reasonable times for initiating proceedings and thus legal certainty as well as consider the specificities of competition law. One aspect to consider in this balancing is the starting date of the limitation period, but EU law sets no requirements to bind that date with a cessation of an infringement.¹¹ On the other hand the Damages Directive¹² clearly imposes a precondition that any limitation periods for seeking redress for infringements of the EU competition rules "shall not begin to run before the infringement ceases".¹³ An infringement's duration therefore affects both public and private enforcement of the EU competition rules by setting boundaries to the powers of competition authorities and the rights of individuals claiming compensation.

Third, similarly as proving the existence of an infringement in the first place, its duration is one of the aspects for which a claimant alleging an infringement of the EU competition rules bears the burden of proof.¹⁴ In the words of the European Court of Justice (ECJ), a claimant must "establish to the requisite legal standard the existence of the circumstances

February 2018, paras 31–32 and 103; Case AT.39849 Commission decision of 17 December 2018, paras 701–703.

⁹Regulation 1/2003, arts 25(1) and (2).

¹⁰ECN+ Directive, rec 70.

¹¹ECN+ Directive, art 29 includes rules only on the suspension or interruption of the limitation periods; see also Case C-308/19 *Consiliul Concurenței v Whiteland Import Export SRL*, ECLI:EU:C:2021:47, paras 49–53.

¹²Directive 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 [2014] OJ L349/1 (Damages Directive).

¹³Damages Directive, rec 36 and art 10(2). Art 10(2) includes other requirements subordinate to this requirement.

¹⁴Regulation 1/2003, rec 5 and art 2.

constituting an infringement”.¹⁵ By stating that “[t]he duration of an infringement is an objective element of [an] infringement”, the ECJ can be considered to have emphasized the infringement period’s independent significance.¹⁶ It therefore falls upon the claimant to establish, to the requisite legal standard, the time period during which either Article 101 or 102 TFEU was infringed.

Finally, the (potentially) novel forms of infringements of Articles 101 and 102 TFEU might not only prove challenging to identify but also pose difficulties from the point of view of determining the period which justifies enforcement action against them. For example, the utilization of algorithms and artificial intelligence in companies’ strategic decision-making may possess considerable potential to make anticompetitive collusion both easier as well as more sustainable and therefore more harmful provide clear examples of such infringements.¹⁷ Prudent and proportional enforcement of infringements that are difficult to recognize in the first place requires a solid understanding on how to assess their duration.

Establishing an infringement period varies from case to case, but at its simplest it can be the period during which a written agreement on which coordination¹⁸ is based on is in force and until it is formally terminated.¹⁹ For example, concerning so called pay-for-delay agreements in *Lundbeck*, the EC considered that the infringement lasted while the agreements by which the generic producers were excluded from the relevant market were in force.²⁰ Regarding more complex cartels, the EC tends to rely on the date from which there is clear evidence linking the undertaking to the infringement in the form of e.g. contacts between the cartel members or other proof. In *Euro Interest Rate Derivatives*, the EC for example relied on the final date from which there was evidence that the undertakings considered themselves to be “devoted to” the infringement.²¹

¹⁵Case C-89/11 P *E.ON Energie AG v Commission*, ECLI:EU:C:2012:738, para 71.

¹⁶Case C-757/21 P *Nichicon Corporation v Commission*, ECLI:EU:C:2023:575, para 149.

¹⁷On algorithmic collusion, see e.g. Lea Bernhardt and Ralf Dewenter, ‘Collusion by Code or Algorithmic Collusion? When Pricing Algorithms Take Over’ (2020) 16(2) *European Competition Journal* 312; on the interplay between artificial intelligence and competition law, see Suzanne Rab, ‘Competition Law’ in Charles Kerrigan (ed), *Artificial Intelligence – Law and Regulation* (Edward Elgar 2022).

¹⁸This article refers to agreements, decisions of associations of undertakings and concerted practices together as coordination.

¹⁹Castillo de la Torre and Gippini Fournier (n 2) 103.

²⁰Case AT.39226 *Commission decision of 19 June 2013*, paras 1292 and 1366. Appeals dismissed ultimately in *C-591/16 P H.Lundbeck A/S and Lundbeck Ltd v Commission*, ECLI:EU:C:2021:243.

²¹Case AT.39914 *Commission decision of 7 December 2016*, paras 623–627. In case T-105/17 *HSBC Holdings plc and others v Commission*, ECLI:EU:T:2019:675, the GC upheld the EC’s assessment as to the substance, but annulled the imposition of a fine due to the EC’s lack of reasoning. On appeal, the ECJ found that the GC had applied an incorrect test in assessing whether the infringement had as its object the restriction of competition, but nevertheless found that the infringement constituted

However, the ECJ's case law has also recognized that an infringement of Article 101 TFEU might not be over even though there is no active coordination between undertakings. The ECJ has in several cases, such as *EMI Records*,²² *Binon*,²³ *Quinn Barlo*,²⁴ and *Kilpailu- ja kuluttajavirasto*,²⁵ confirmed that Article 101 TFEU may apply in some cases where the coordination has already ceased "to be in force". In essence this means that an infringement of Article 101 TFEU may continue beyond the duration of the coordination itself.

This article aims to promote the discussion on the assessment of an infringement's duration by examining the doctrine of applying Article 101 TFEU to coordination that has ceased to be in force by reviewing the above-mentioned line of the ECJ's case law that has established that doctrine and assesses what requirements this case law imposes on applying Article 101 TFEU discontinued coordination. Thereby, this article seeks to elaborate and discuss the determination of an infringement period and provide more detail to the statement that Article 101 TFEU may be applied if a coordination continues to produce its effects. It argues that while earlier case law emphasized that an infringement continues if the infringing parties carry on market conduct that corresponds the original infringing conduct, more recent case law seems to shift focus to the anticompetitive effects the coordination has on the underlying competitive conditions. Moreover, it is argued that the ECJ lays emphasis on the restriction of competition in a somewhat literally understood sense, focusing on the period during which the relevant competitive process is being distorted by restrictive effects on competition and thus prevented from creating the benefits it is supposed to, rather than on the price effects of or damages to other market players or consumers caused by the infringement.

Case law on the application of Article 101 TFEU to discontinued coordination

EMI Records

The preliminary ruling in *EMI Records* concerned a dispute between EMI Records Limited (EMI) and CBS United Kingdom Limited (CBS) on the

an infringement by object, and dismissed the appellants' action (Case C-883/19 P HSBC Holdings plc and others v Commission, ECLI:EU:2023:11).

²²Case C-51/75 *EMI Records v CBS United Kingdom Limited*, ECLI:EU:C:1976:85.

²³Case C-243/83 *SA Binon & Cie v SA Agence et messageries de la presse (AMP)*, ECLI:EU:C:1985:284.

²⁴Case C-70/12 P *Quinn Barlo Ltd and others v Commission*, ECLI:EU:C:2013:351.

²⁵Case C-450/19 *Kilpailu- ja kuluttajavirasto*, ECLI:EU:C:2021:10.

use of the “Columbia” trademark (Columbia mark). As to the relevant background of the complicated set of facts behind the dispute, for the purposes of this article it suffices to state that, at one point in time, a predecessor of EMI as the transferor of the UK and Europe Columbia marks had essentially undertaken not to conduct business similar to the predecessor of CBS’ as the transferee of the Columbia mark in the areas where that transferee was the proprietor of the Columbia mark, most importantly in the European countries making up the European Community at the time of the dispute.²⁶

The ECJ was asked whether EMI could rely on its trademark registered in several Member States to prevent the import of products bearing a similar mark into these Member States by CBS which held the mark in another country.²⁷ The ECJ began by finding that a trademark in itself does not constitute a form of coordination relevant for the application of Article 101 TFEU. However, the way in which it is exercised might fall within that Article’s ambit, if it is a manifestation of the “subject, the means, or the consequence” of coordination.²⁸ In essence, if two entities agree that a trademark will be used in an anticompetitive manner, Article 101 TFEU might apply. Next, the ECJ identified the relevant restriction. It stated that a practice which secludes the Common Market from imports from third countries would diminish the supply of these products, and consequently have negative effects on competition within the Common Market.²⁹

²⁶A full account of the facts is presented at 813–16 of EMI Records (n 22). In short, the American Grapophone Company (AGC), a producer of Grapophones, had a subsidiary named Columbia Grapophone Company (CGC), which held the trademark for the word ‘Columbia’ in e.g. the US, UK and some European countries. In March 1917 the CGC established a subsidiary Columbia Grapophone Company Limited (CGCL) in the UK, to which it transferred its UK and Europe business along with the trademarks corresponding these areas. In the transfer agreement for the marks, CGC undertook not to engage in ‘any business similar to or identical with the business hereby assigned’ in the territory in which the assigned business had so far operated, in essence agreeing not to compete in the areas where CGCL operated. In December of the same year AGC transferred its shares in CGCL and CGC to the Columbia Grapophone Manufacturing Company (CGMC). In November 1922 CGMC sold its share in CGCL, thereby severing the parent-subsidiary tie between CGCL and CGC, resulting in CGMC remaining the owner of CGC and thus the US trademark and CGCL having the UK and European trademarks. Between 1922 and 1925 the US trademark was assigned to the Columbia Phonograph Company (CPC), which in turn became a subsidiary of CGCL in 1925. In 1931 Electric and Musical Industries (EMI) was founded, and it bought the shares of CGCL as well as another company, Gramophone Company Limited (GCL), during the same year. Simultaneously with this transfer, the CGCL divested its holding in CPC, which, with the US trademark, was transferred to Grigsby Grunow (GG). In 1938, Columbia Broadcasting Systems Inc (CBS), became the owner of CPC. In 1954, after the CPC had divested itself of the American marks, CBS became the holder of the American marks. In 1964, CBS purchased CBS United Kingdom Limited. In 1965 CGCL transferred all its trademarks to GCL, which later became EMI Records Ltd.

²⁷EMI Records (n 22), para 6 and 816.

²⁸*ibid*, paras 26–27.

²⁹*ibid*, para 28.

Having established these prerequisites for the application of Article 101 TFEU, the ECJ stated that in cases where coordination has ceased to be formally in force, Article 101 TFEU still applies if such coordination “continue [s] to produce [its] effects after [it has] formally ceased to be in force”.³⁰ As to the relevant “effects” of coordination, the ECJ noted two relevant factors: first, a claimant must be able to identify “elements of concerted practice and of coordination peculiar to the agreement” in the suspected parties’ continuing conduct, and second, this conduct should produce “the same result as that envisaged by the [original] agreement”.³¹ In essence, Article 101 TFEU could thereby apply to conduct that is based on previously ended coordination, bears similarity to this coordination, and results in similar outcomes to which the ended coordination aimed at.³²

Consequently, the ECJ found that if the relevant outcome results purely from the independent exercise of a trademark, Article 101 TFEU does not apply. This was the case in EMI’s exercise of its trademark.³³ Accordingly, it was not possible to conclude simply from the unilateral use of a trademark that it would be based on a previous agreement, even though this use resulted in a similar outcome as the discontinued agreement.

In other words, the judgment made clear that it is possible to apply Article 101 TFEU to coordination that has already formally ended. However, for Article 101 TFEU to apply to the “intended consequences” of discontinued coordination, there must first be coordination which fulfils the conditions of Article 101 TFEU in the first place from which such consequences flow.³⁴ According to the judgment, Article 101 TFEU applies to discontinued coordination only when the infringing parties continue the same conduct, and this conduct continues to produce similar effects as their original coordination.

Binon

Binon concerned a dispute between a retailer of newspapers and periodicals, SA Binon & Cie (Binon), and a distribution agency for these

³⁰ibid, para 30.

³¹ibid, para 31.

³²Similarly, Advocate General Warner’s Opinion in Case C-51/75 EMI Records v CBS United Kingdom Limited, ECLI:EU:C:1976:48, at 865, where the AG uses as an example a restrictive achievement which is to be achieved by ‘an assignment of trademarks’.

³³EMI Records (n 22), paras 32–34.

³⁴Similarly, AG Warner’s Opinion in EMI Records (n 32) 866: Article 101 TFEU extends ‘to the continuance after the entry into force of the Treaty of an Agreement of the kind described in Article [101] made before then’, but not ‘to any consequences of that agreement *other than those (if any) attributable to that continuance*’ (emphasis added).

products, SA Agence et messageries de la presse (AMP), where Binon relied on Article 101 TFEU to secure deliveries from AMP. AMP was responsible for the distribution of most Belgian publishers' and practically all foreign publishers' products in Belgium.³⁵ AMP had ceased to deliver these products to Binon, after which Binon had unsuccessfully tried to acquire them directly from Belgian publishers. Binon alleged that the cessation of deliveries was due to a selective distribution system set up between AMP and the Belgian publishers. For some time before Binon's claim, the publishers' and AMP's distribution system was open only to retailers that were approved by a distinct committee. After this system was declared incompatible with Belgian law and Articles 101 and 102 TFEU, AMP and the publishers changed the system so that AMP drafted the conditions for approval into the distribution system and each publisher had to agree to these individually. AMP then presented the publishers with its view on whether to approve or reject an applicant retailer, and in cases of inactivity the publishers were assumed to follow AMP's recommendation.³⁶ The publishers had also granted AMP exclusivity of the distribution of their products.³⁷ Binon claimed that the new system was simply a new form to continue the publishers' previous practice of limiting the number of retailers to which they distributed their products.³⁸

The referring court's view was that AMP controlled entry into the newly organized distribution network.³⁹ The questions referred to the ECJ revolved around whether such a system was compatible with Article 101 TFEU.⁴⁰ The ECJ considered that the question concerned the distribution of products via a specific agency. It identified three different aspects in the specific case: the conduct between the publishers, the conduct of AMP, and the selective distribution system set up by AMP to the level of distribution.⁴¹ For the assessment of an infringement's duration the ECJ's assessment of the first conduct is relevant.

³⁵Binon (n 23), paras 2–4.

³⁶ibid, para 5.

³⁷Advocate General Slynn's Opinion in Case C-243/83 SA Binon & Cie v SA Agence et messageries de la presse (AMP), ECLI:EU:C:1985:66, at 2019.

³⁸ibid 2022.

³⁹Binon (n 23), paras 6–7.

⁴⁰ibid, para. 8. The other questions assessed by the ECJ related to whether AMP held a dominant position, which was left unanswered (Binon (n 23), paras 19–26), whether a selective distribution system complies with EU competition law in general (paras 27–35), as well as claims relating to e.g. retail price maintenance (paras 36–47).

⁴¹ibid, para 10; similarly AG Slynn's opinion in Binon (n 37) 2022.

The publishers' practice was described as supplying their products via a wholesaler and refusing to supply to retailers directly, as well as, by following AMP's advice, discriminating retailers wishing to join the system.⁴² According to the ECJ the relevant question was therefore to assess whether such parallel conduct by the publishers could constitute coordination within the meaning of Article 101 TFEU even though the agreement between the publishers and AMP had been replaced with a framework of separate agreements between individual publishers and AMP on the one hand, and agreements between AMP and the retailers on the other, thereby (apparently) severing the connections between publishers.⁴³

The ECJ identified two different situations. In the case at hand, the publishers' control of new retail outlets into the distribution system was originally based on an agreement which was subsequently replaced with a new one. However, the publishers had continued to restrict the amount of retail outlets with the new agreement by supplanting the consultative committee's opinions with AMP's view. According to the ECJ, since the purpose of the new agreement was to continue the same anti-competitive conduct pursued with the previous agreement, the new agreement was contrary to Article 101 TFEU as well.⁴⁴

In addition to this, the ECJ noted that Article 101 TFEU would have applied to the publishers' parallel conduct even if the previous agreement had not been replaced but continued to produce its effects after its termination. The ECJ clarified that "the system of competition rules established by Article [101] *et seq.* ... is concerned with the economic effects of ... coordination rather than with [its] legal form".⁴⁵ What the ECJ meant with the "effect of the agreement" in this case seemed to be that the approval of retailers into the distribution network was entrusted to a third party.⁴⁶

The focus in *Binon* was whether, despite changes to the parties' coordination's form, the parties' conduct justified a deduction that an agreement remained in force between them.⁴⁷ Noteworthy in *Binon* is that changing the form of the agreement was irrelevant if its outcome was

⁴²Binon (n 23), para 11.

⁴³ibid, para 15.

⁴⁴ibid, para 16. The existence of a previous agreement effectively made implausible the claim of AMP that the publishers' parallel conduct was an intelligent reaction to their competitors' conduct (para 12).

⁴⁵ibid, para 17.

⁴⁶ibid, para 18.

⁴⁷See also AG Slynn's opinion in Binon (n 37) 2024, where the AG assesses factors pointing towards there being continuing coordination between the parties.

the same as the agreement subject to changes – framing similar coordination in other terms makes no difference for the purposes of Article 101 TFEU.⁴⁸

Quinn Barlo

The judgment in *Quinn Barlo* followed from a complaint of the EC's decision in the *Methacrylates* case.⁴⁹ The EC had found that the appellants (Quinn Barlo Ltd, Quinn Plastics NV, and Quinn Plastics GmbH) had participated in a price-fixing scheme from April 1998 until 21 August 2000, a period spanning from their first participation in an anti-competitive meeting until their last participation in such a meeting.⁵⁰ The dispute before the ECJ concerned a meeting on 29 June 1998.⁵¹ The GC had found that two participants other than the appellants in that meeting had agreed on a hike in prices “for October 1998”. Even though the appellants themselves had not explicitly participated in that agreement, the GC considered they had received information they could utilize to modify their conduct accordingly and considered them liable for the anti-competitive coordination established in that meeting relying on the doctrine of passive participation.⁵² The GC consequently concluded that the appellants had participated in the infringement until the end of October.⁵³

Before the ECJ, the appellants argued that the GC had breached the presumption of innocence by considering that their infringement lasted until after the relevant meeting. According to the appellants, it was susceptible that it could have benefited from the information it received, and consequently the presumption of innocence would have required that its infringement should have ceased on the date of the meeting, or in August or September of the same year at the latest.⁵⁴

⁴⁸Similarly, *EMI Records* (n 22), para 31, where what the ECJ considered relevant was that the continued conduct still produced ‘the same result’.

⁴⁹Case COMP/F/38.645, Commission decision of 31 May 2006.

⁵⁰*ibid*, paras 309 and 313.

⁵¹ECJ's judgment in *Quinn Barlo* (n 24), paras 32–35. The GC had partly overturned the Commission decision, since it considered there to be no evidence of Barlo's participation in the infringement between the period of 1 November 1998 and 23 February (Case T-208/06 *Quinn Barlo Ltd and others v Commission*, ECLI:EU:T:2011:701, paras 92–114).

⁵²According to this doctrine a participant to an anti-competitive meeting is considered to have partaken in the infringement if it does not publicly distance itself from what was agreed in the meeting; see e.g. Case C-199/92 P *Hüls AG v Commission*, ECLI:EU:C:1999:358 (para 155); Case C-49/92 P *Commission v Anic Partecipazioni SpA*, ECLI:EU:C:1999:356 (para 96); Andriani Kalintiri, ‘Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises and Presumptions’ (2020) 16(3) *Journal of Competition Law & Economics* 392, 415 and 417–18.

⁵³GC's judgment in *Quinn Barlo* (n 51), para 163.

⁵⁴ECJ's judgment in *Quinn Barlo* (n 24), paras 32–33.

The ECJ began by pointing out that a breach of the presumption of innocence is in itself a valid point of law subject to judicial review. Thus, the assessment of an infringement's duration may be appealed individually if that assessment breaches the presumption of innocence.⁵⁵ Next, the ECJ reminded of the case law based on *EMI Records* and *Binon* and pointed out that Articles 101 and 102 TFEU concern the “economic consequences” of different forms of market conduct. Relying on this case law, the ECJ stated that an infringement's duration “may be assessed by reference to the period during which the undertakings concerned engaged in conduct prohibited by [Article 101 TFEU]”.⁵⁶ According to the ECJ, in the case at hand this meant that the infringement could have lasted as long as “the unlawful prices were applied”. This would have resulted in a more adverse outcome to the appellants than the GC's conclusion.⁵⁷

Finally, the ECJ found that for the infringement to have ceased on the appellants' part, they should have been able to establish two things: first, that they had distanced themselves from the topics discussed in the meeting, and second, that the information they had received had not affected their commercial strategy. The ECJ considered that the appellants had not fulfilled either of these requirements, and consequently dismissed their appeal.⁵⁸

Quinn Barlo confirmed that a miscalculation in an infringement's duration is a valid point to base an appeal of an EC decision on.⁵⁹ The judgment also further clarified the basis for assessing an infringement's duration in cases where contacts have already ceased: an infringement continues as long as the participants “engage in conduct” contrary to Article 101 TFEU.

Kilpailu- ja kuluttajavirasto

The judgment in *Kilpailu- ja kuluttajavirasto* emanated from a request for a preliminary ruling from the Supreme Administrative Court of Finland (SAC). The Finnish Competition and Consumer Authority (FCCA) had appealed a decision by the Market Court (MC) by which the MC had dismissed the FCCA's proposal for a penalty payment to

⁵⁵ *ibid*, paras 36–37.

⁵⁶ *ibid*, para 40.

⁵⁷ *ibid*. The ECJ also pointed out that evidence suggested that the participants in the June meeting had also discussed price increases to be implemented or announced in the latter half of 1998 and even in January 1999 (*ibid*, para 41).

⁵⁸ *ibid*, para 42.

⁵⁹ See also Jones, Sufrin and Dunne (n 1) 989–90.

Eltel Group Oy and Eltel Networks Oy (jointly Eltel),⁶⁰ a company active in the power line building industry.⁶¹ Pursuant to the national procedural rules applicable to the infringement, a penalty payment was time-barred if over five years had lapsed since either when the infringement had ceased or when the FCCA became aware of the infringement.⁶²

On 16 April 2007, the Finnish grid operator Fingrid Oyj (Fingrid) put the construction of a high voltage transmission line between Keminmaa and Petäjäkoski out to tender. Tenders had to be submitted on 5 June 2007 at the latest, and the works had to be completed by 12 November 2009.⁶³ Eltel submitted the winning bid on 4 June 2007, and a contract between Eltel and Fingrid was concluded on 19 June 2007. The works were finished on time, and Fingrid paid the last instalment based on the contract on 7 January 2010.⁶⁴ In October 2014, the FCCA demanded the MC to impose a penalty payment on Eltel for a single and continuous infringement of Article 101 TFEU and its national counterpart lasting from October 2004 until at least March 2011. The last aspect of this infringement was, according to the FCCA, a coordination between Eltel and Empower Oy (Empower), another undertaking active in the same industry, concerning Eltel's above-mentioned winning bid.⁶⁵ The FCCA had concluded that, for Eltel's bid, Eltel and Empower had agreed on the prices of their respective bids and acted accordingly by submitting the bids.⁶⁶

The dispute before the ECJ concerned this concerted bid, which was the final expression of the infringement in question, and how the case law from *EMI Records*, *Binon* and *Quinn Barlo* should apply to the case at hand, especially how long could the infringement in question be considered to continue due to its economic effects.⁶⁷ The parties had proposed four different potential end points: the making of the

⁶⁰Eltel Group Oy and Eltel Networks Oy formed a single economic unit and therefore a single undertaking.

⁶¹Kilpailu- ja kuluttajavirasto (n 25), para 2.

⁶²*ibid*, para 3. The national rules were amended in 2011. According to the Finnish rules currently in force, a penalty payment proposal is time-barred if it is not made within five years of the date of the violation, or in the case of a continuous infringement, within five years of the date on which the violation ended (Competition Act, 948/2011, Section 19). This limitation period corresponds the limitation period set out in Regulation 1/2003, art 25 (Government proposal HE 88/2010 vp, at 65).

⁶³Kilpailu- ja kuluttajavirasto (n 25), para 4.

⁶⁴*ibid*, paras 5–6 and 28.

⁶⁵Generally, the FCCA claimed that the infringement took the form of meetings between the two undertakings' representatives during which they coordinated prices, margins, and market shares regarding possible future contracts for transmission line constructions, including the bid for Fingrid's tender process (Kilpailu- ja kuluttajavirasto (n 25), paras 9–10.) Empower had applied for and been granted leniency, so it was not a target of the penalty payment proposal.

⁶⁶Kilpailu- ja kuluttajavirasto (n 25), paras 28 and 31.

⁶⁷*ibid*, paras 15–16.

bid, concluding the contract based on the bid, completion of the contract works, and payment of the final instalment to Fingrid.⁶⁸

According to the ECJ, the participation of Eltel in the infringement “covers the entire period during which [it] implemented the anticompetitive agreement”. In the case at hand, the ECJ found that this corresponded to the time during which Eltel’s bid was in force and could have led to a contract between it and Fingrid, or in the ECJ’s words until “the essential characteristics of the contract for the construction of the high-voltage line in question were finally determined and, in particular, the total amount to be paid for those works”.⁶⁹ The ECJ dismissed the FCCA’s claim that the infringement continued to cause its effects until the final instalment was paid. According to the ECJ, the goals of Article 101 TFEU, namely the protection of competitors, consumers, and “the structure of the relevant market and thus competition as such”, require that the infringement continues “as long as the restriction of competition resulting from the conduct concerned persists”.⁷⁰ The ECJ considered that when the coordination concerns a bid intended for a specific tender, there are no restrictive effects beyond the moment of the conclusion of the contract, since this is when the customer loses the possibility to obtain the contract works “under normal market conditions”.⁷¹

The FCCA had argued that the higher prices of Fingrid’s customers resulting from the pass-on of the inflated costs should be considered as relevant effects of the coordination justifying a longer infringement period. The ECJ approached the argument by finding that excluding competing tenderers and artificially restricting the customer’s choice were the restrictive effects on competition that deprived the customer the possibility to benefit from normal market conditions, or “competitive conditions”. These, according to the ECJ, must be kept separate from “wider adverse economic effects on other market players”, for which it is possible to “seek redress before the national courts”.⁷² Therefore, the higher costs of Fingrid’s customers could not be considered when assessing the infringement’s duration.

Finally, the ECJ dismissed the arguments claiming that in cases such as the one at hand, adopting a too short infringement period would

⁶⁸ibid, paras 12–13 and 19.

⁶⁹ibid, para 32–33.

⁷⁰ibid, paras 33–34.

⁷¹ibid, para 35.

⁷²ibid, para 37.

jeopardize the full effectiveness of Article 101 TFEU. The ECJ drew attention to the rule of law and pointed out that the EU legal system subjects the enforcement of Article 101 TFEU to limitation periods and concluded that “artificially extending the duration of the infringement period in order to allow its prosecution” is therefore not justified.⁷³

Finding an end to an infringement

Starting points

The oft-cited paragraphs of the case law present the relevant aspects for the assessment of an infringement’s duration in a sequential chain.⁷⁴ The crux of the matter is that Article 101 TFEU concerns the “economic consequences” of different forms of coordination rather than their “legal form”. The focus on “economic consequences” presupposes that the provision applies to company conduct if it continues to produce its effects after the “unlawful contacts” by which the coordination was established have ended. This, in turn, means that if the parties to the original coordination continue to act in a manner prohibited by Article 101 TFEU even unilaterally – for example by applying “unlawful prices” –, the infringement is considered to continue on their part.⁷⁵

From this, two points for further scrutiny may be discerned. First, when can a coordination be considered to produce its effects after it has been terminated? Is this the case only when the parties actively continue to pursue conduct prohibited by Article 101 TFEU, or can an infringement continue without continuing conduct? Even though the focus is on “economic consequences”, does the original coordination’s “legal form” play any role?

Second, what are the relevant effects of the coordination that define the infringement’s duration? It seems clear that the starting point for determining an infringement’s duration would be the “unlawful contacts”, and that the effects should be assessed once these have ended. However,

⁷³ibid, paras 39–40. Based on the preliminary ruling, the SAC in its final judgment found that the FCCA’s proposal was time-barred, and thus dismissed the FCCA’s appeal (judgment of the SAC 20 August 2021, ECLI:FI:KHO:2021:112).

⁷⁴EMI Records (n 22), para 30; Binon (n 23), para 17; ECJ’s judgment in Quinn Barlo (n 24), para 40; Kilpailu- ja kuluttajavirasto (n 25), para 30.

⁷⁵It should be noted that, since Binon (n 23), the ECJ has emphasized that ‘the *system of competition established by Articles 101 and 102 TFEU* is concerned with “economic consequences”’ (emphasis added). While the judgments discussed in this article assess the duration of infringements of Article 101 TFEU, it is therefore arguable that a similar approach could be applied to infringements of Article 102 TFEU where applicable.

anticompetitive coordination might have a wide variety of different effects – do all of them count, or just some of them?

When does conduct continue to produce its effects?

The judgment in *EMI Records* made it clear that Article 101 TFEU applies to an agreement that has already formally ended if it continues to produce effects. According to the judgment, a coordination produces effects if, first, the parties continue to conduct in a manner that resembles the concerted action brought about by the original coordination, and second, this conduct produces “the same result” that was the aim of the original coordination.⁷⁶ Therefore, an intervention based on Article 101 TFEU on the basis of *EMI Records* presupposes two things: continued conduct and a resulting effect, both of which must be linked to the original, underlying coordination.⁷⁷

This is emphasized by the ECJ’s statement that, even though a specific use of a trademark might be caught by Article 101 TFEU if such use is based on coordination between two undertakings, the unilateral exercise of national trademark rights did not display that the original agreement continued to produce its anticompetitive effects.⁷⁸ It should be noted that the original agreement that the use of the trademark was allegedly a continuation of in *EMI Records* did not include any understanding on using the assigned trademarks in a specific manner. What had been agreed upon was a specific commitment by the transferor, the predecessor of EMI, to refrain from competing in those European countries where the trademark transferee was active in, which in effect constituted a market partitioning clause.⁷⁹ The original agreement’s scope and the scrutinized conduct thereby did not entirely correspond each other. On the one hand, by relying on its trademark, EMI wished to prevent CBS from selling records in which the Columbia mark was still visible in the European countries where EMI was the trademark holder. On the other hand, according to the original agreement, the parties had agreed that the transferor would refrain from all similar business within all the territories where the recipient of the European rights for the Columbia mark had been active in at the time of the transfer.⁸⁰ Therefore, even though the

⁷⁶EMI Records (n 22), para 31.

⁷⁷Similarly, Faull and Nikpay (n 1) 216.

⁷⁸EMI Records (n 22), paras 27 and 32.

⁷⁹ibid 814 and 827.

⁸⁰ibid 814 and 816. Arguably, the case’s outcome could have been different if EMI had aimed to cease CBS from selling *any* records irrespective of the mark they carried in the areas where EMI was active.

unilateral use of a trademark did have a similar effect of preventing the other party from competing in certain geographical areas, limiting such prevention only to products bearing the Columbia mark meant that relying on the trademark differed significantly from what was agreed upon in the original agreement, and thus did not display the continuance of the original agreement's effects.⁸¹

Binon was a rather straightforward application of *EMI Records*. The publishers and the distribution agency originally had an explicit agreement pursuant to which the former let the latter decide to whom the publishers would supply their products. Though the agreement was modified, the fact that the publishers continued to let a third party make the decision, and that their conduct thereby produced the same result as the original agreement, justified the application of Article 101 TFEU. The ECJ stated that the existence of the underlying agreement excluded the possibility that the publishers' concerted conduct would have been a result of their independent adaptation to each other's similar behaviour.⁸² This further emphasizes the significance of the connection between the underlying agreement and the persisting conduct: prohibiting parallel conduct with an anticompetitive outcome without proof of coordination would be tantamount to prohibiting tacit collusion, which is outside the scope of Article 101 TFEU.⁸³ In other words, an anticompetitive outcome without continuing conduct pursuing the original agreement would not have been sufficient for Article 101 TFEU to apply.

Therefore, for Article 101 TFEU to apply, an effect similar to that of the original coordination seems to be insufficient in itself – the effect should result from continuing conduct identical to conduct that the original coordination concerned.⁸⁴ Conversely, mere behaviour based on an agreement which originally restricted competition but no longer has any negative effects should also be outside the scope of Article 101 TFEU.⁸⁵

⁸¹Similarly, see AG Warner's Opinion in *EMI Records* (n 32) (at 886), discussing whether Article 101 TFEU could apply to the consequences of an agreement that was terminated prior to the entry of force of the Treaties. According to the AG, Article 101 would apply 'to the continuance after the entry into force of the Treaty of an agreement of the kind described in Article [101] made before then', but not 'to any consequences of that agreement other than those (if any) attributable to that continuance'. The AG's reasoning resonates with the idea that the consequences which make Article 101 TFEU applicable must be interpreted narrowly.

⁸²*Binon* (n 23), para 16.

⁸³See joined cases C-89/85 and others *Ahlström Osakeyhtiö and Others v Commission*, ECLI:EU:C:1993:120, para 71, and *Jones, Sufrin and Dunne* (n 1) 663–66.

⁸⁴Similarly, *Faull and Nikpay* (n 1) 206; Kenneth Khoo, 'Regulating the Inferential Process in Alleged Article 101 TFEU Infringements' (2017) 13(1) *Journal of Competition Law & Economics* 45, 69.

⁸⁵This would also follow from the fact that the application of Article 101 TFEU always presupposes a restriction of competition (see e.g. *Jones, Sufrin and Dunne* (n 1) 195).

Both *EMI Records* and *Binon* concerned situations where the conduct in question was based on⁸⁶ a common understanding on the parties' future market conduct. In the ECJ's words, their coordination therefore constituted an "agreement" within the meaning of Article 101 TFEU: the parties had expressed a "joint intention to conduct themselves on the market in a specific way".⁸⁷ A similar form of coordination was in question in *Kilpailu- ja kuluttajavirasto*, where the parties had agreed on the prices of their tenders that they would submit to Fingrid.⁸⁸ Consequently, since the parties had explicitly concerted their future market conduct regarding their tenders' price, it seems that the infringement continued only as long as they actively pursued this coordination, or in other words until the fixed-price bids were in force.⁸⁹

The coordination in *Quinn Barlo* differed from the types of coordination assessed in the previous cases. The case concerned an exchange of information, where the appellants had received information from which they could benefit and consider when deciding upon their future conduct.⁹⁰ It should be noted that, since Article 101 TFEU is based on the assumption that all market players should define their market conduct independently, the prohibition of concerted practices encompasses contacts by which market players aim to either influence their competitors' conduct or reveal their own determined or planned future conduct.⁹¹ In *Quinn Barlo*, the receipt of information on other players' future price increases resulted in an assumption that the appellants' future conduct regarding their own pricing was influenced, and it fell upon them to prove the opposite.⁹² It would seem that, in such cases, the infringement's duration covers not only the period of the actual contact and the period during which they may use the received information to their benefit.⁹³

Moreover, it should be noted that when assessing the infringement period in *Quinn Barlo*, neither the GC nor the ECJ considered whether the appellants had actually changed their market conduct – it was sufficient that they were able to benefit from the information received in the June meeting. Benefiting from information concerning a future

⁸⁶Or, in the case of *EMI Records* (n 22), was allegedly based on.

⁸⁷*Kilpailu- ja kuluttajavirasto* (n 25), para 21 and the case law cited.

⁸⁸*ibid*, para 28.

⁸⁹*ibid*, paras 28 and 31–32.

⁹⁰ECJ's judgment in *Quinn Barlo* (n 24), para 41.

⁹¹*Kilpailu- ja kuluttajavirasto* (n 25), paras 22–23 and the case law cited.

⁹²ECJ's judgment in *Quinn Barlo* (n 24), para 42.

⁹³*ibid*, para 40; see similarly *Khoo* (n 84) 55.

price increase would apparently have resulted in an infringement for the whole period that the appellants would have applied a price that could have been influenced by this exchange.⁹⁴ Arguably, this follows from the legal presumption in EU competition law of causal connection between concerted practices and market conduct, namely that it is assumed that participants to an information exchange that remain active in the market make use of the received information.⁹⁵ When the infringing parties reduce the competitive uncertainty between them, there is thus an assumption of following market conduct that satisfies the requirement of “behaviour peculiar to the agreement” required by *EMI Records*, and, consequently, that the coordination therefore continues to produce its effects and the infringement would be considered to continue irrespective of proof of actual market conduct. Combined with the ECJ’s reference to the “unlawful prices”, such assumption suggests that if, for example, two undertakings have exchanged information on a future price increase, if they cannot prove that they effectively distanced themselves from the exchange and that the exchange did not affect their market conduct,⁹⁶ their infringements would persist from that exchange until they adopt a genuinely independent pricing decision, and therefore do not “engage in conduct prohibited” by Article 101 TFEU anymore.

Thus, when eliminating uncertainty of future conduct, or when the contacting parties substitute the risks of competition with practical cooperation,⁹⁷ it seems that the infringement would continue after the ending of the unlawful contact irrespective of whether the parties act based on the contact. In such cases, therefore, instead of “did the parties continue to conduct according to the original coordination” and “did this conduct continue to produce similar effects as the original coordination”, the only relevant question seems to be “what future behaviour did the contact influence”, while the future conduct, and simultaneously the relevant effect, is presumed. Even though the burden of proof to show an appropriate distancing and the lack of influence of a contact on market conduct rests on the defendant, it should not be possible for claimants to argue that the infringement has continued until proven otherwise. On the contrary, a claimant should establish the

⁹⁴GC’s judgment in *Quinn Barlo* (n 51), para 163; ECJ’s judgment in *Quinn Barlo* (n 24), paras 40–43.

⁹⁵Case C-8/08 *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, para 51; see also *Kalintiri* (n 52) 414–15 and 417–18.

⁹⁶ECJ’s judgment in *Quinn Barlo* (n 24), para 42.

⁹⁷See *Kilpailu- ja kuluttajavirasto* (n 25), para 22 and the case law cited.

precise scope of the coordination and relevant conduct related to it and define the infringement's duration accordingly.⁹⁸ While an infringement may be considered to continue until proven otherwise in some rare cases,⁹⁹ the case law makes it clear that the duration must be tied to the specific conduct that has been influenced. Requiring claimants to establish exact limits for the infringement respects the defendants' rights of defence and is in line with the presumption of innocence.

In cases of "agreements", it therefore seems that an infringement's continuance after its formal ending requires active conduct from the parties. The ECJ's approach seems to follow the logic of contract law – even though the parties agree to a fixed-term contract, the agreement can be considered to be in force if the parties conduct according to the original contract after the contract period has expired.¹⁰⁰ In cases of "concerted practices", active conduct after the "facilitating practice"¹⁰¹ seems to be assumed, and the infringement continues for as long as the participating undertaking engages in market conduct assumedly influenced by the facilitating practice. To put it another way, an infringement continues either for as long as the parties act according to their initial agreement, or during the time they implement a decision that was influenced by an anticompetitive contact. The mechanism by which the infringement is put into effect naturally varies with every infringement and must thus be identified on a case-by-case basis taking its individual characteristics into account.¹⁰² While this may be considered as looking at differences in the coordination's form which should in principle be irrelevant in applying Article 101 TFEU,¹⁰³ the identification of the underlying

⁹⁸Castillo de la Torre and Gippini Fournier (n 2) 103–04.

⁹⁹See, to that effect, Joined Cases T-25/95 and others *Cimenteries CBR and Others v Commission*, ECLI:EU:T:2000:77, paras 2800–2802, and Khoo (n 84) 75–77, where the author draws a distinction between complex arrangements that require continuous contact to be upheld on the one hand, and a single meeting that is enough to implement the infringement.

¹⁰⁰For example, the Draft Common Frame of Reference (DCFR) III. – 1:111 on tacit prolongation states that '[w]here a contract provides for continuous or repeated performance of obligations for a definite period and the obligations continue to be performed by both parties after that period has expired, the contract becomes a contract for an indefinite period, unless the circumstances are inconsistent with the tacit consent of the parties to such prolongation.' (Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Outline edition, Sellier European Law Publishers 2009) 233).

¹⁰¹Khoo (n 84) 50.

¹⁰²Castillo de la Torre and Gippini Fournier (n 2) 99. For example, in Case C-440/19 P *Pometon SpA v Commission*, ECLI:EU:C:2021:214, the ECJ upheld the EC's finding that after the initial establishment of the cartel, the implementation of an infringement did not require any contacts between the cartel's participants, and the duration could therefore be assessed based on the implementation period (paras. 109–121).

¹⁰³Jones, Sufrin and Dunne (n 1) 165; *Anic Partecipazioni v Commission* (n 52) paras 112 and 132.

mechanism by which the coordination is achieved can also be seen as identifying the cause in a causal relationship between coordination and anticompetitive effect.¹⁰⁴ The mechanism, or cause, effectively establishes the relevant scope of the infringement, and, for Article 101 TFEU to apply, any continuing and/or affected conduct must correspond that scope.

What kind of effects are relevant?

What sort of effects must the continuing conduct then produce for Article 101 TFEU to apply? The judgments in *EMI Records*, *Binon*, and *Quinn Barlo* all seem to equate “effect” with continued behaviour in line with the underlying coordination. For example, in *EMI Records*, the ECJ did not take a stand on what sort of “result” is relevant – only that it needed to correspond with the underlying coordination’s aim.¹⁰⁵ In *Binon*, the ECJ considered that Article 101 TFEU continues to apply if the parties continue to conduct in a similar manner as with the prior agreement. This was the case when the new agreement’s “effect” was that publishers agreed to let an agency acting as an intermediary between the publishers and retailers to choose the retailers accepted in the distribution system, in other words certain type of market conduct.¹⁰⁶ The infringement in question in *Quinn Barlo* would have lasted “throughout the whole period in which the unlawful prices were applied”, an outcome that can also be read as a reference that specific conduct is required for an infringement to continue.¹⁰⁷

The judgment in *Kilpailu- ja kuluttajavirasto* articulated, for the first time, what kind of effects on competition are relevant besides continuing conduct. It should be recalled that the conduct in question in that case consisted of competitors manipulating a tender process by fixing the price and/or the award of the contract.¹⁰⁸ The ECJ’s statement that an infringement continues “as long as the restriction of competition resulting from the conduct concerned persists” and its reference to the goals of Article 101 TFEU, namely that the Article aims “to protect not only the direct interests of competitors or consumers, but the structure of the

¹⁰⁴Kelvin Hiu Fai Kwok, ‘The Concept of “Agreement” under Article 101 TFEU: A Question of EU Treaty interpretation (2019) 44(2) European Law Review 196, 210–11.

¹⁰⁵*EMI Records* (n 22), para 31.

¹⁰⁶*Binon* (n 23), para 18.

¹⁰⁷ECJ’s judgment in *Quinn Barlo* (n 24), para 40.

¹⁰⁸*Kilpailu- ja kuluttajavirasto* (n 25), para 35.

relevant market and thus competition as such”, provide indications on the relevant effects.¹⁰⁹ Accordingly, the ECJ seems to have identified two relevant restrictive effects: an “artificial restriction of the customer’s choice” and “the exclusion of competing tenderers” respectively.¹¹⁰ These effects, in turn, deprived the customer the possibility to “obtain the agreed goods, works or services under competitive conditions”, and the infringement lasted as long as the customer was “definitely deprived of” this possibility.¹¹¹ Finally, the ECJ distinguished between restrictive effects on competition relevant for an infringement’s duration on the one hand, and “wider adverse economic effects” for which the market players targeted by such effects “may seek redress before the national courts” on the other.¹¹²

Before addressing the ECJ’s approach in detail, it should be noted that several commentators have indicated that the scope of application of *Kilpailu- ja kuluttajavirasto* is rather limited, and that any potential guidance it gives on the interpretation of Article 101 TFEU should mainly concern bid-rigging infringements.¹¹³ Undoubtedly, the judgment answers to the preliminary reference which naturally concerns the infringement in question.¹¹⁴ However, a closer look into how the ECJ approached the question and came to its conclusion shows that the judgment may have further

¹⁰⁹ibid, para 34.

¹¹⁰ibid, para 37.

¹¹¹ibid, paras 35 and 37. See similarly Justin Lindeboom, ‘Determining the End of an Infringement of Article 101(1) TFEU in Bid-Rigging Cartel Cases’ (2022) 6(1) European Competition and Regulatory Law Review 92, 95.

¹¹²*Kilpailu- ja kuluttajavirasto* (n 25) 37.

¹¹³Lindeboom (n 111) 95–96; Arttu Mentula, ‘Finnish Eltel Precedent Case and Limitation Periods in Cartel Matters’ (2022) 43(5) European Competition Law Review 230, 236; Sophie Gilliam, ‘Determining the Duration of an Infringement of Article 101 TFEU in Bid Rigging Cases: Case C-450/19 *Kilpailu- ja kuluttajavirasto*’ (2021) 12(8) Journal of European Competition Law & Practice 633, 634. Lindeboom for example argues that the price effects could have been excluded from the relevant restrictive effects on competition in *Kilpailu- ja kuluttajavirasto* due to there being ‘an additional step between the agreement between Eltel and Empower and the supra-competitive prices to be paid by Fingrid – that is, the contract that was signed between Eltel and Fingrid’. According to Lindeboom, the fact that the price effect materialized only after such an additional step would be further confirmation that *Kilpailu- ja kuluttajavirasto* ‘would have limited applicability outside bid-rigging cartels’ (Lindeboom (n 111) 95–96). I am not entirely convinced that such an ‘additional step’ would diminish the relevance of *Kilpailu- ja kuluttajavirasto*. A similar step can be identified in most price-fixing cartels wherein, just as in *Kilpailu- ja kuluttajavirasto*, the parties first coordinate on pricing, and that price is in effect (or ‘on offer’ to customers) until a customer buys the cartelized product, which is comparable to the signing of the agreement in *Kilpailu- ja kuluttajavirasto* (i.e. taking the additional step). It could be argued therefore, that, irrespective of whether the parties fixed the price of an individual product to one customer or a batch of products on offer to any potential purchaser, the life cycle of most price-fixing infringement’s consists of three steps: the act of coordination, the time that the price is applied, and the time that the customer agrees to the price by buying the cartelized product. As will be later noted in more detail, a distinction should be made between the period of application of an unlawfully determined price on the one hand and the point of time when a consumer suffers the cartel’s price effect by purchasing the product.

¹¹⁴*Kilpailu- ja kuluttajavirasto* (n 25), paras 35 and 37.

implications.¹¹⁵ First, by relying on Article 101 TFEU's objectives, the ECJ, in general terms, found that an infringement's duration is determined by the restriction of competition, or the restrictive effects on competition, resulting from the coordination in question.¹¹⁶ Second, the ECJ found that the restrictive effects of a cartel like the one in question ended when a certain precondition¹¹⁷ had been fulfilled, since after that point the customer had no possibility to enjoy the benefits that competition would have provided her.¹¹⁸ And third, the ECJ elaborated, again reflecting Article 101 TFEU's objectives, what the restrictive effects in that case were and were not.¹¹⁹

It is therefore arguable that in *Kilpailu- ja kuluttajavirasto* the ECJ, by relying on a teleological interpretation of Article 101 TFEU,¹²⁰ laid out a general rule that an infringement lasts as long as the restriction of competition caused by the conduct lasts, applied it in the case at hand, and, again relying on Article 101 TFEU's objectives, gave guidance as to what are the relevant restrictive effects when assessing the infringement period. While the judgment's parts that apply the general rule should undoubtedly be reserved for cases where the infringement under review is similar, the general rule presented in *Kilpailu- ja kuluttajavirasto* should be applicable to any infringements of Article 101 TFEU.¹²¹

Relevance of the underlying competition

When assessing the length of an infringement period, the ECJ in *Kilpailu- ja kuluttajavirasto* focused on the deprivation of the possibility "to obtain the goods ... under normal market conditions" (or "competitive conditions") caused by the coordination's restrictive effects.¹²² This suggests

¹¹⁵See similarly Pablo Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (2020) 17(2) *Journal of Competition Law & Economics* 309, 312, where the author emphasizes that it is relevant to focus on 'what the [ECJ] does in concrete cases'.

¹¹⁶*Kilpailu- ja kuluttajavirasto* (n 25), para 34; see also Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64(2) *The Antitrust Bulletin* 172, 178, where the author stresses that a provision's objectives should guide its interpretation.

¹¹⁷In that case, when the essential characteristics of the contract had been definitively determined.

¹¹⁸*Kilpailu- ja kuluttajavirasto* (n 25), para 35.

¹¹⁹*ibid* 37.

¹²⁰On teleological interpretation, see Koen Lenaerts and José A Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2013) *EUI Working Papers AEL* 2013/9, 24–29 <https://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1&isAllowed=y> accessed 30 August 2023.

¹²¹Considering that Article 101 and 102 TFEU supposedly share objectives (Case C-6/72 *Europemballage Corporation and Continental Can Company v Commission*, ECLI:EU:C:1973:22, para 25; Witt (n 116) 174; Jones, Sufrin and Dunne (n 1) 45), the reliance on Article 101 TFEU's objectives in assessing an infringement's duration further underlines that the same rules should apply when assessing the duration of an infringement of either Article 101 or 102 TFEU (similarly as in n 75 above).

¹²²*Kilpailu- ja kuluttajavirasto* (n 25), paras 35 and 37.

that the ECJ's approach to assess an infringement's duration seems to be based on the assumption that competition is a process that provides a wide variety of benefits, especially to consumers. If this process is restricted or distorted by anticompetitive effects of companies' market conduct, competition on the relevant market does not function as it should, and consumers are deprived of these benefits.¹²³ Thus, the competitive process, or simply competition, should be protected from restrictive effects that can restrict competition.¹²⁴

According to the ECJ therefore, an infringement lasts as long as a coordination's restrictive effects result in competitive conditions in the relevant market that do not correspond the undistorted state of competition, and thereby consumers are deprived of the benefits of competition. The ECJ can be seen to echo its judgment in *STM*, in which it stated that when assessing the existence of a restriction of competition, "[t]he competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute".¹²⁵ Just as the existence of an infringement in the first place, the identified restrictive effects should be reflected against this state of competition to define the infringement's ultimate duration.¹²⁶

Kilpailu- ja kuluttajavirasto exemplifies the relevance of the characteristics of the underlying competitive situation. It should be noted that one of the core aims of competitive tendering is to harness the potential of competition to receive the most advantageous terms for a (usually) one-off procurement of products or services.¹²⁷ In such cases, the temporal scope of competition is strictly limited to the beginning and end of the process. Therefore, in the context of a tendering process, no competition exists once the desired products or services have been procured and the process is complete – the tendering process is the competition that may be restricted, thus representing a sort of microcosm of competition.¹²⁸ While, as stated above, the specific application to the facts of

¹²³See similarly Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Thomson Reuters 2010) 20–21; Jones, Sufrin and Dunne (n 1) 26–27, where the authors refer to Bishop and Walker; see also Guidelines on the application of Article 81 (3) of the Treaty [2004] OJ C 101/08, para 13 (Article 81(3) Guidelines).

¹²⁴See also Jones, Sufrin and Dunne (n 1) 31 referring to the protection of the competitive process or protecting competition as a potential goal of competition law.

¹²⁵Case C-56/65 *Société Technique Minière (L.T.M) v Maschinenbau Ulm (M.B.U)*, ECLI:EU:C:1966:38, at 249–50.

¹²⁶Ibáñez Colomo (n 115) 327 and 334–35; Lindeboom (n 111) 93; see also Article 81(3) Guidelines (n 123), para 17.

¹²⁷In the context of public procurement, see Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Hart Publishing 2011) 101–05; see also Jones, Sufrin and Dunne (n 1) 660–61.

¹²⁸See similarly Lindeboom (n 111) 94.

Kilpailu- ja kuluttajavirasto should be limited for similar infringements, the general rule that an infringement continues as long as the restriction of competition persists, in other words that the underlying competitive process does not produce its desired outcome due to effects of undertakings' conduct, should have a wider application. By limiting the infringement's duration to the conclusion of the contract, the ECJ's judgment in *Kilpailu- ja kuluttajavirasto* simply emphasizes the relevance of the underlying competitive conditions' characteristics – in that case, no competition could have existed after the conclusion of the contract. Thereby, it seems to strictly tie the restriction of competition and relevant restrictive effects to the underlying competitive conditions and competition on that specific market.

Effects on competition determine the infringement period

When discussing the restrictive effects on competition, the ECJ highlighted “the exclusion of competing tenderers and/or the potential artificial restriction of the customer's choice”.¹²⁹ As stated above, these can be seen as a reflection of the ECJ's teleological approach, namely that the EU competition rules are designed to protect both “the direct interests of competitors and consumers” as well as “the structure of the relevant market and thus competition as such”, and that these objectives should guide the assessment of the infringement period.¹³⁰

The reference to exclusion of competitors and protection of market structure, or competition “as such”, may be reflected against the most commonly identified sources of anticompetitive harm, namely exclusion (or foreclosure) and collusion.¹³¹ Exclusion is commonly understood as the hindering of the ability of competitors from competing in the market, especially by making entry and expansion more difficult, and potentially ultimately forcing them to exit the market.¹³² In its recent case law concerning Article 102 TFEU, the ECJ has used similar expressions to define exclusionary effects. According to the ECJ, exclusionary effects refer to driving “competitors from the market concerned” and “making it more difficult for competitors to enter or remain on the

¹²⁹*Kilpailu- ja kuluttajavirasto* (n 25), para 37.

¹³⁰*ibid*, para 34.

¹³¹See e.g. Ibáñez Colomo (n 115) 318–20, where the author refers to exclusion and collusion as “[m]echanisms through which [a]nticompetitive [e]ffects are [m]anifested” and includes exploitation of market power in the context of Article 102 TFEU.

¹³²Jones, Sufirin and Dunne (n 1) 361 Ibáñez Colomo (n 115) 319 and 338; see also Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C 259/01, para 21 (Horizontal Guidelines), and Guidelines on vertical restraints [2022] OJ C 248/01, para 18 (Vertical Guidelines).

market in question”.¹³³ More specifically, the ECJ has referred to exclusionary effects explicitly as harm to market structure.¹³⁴

Collusion on the other hand refers to coordination of competitive behaviour with the result of softening of competition between the colluding parties, and potentially with third-party market actors.¹³⁵ Collusion may also be described as decreasing the colluding parties’ decision-making independence.¹³⁶ By colluding, undertakings can achieve anti-competitive outcomes, such as higher prices or restricted output, which they would not be able to in conditions of “normal” competition, when the actions and intentions of competitors are shrouded by competitive uncertainty.¹³⁷ While not explicitly referred to as a restrictive effect on competition in *Kilpailu- ja kuluttajavirasto*, the ECJ has identified collusion as harm to competition in other cases. In *T-Mobile*,¹³⁸ the ECJ found that since the EU competition rules require independent decision-making regarding market conduct, they prohibit contacts that reduce competitive uncertainty between undertakings, or “uncertainty as to the operation of the market in question”, that thereby create “conditions of competition which do not correspond to the normal conditions of the market in question”.¹³⁹ Considering the ECJ’s prior approach to collusion as harm to competition and its reference to *T-Mobile* in *Kilpailu- ja kuluttajavirasto*, a collusive outcome should be considered as a relevant restrictive effect on competition when assessing an infringement’s duration.

The relevance of protection of “competition as such” in an infringement’s duration can thus be seen as manifesting in extending the duration of the infringement to the period during which the exclusionary

¹³³Case C-377/20 Servizio Elettrico Nazionale v Autorità Garante della Concorrenza e del Mercato and Others, ECLI:EU:C:2022:379, paras 53 and 61. While not using the explicit term ‘foreclosure’ or ‘exclusion’, for an example in the context of Article 101 TFEU, see Case C-179/16 F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato, ECLI:EU:C:2018:25, where a concerted campaign to disseminate misleading information resulting in a fall in demand for a competing product was considered an infringement of Article 101 TFEU.

¹³⁴E.g. Jones, Sufrin and Dunne (n 1) 365; Servizio Elettrico Nazionale (n 133), para 61; see also Bishop and Walker 230, where the authors refer to exclusionary practices as ones that ‘harm consumers indirectly by excluding or foreclosing competitors’.

¹³⁵Bishop and Walker (n 123) 163–64; Ibáñez Colomo (n 115) 319 and 338.

¹³⁶Horizontal guidelines, para 21. It should be noted that EU competition law concerns *explicit* collusion, namely collusion achieved by explicit inter-firm coordination, while *tacit* collusion, or a collusive outcome without explicit coordination, is not a concern (Bishop and Walker (n 123) 164–65; Jones, Sufrin and Dunne (n 1) 653). Moreover, the competition law notion of collusion should be distinguished from the economic notion of collusion (to that end, see Khoo (n 84) 53–54).

¹³⁷Bishop and Walker (n 123) 169.

¹³⁸To which the ECJ referred to in para 34 of *Kilpailu- ja kuluttajavirasto* (n 25) to extract the objectives of Article 101 TFEU.

¹³⁹*T-Mobile* (n 95), paras 32–35; see also more recently *Nichicon Corporation* (n 16), paras 57–60, in which the ECJ upheld a similar assessment by the GC.

effects and/or the collusive outcome, or “collusive equilibrium”,¹⁴⁰ persists. At the same time, protection from exclusion could be seen as protecting the interests of competitors by protecting the competitive process.¹⁴¹

On the other hand, the “artificial restriction of the customer’s choice” could be seen to reflect Article 101 TFEU’s aim to protect consumers’ interests. Indeed, the CJEU has recently stated that the “well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law”.¹⁴² On a first reading, the reference to the customers’ choice could indeed be considered as referring to the conduct’s effects on consumer welfare, which is widely considered to be the goal of the EU competition rules.¹⁴³ However, this might not be entirely the case as regards the duration of an infringement. First, on a more semantic level, the ECJ identified the restriction of customer choice as a restrictive effect *on competition*, not a negative effect to the customer.¹⁴⁴ Indeed, the central concern of the ECJ seemed to be the fact that Fingrid had been deprived the possibility to benefit from a competitive market.¹⁴⁵ Second, while the ECJ considered that the infringement had been a “manipulation of a tender procedure” by price-fixing, it did not consider the potential effect on the price paid by Fingrid as a relevant restrictive effect on competition.¹⁴⁶ In relation to this, it is noteworthy that the ECJ referred to Advocate General (AG) Pitruzzella’s Opinion,¹⁴⁷ where the AG differentiated between restrictive effects on competition, including the restriction of the customer’s choice, on the one hand and “wider economic effects caused to the customer and, incidentally, to the

¹⁴⁰See Khoo (n 84) 50 and 55.

¹⁴¹See similarly Bishop and Walker (n 123) 18–19; Jones, Sufrin and Dunne (n 1) 31; for two somewhat different viewpoints on the discussion on whether only the exclusion of ‘as efficient’ competitors is relevant for the application of EU competition law, see Ibáñez Colomo (n 115) 339–41 and Fernando Castillo de la Torre, ‘Is the Effects-Based Approach Too Cumbersome?: Taking Stock of Recent Practice and Case Law on Article 102 TFEU’ in Assimakis Komninos, Adina Claiici and Denis Waelbroeck (eds), *The Transformation of EU Competition Law* (Kluwer Law International 2023) 145–98, 149–51, 181–83 and 188–92, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=439540> accessed 30 August 2023.

¹⁴²Servizio Elettrico Nazionale (n 133), para 46, in the context of Article 102 TFEU; for a similar line of argumentation as the ECJ’s in Servizio Elettrico Nazionale on the role of consumer welfare in the context of Article 101 TFEU, see Luc Peeperkorn, ‘Coherence in the Application of Articles 101 and 102: A Realistic Prospect or an Elusive Goal?’ (2016) 39(3) *World Competition* 389, 390–93.

¹⁴³Especially by the EC: see e.g. Bishop and Walker (n 123) 29–30; Jones, Sufrin and Dunne (n 1) 46–50; Whish and Bailey (n 1) 21–22.

¹⁴⁴Kilpailu- ja kuluttajavirasto (n 25), para 37: ‘restrictive effects of the cartel *on competition* which consist in ... the potential artificial restriction of the customer’s choice’ (emphasis added).

¹⁴⁵ibid, paras 35 and 37.

¹⁴⁶ibid, paras 27–28, 31–32, 35 and 37.

¹⁴⁷Opinion of Advocate General Pitruzzella in Case C-450/19 Kilpailu- ja kuluttajavirasto, ECLI:EU:C:2020:698, para 39.

customers of the customer” on the other.¹⁴⁸ The ECJ ultimately rejected arguments that the infringement should have continued until the final instalment of the price was paid or even until it could affect the price paid by Fingrid’s customers and stated that such effects may be subject to damages claims.¹⁴⁹

In effect, the ECJ seems to thereby have excluded the relevance of any other economic effects caused by the cartel to the customer than the restriction of its choice, and simultaneously any effects it might have on the customer’s customers, in an infringement’s duration. Crucially, such excluded “wider economic effects” appear to encompass the potentially higher price resulting from the cartel paid by both Fingrid and its customers. This indicates that any price effects of infringements of the EU competition rules or damages suffered as a result of such infringements would have no bearing on an infringement’s duration.¹⁵⁰ A price effect, or an overcharge, refers to the transfer of wealth from customers to the infringers and, consequently, the harm or damage inflicted upon customers by an infringement of competition law.¹⁵¹ Price effects or damages may be incurred by the infringing companies’ customers directly in the form of an overcharge and indirectly in the form of loss of sales.¹⁵² Moreover, as argued by the FCCA in *Kilpailu- ja kuluttajavirasto*, an infringement might result in a passing-on of the overcharge to the direct customer’s customers.¹⁵³ Due to the pass-on effect, an infringement of competition law might cause damages to an extremely wide-reaching array of different economic actors both up- and downstream of the market where the infringement took place, which might also materialize at very different times.¹⁵⁴ Furthermore, competition law infringements can cause a multitude of different types of damages that similarly may be felt at different levels of the economy and at different times.¹⁵⁵

¹⁴⁸Kilpailu- ja kuluttajavirasto (n 25), para. 37.

¹⁴⁹ibid 37–38. According to AG Pitruzzella, the pass-on of the distorted price was ‘only one consequence of the infringing conduct’, but not proof that ‘the conduct continued over time’ (AG Pitruzzella’s Opinion in *Kilpailu- ja kuluttajavirasto* (n 147), para 39).

¹⁵⁰According to AG Pitruzzella, while being one of the ‘consequences’ of Eltel’s ‘infringing conduct’, the pass-on by Fingrid of the potentially higher price ‘did not in itself prove that the conduct continued over time’, and implied that such effects did ‘not strictly [relate] to the alleged anticompetitive conduct’ (AG Pitruzzella’s Opinion in *Kilpailu- ja kuluttajavirasto* (n 147), paras 39–40).

¹⁵¹Frank Maier-Rigaud and Ulrich Schwalbe, ‘Quantification of Antitrust Damages’, in David Ashton (ed.), *Competition damages actions in the EU: law and practice* (Edward Elgar 2018) 405–06.

¹⁵²ibid 415; Bishop and Walker (n 123) 700–01. Bishop and Walker refer to these as the ‘direct effect’ and the ‘output effect’ respectively; recoverable damages have been similarly defined in EU law: see *Joined Cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloud Adriatico Assicurazioni SpA and others*, ECLI:EU:C:2006:461, para 95; *Damages Directive*, art 3(2).

¹⁵³Bishop and Walker (n 123) 701.

¹⁵⁴Maier-Rigaud and Schwalbe (n 151) 411–18.

Due to their (to some extent) unpredictable nature and the broad range of different types that may or may not ultimately manifest, an approach disregarding damages and price effects from an infringement period therefore seems justified.¹⁵⁶

The ECJ's approach therefore appears to lay emphasis on the effective functioning of the market and the consumers' and customers'¹⁵⁷ ability to enjoy the benefits of free and undistorted competition when assessing an infringement's duration, while the relevance of any damages resulting to consumers or customers from the prevention of the materialization of the positive effects of competition is assigned to the realm of competition law damages claims.¹⁵⁸ In other words, while usually causing both types of harm, an infringement's duration would be determined based on the different inefficiencies caused in the relevant market resulting from it due to e.g. foreclosure or collusion, and not on the resulting price effects and other damages inflicted upon a variety of market actors.¹⁵⁹ The ECJ's focus on the effective functioning of the market when assessing an infringement's duration reflects the view that the objective of the EU competition rules is primarily to protect competition as a process.¹⁶⁰

It should be noted that there is a (at least theoretical) difference with the exclusion of price effects from having relevance in an infringement's duration and the rule established in *Quinn Barlo* according to which an

¹⁵⁵For example, the ECJ has recognized that damages resulting from higher prices charged by non-cartelists in the market made possible changes in the competitive conditions brought about by the cartel ('umbrella pricing') are recoverable (Case C-557/12 *Kone AG and others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317).

¹⁵⁶Such approach is also in line with AG Pitruzzella's Opinion, according to which the infringing undertakings should have a possibility to affect the cessation of their infringement (AG Pitruzzella's Opinion in *Kilpailu- ja kuluttajavirasto* (n 147), para 38).

¹⁵⁷*Kilpailu- ja kuluttajavirasto* (n 25) reflects the fact that EU competition law is concerned with the interests of both intermediate and final customers; see also Jones, Sufrin and Dunne (n 1) 47; Servizio Elettrico Nazionale (n 133) para 46.

¹⁵⁸In connection with this, in its recent case law concerning damages actions, the ECJ seems to have recognized a somewhat similar distinction between the relevancies of inefficiencies on the one hand and price effects caused by competition law infringements on the other. By helping to ensure full compliance of Articles 101 and 102 TFEU and the prevention of anticompetitive conduct, the ECJ has noted that private damages not only provide 'a remedy for the direct damage alleged to have been suffered ... but also for the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned' (Case C-163/21 *AD and Others v PACCAR Inc and Others*, ECLI:EU:C:2022:863, paras 55–56; Case C-312/21 *Tráficos Manuel Ferrer SL v Daimler AG*, ECLI:EU:C:2023:99, paras 41–42).

¹⁵⁹On the different notions of harm to competition (or inefficiencies) caused by competition law infringements, see Maier-Rigaud and Schwalbe (n 151) 403–11.

¹⁶⁰For a similar conclusion in the context of Article 102 TFEU see Raffaele Di Giovanni Bezzi, 'A Tale of Two Cities: Effects Analysis in Article 102 TFEU Between Competition Process And Market Outcome' (2023) 14(2) *Journal of European Competition Law & Practice* 83. More generally on the discussion of the distinction between protecting the competitive process or consumer welfare, see Peepkorn (n 142), and Wouter PJ Wils, 'The Judgment of the EU General Court in *Intel* and the So-Called More Economic Approach to Abuse of Dominance' (2014) 37(4) *World Competition* 405.

infringement can be considered to continue as long as the infringing undertakings apply a price based on coordination contrary to Article 101 TFEU. Higher prices are relevant as long as they are a manifestation of continuing conduct and the collusion underlying that conduct, in other words how long the infringing undertakings keep charging them, but the precise point of time when a customer suffers the price effect is irrelevant for an infringement's duration. These two time periods usually overlap in cases of collusion, but depending on the characteristics of the infringement, the illegal price may be applied also after a customer has suffered from the overcharge, i.e. beyond the time when the customer purchases the cartelized product.¹⁶¹ In cases of exclusion, the price effect may manifest on many different times. On the one hand, the restriction and price effect can occur simultaneously, when the excluded competitor suffers indirect damages in the form of loss of profit due to reduction in demand. On the other hand, the altered competitive conditions might enable the infringing parties to unilaterally raise their prices once their competitor has been excluded. In such cases, the infringement would end once the exclusionary effect has worn off, but the price effect to individual consumers would manifest only after the exclusion has taken place.¹⁶² Such discrepancies in the time of occurrence of price effects further underline that excluding them from affecting an infringement period brings about predictability in the enforcement of the EU competition rules.

Finally, the relevance of effects in an infringement's duration's assessment suggests that, similarly as with when assessing whether certain conduct constitutes an infringement in the first place, an infringement continues as long as the relevant anticompetitive effects can manifest in the relevant underlying competitive conditions.¹⁶³ Therefore, continuing the conduct that established the infringement in the first place is in itself insufficient to justify a finding that the infringement continued after it had "formally ended". However, the role of effects also suggests that an infringement's continuation would not always necessitate explicit continuing

¹⁶¹This would be the case e.g. if the infringement concerned products that the infringing parties kept on offer constantly in large volumes. While an individual customer would suffer from the overcharge when she bought one individual copy of the product, the infringing undertakings would continue to charge the unlawful price for the rest of the cartelized products, and thus the infringement would continue.

¹⁶²The situation would be different if the parties had also agreed to raise their prices after the exclusion of a competitor – in such cases, the infringement would continue as long as the parties apply the unlawfully agreed price.

¹⁶³See e.g. Case C-307/18 Generics (UK) Ltd and Others v Competition and Markets Authority, ECLI:EU:C:2020:52, paras 30–31 and 154; Castillo de la Torre (n 141) 149–51; Ibáñez Colomo (n 115) 320.

conduct after the initial contact.¹⁶⁴ This would be so especially in cases of concerted practices, where a one-off contact softens competition in the market, in other words creates a collusive equilibrium. For example, if, during a one-off contact at the beginning of the final quarter of a year when pricing decisions for following quarters are made (period X), undertaking A contacts undertaking B to reveal its pricing policy for the first quarter of the following year (period Y), competition has been softened between A and B during period X, and the competitive conditions do not correspond the normal market conditions of competitive uncertainty when the pricing decisions are made. While the infringement would continue for period Y if the parties applied the unlawful price during that time, it would last starting from the contact until at least the end of period X without any explicit market action being necessary.¹⁶⁵

All in all, the interrelation between the original conduct, the underlying competitive conditions, and the relevant restrictive effect in assessing an infringement's duration should encourage claimants to establish and describe in a clear and consistent manner a theory of harm which may be relied upon when assessing the infringement's duration.¹⁶⁶

Conclusions

The duration of an infringement of the EU competition rules carries significant relevance regarding several aspects of the enforcement those rules. First, duration is one of the central aspects of which a claimant alleging an infringement of the EU competition rules carries the burden of proof. Second, it is a determining factor when assessing the amount of the fine to be imposed on an undertaking breaching those rules. Third, the conclusion of an infringement affects the limitation periods both for imposition of penalties and damages claims. And finally, the assessment of the duration of the potential novel forms of competition law infringements might prove challenging without clear guidelines.

This article has aimed to sort out and clarify the ECJ's approach to assessing the duration of an infringement of EU competition rules. It

¹⁶⁴Cf with Faull and Nikpay (n 1) 216; Bailey and John (n 1) 116.

¹⁶⁵However, due to the EU competition law assumption attached to concerted practices according to which players remaining active in the market have taken the contents of their anticompetitive contacts into account when deciding on their market conduct described above (n 95 and the accompanying text), the distinction between the time of the collusive equilibrium and the time of application of the unlawfully determined price might remain mostly theoretical.

¹⁶⁶See similarly Bezzi (n 160) 92.

argues that for an infringement to continue beyond its “formal duration”, namely the duration of an anticompetitive agreement or contact, the restriction of competition resulting from the original conduct must continue. This means that the infringement continues as long as the original conduct’s restrictive effect on competition, or its collusive or foreclosure effect, in the relevant underlying conditions of competition persists. It presupposes the proper identification and definition of the relevant competitive conditions as well as the restrictive effects therein. The infringing parties’ continuing conduct, e.g. the charging of a price based on an anticompetitive contact, after the formal duration may further extend the infringement period. However, while likely simultaneous with the charging of an unlawful price, and thus continuation of the infringement based on continuing conduct, any price effects or other damages inflicted upon the customers of the infringing parties do not affect the infringement period.

The ECJ’s approach seems to focus on the effects of anticompetitive conduct to the underlying competitive process and reflect its view that the EU competition rules primarily protect competition as a process to ensure that consumers may benefit from the full range of benefits brought about by effective competition. In this view, competition can be compared to a constantly running machine spewing out products wanted by consumers. If someone throws sand into the machinery, the machine starts coughing and operating poorly, potentially producing defective products at a slower pace. While consumers may rely upon the EU competition rules to receive compensation for faulty products, an infringement of those rules ends once the sand is cleaned out and the machine runs smoothly once again.

Acknowledgements

The author would like to thank Liisa Tarkkila for valuable comments.

Disclosure statement

No potential conflict of interest was reported by the author(s).