

SOME BRIEF CONSIDERATIONS
ON THE COMMISSION'S 'NON-UNLIMITED'
DISCRETIONALITY WHEN REJECTING
COMPETITION LAW COMPLAINTS
UNDER REGULATION 1/2003 - THE GENERAL
COURT'S RULING IN CASE T-201/11 SI.MOBIL V
EUROPEAN COMMISSION¹

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SUMMARY: 1. INTRODUCTION. 2. ANALYSIS OF THE *SI.MOBIL* RULING.
2.1. *Background*. 2.2. *Arguments of the parties*. 3. RULING OF THE
GENERAL COURT. 4. CONCLUSIÓN.

1. INTRODUCTION

According to the *Automec* case-law,² the European Commission has a discretion as to how it deals with complaints. That said, the Court of Justice of the European Union has clearly stated that the Commission's discretion

¹ The author together with PETER ALEXIADIS, a partner in Gibson Dunn & Crutcher LLP's Brussels office, acted for Si.mobil in Case T-201/11 *Si.mobil telekomunijacijske storitve d.d. v European Commission*, Ruling of 17 December 2014. The usual disclaimers apply.

² See, Case T-24/90 *Automec v. Commission* [1992], at paras. 73.

when rejecting complaints is «*not unlimited*».³ *Regulation 1/2003*⁴ awarded to the Commission two additional grounds under which to dismiss cases. Pursuant to Article 13 the Commission can dispose of complaints where «*one authority is dealing with the case*» (13(1)) or where a complaint «*has already been dealt with by another competition authority*» (13(2)).

In late 2014, the General Court has recently issued a Ruling in the context of the *Si.mobil* case interpreting the first of these provisions in a way which further enhances the Commission's «*not unlimited*» discretion when rejecting complaints (the «*Si.mobil* Ruling»⁵). More specifically, the General Court endorsed the Commission's deference to the National Competition Authorities of the EU Member States (the «NCA»s). In our view, in doing so, the General Court allowed the Commission to abdicate from its constitutional Role of Guardian of the Treaties and to disregard the effectiveness of the Competition provisions in those Treaties.⁶ The *Si.mobil* Ruling becomes particularly surprising in the light of a series of unambiguous and repeated statements of the Commission in relation to the institutional failures of certain NCAs.⁷

2. ANALYSIS OF THE SI.MOBIL RULING

2.1. Background

The *Si.mobil* Ruling hinged on the interpretation of Article 13(1) *Regulation 1/2003*, according to which, «*[t]he Commission may [...] reject a complaint on the ground that a competition authority of a Member State is dealing with the case*».

On 14 August 2009, Si.mobil telekomunikacijske storitve d.d. filed a complaint before the Commission against Telekom Slovenije d.d. («TS»), the incumbent mobile operator in Slovenia, for an alleged abuse of TS' dom-

³ See Case C-119/97 P *Ufex and Others v. Commission* [1999], at para. 89.

⁴ See *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 103] of the [TFEU]*, Official Journal L 001, 04/01/2003 P. 0001 – 0025.

⁵ See Ruling of the General Court of 17 February 2014 in Case T-201/11 *Si.mobil v European Commission* [Not Yet Reported.]

⁶ Moreover, the *Si.mobil* Ruling was issued in the context of a broader series of Rulings which further enhance the Commission's discretion when rejecting complaints, see ALEXIADIS, P. and FIGUEROA, P., «Commission Discretion Unchained», *Competition Law Insight*, 17 March 2015.

⁷ See, e.g., the Speech of former Vice-President ALMUNIA, «Honing the instruments of EU competition control», International Competition Law Forum, St. Gallen, 15 May 2014, where former Vice President Almunia expressed concerns in relation to the lack of resources and independence of certain NCAs.

inant position consisting, *inter alia*, in margin squeezes and predatory pricing. On 24 January 2011, the Commission rejected the complaint mainly on the grounds that the Slovenian NCA (the «UVK») was already dealing with the case.

Si.mobil challenged these findings on appeal before the General Court, clearly stressing that Article 13(1) of *Regulation 1/2003* should be interpreted in the light of the general principle of effectiveness of EU law.

2.2. Arguments of the Parties

The Commission's case rested on the proposition that Article 13 of *Regulation 1/2003* should be interpreted in such a manner that the mere fact that a NCA *claims to be dealing with a case* is sufficient in and of itself to enable the Commission not to take the case.⁸ The implications of the position of the Commission are both sweeping and, it is respectfully submitted, disturbing. Let's posit an imaginary Member State which, perhaps as a consequence of budgetary cuts and / or internal opposition to the application of the Competition provisions in the Treaties, reduces its NCA to a small office with a single civil servant, with a phone and a fax line. Under the Commission's interpretation, *even in scenarios with an effect on trade between Member States*, and thereby meriting the application of the EU Competition rules, as long as such NCA claims to deal with, let's say a margin squeeze case (to name an example which tends to be resource-intensive to investigate), the Commission would be obliged to relinquish jurisdiction (!).

However, such proposition would involve a dramatic re-assessment of the Commission's role as regards the exercise of its jurisdiction in relation to subject-matter which falls within the exclusive competence of the Union such as, for example, the Competition Rules necessary for the functioning of the internal market. The Commission's approach would have far-reaching implications for the Community's legal order. By *de facto* completely disregarding the general legal principle of «effectiveness» from its decision to assert jurisdiction to apply European law, the Commission would be undermining the very foundations of the Treaties whose application is entrusted to ensure pursuant to Article 17 of the *Treaty on the European Union* (the «TEU»).⁹

Si.mobil takes the view that the rationale behind the Commission's radical defence strategy betrays the fact that its case is weak as a matter of both legal principle and on the basis of the information on *the file*.

The idea of effectiveness underlies a series of developments in the sphere of judicial protection and has been recognised as a general principle of Euro-

⁸ See Case COMP/39.707 *Si.mobil / Mobitel* (the «Decision»), at Section 2(1).

⁹ See Application, at Section IV.3.

pean Union law by the Court of Justice of the European Union (the «CJEU»).¹⁰ According to the CJEU, this principle requires, at a minimum,¹¹ that the exercise of Community rights is not made virtually impossible or excessively difficult.¹² According to a general rule of interpretation which derives from the principle of hierarchy of norms, the interpretation of a Community measure must be such as to render it compatible with the TFEU and with the general principles of law.¹³ Therefore, Article 13 of *Regulation 1/2003* should be interpreted in a way that ensures the most effective application of the Competition Law provisions of the TFEU.¹⁴

Moreover, aside from the Commission's wrongful exclusion of the general principle of effectiveness from its interpretation of Article 13 of *Regulation 1/2003*, the Commission's position is also at odds with both a literal and a purposive interpretation of *Regulation 1/2003* and its implementing rules.

Contrary to what the Commission suggests in its Defence, *Regulation 1/2003* was not introduced only, or even primarily, to achieve a decentralized application of the competition rules, and certainly *not at the expense of the doctrine of effectiveness of enforcement of Competition rules*.¹⁵ The following considerations provide clear evidence that the Commission's rather absolutist views are without foundation:

¹⁰ See, e.g., Joined Cases C-46 and C-48/93, *Brasserie du Pêcheur v Germany and the Queen v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029, at para. 95. Professor Snyder highlights that «[t]he general principles of law, elaborated by the Court of Justice [...] surely include the right to an effective remedy» (see Snyder, F., «The Effectiveness of European Community Law: Institution, Processes, Tools and Techniques», *MLR 56:1*, January 1993, at p. 51).

¹¹ As explained in Tridimas, T, *The General Principles of EU law*, Oxford EC Law Library, at p. 424.

¹² See, *inter alia*, Case C-199/82 *Amministrazione delle Fianze dello Stato v. SpA San Giorgio* [1983] ECR 3595, at para. 14.

¹³ See Case 218/82 *Commission v Council* [1983] ECR 4063, at para. 15 and Case C-314/89 *Rauh* [1991] ECR I-1647, at para 17.

¹⁴ In any event, the General Principles of European Union law form part of the Union's legal order and their infringement therefore constitutes an «*infringement of the Treaties or of any rule of law relating to their application*» within the meaning of the second paragraph of Article 263 TFEU (see Case C-112/77 *Töpfer v. Commission* [1978] ECR 1019, at para. 19). In other words, a Decision should be annulled insofar as it would jeopardise the general principle of effectiveness, even if it were, *quod non*, to otherwise constitute a reasonable interpretation of Article 13 of *Regulation 1/2003*.

¹⁵ It is rare for rules on the allocation of jurisdiction or conflicts of law to completely disregard considerations of *effectiveness*. For example, much of U.S. law concerned with the efficient allocation of jurisdiction, and most presumptive jurisdictional measures, allocate jurisdiction based on the principle of effective implementation, as opposed to the rigid adherence to arbitrary rules (see, e.g., Hay, P., *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. Colo. L. Rev. 9, 10, 1988).

- i. Regulation 1/2003 begins in its very first Recital with the observation that «*in order to establish a system which ensures that competition in the common market is not distorted, Articles [101] and [102] of the Treaty must be applied effectively and uniformly in the Community*».
- ii. According to Recitals 2 and 3 of Regulation 1/2003, the de-centralised system of implementation of the Competition Rules that the Regulation establishes intends to achieve a balance between «*the need to ensure effective supervision on the one hand and to simplify administration to the greatest possible extent on the other*».
- iii. The fact that achieving the effective application of Competition Rules is the key objective of the Regulation becomes further evidenced at its Recital 6, according to which the rationale for de-centralised enforcement is precisely to ensure the effectiveness of Competition Rules. In the words of Recital 6: «*[i]n order to ensure the effective enforcement of the Community competition rules, the competition authorities of the Member States should be associated more closely with their application*».¹⁶ The Regulation further highlights that it is only «*to this end that [the said competition authorities of the Member State]s should be empowered to apply Community law*».
- iv. Similarly, according to the European Commission's *Notice on the Handling of Complaints by the Commission under Articles [101 and 102 TFEU]* (the «*Notice on the Handling of Complaints*»): «*[t]he Regulation [1 /2003] pursues the objective of ensuring the effective enforcement of Articles [101 and 102 TFEU] through a flexible division of case work between the public enforcers in the Community*».¹⁷

Since ensuring the effectiveness of the competition provisions of Article 101 and 102 TFEU is one of the overarching objectives of *Regulation 1/2003*, it is, unsurprisingly, also a key objective that should be pursued by the network of National Competition Authorities created in order to implement the said Regulation. According to the Commission's *Notice on cooperation within the Network of Competition Authorities* (the «*Notice on the Network of Competition Authorities*»), «*[t]he network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules*».¹⁸

¹⁶ Further references to the principle of effectiveness can be found at Recitals 5 and 8 of *Regulation 1/2003*.

¹⁷ See *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ C 101, 27.4.2004, p. 65–77, at para. 20.

¹⁸ See *Commission Notice on cooperation within the Network of Competition Authorities*, Official Journal C 101, 27.04.2004, p. 43–53, at para. 3. Similarly, following the *Joint Statement of the Council and the Commission on the Functioning of the Network of*

In short, far from being «irrelevant», as the Commission argued during the proceedings, the principle of effectiveness lies at the core of *Regulation 1/2003* and the system of allocation of jurisdiction established by that Regulation. Consequently, when in doubt as to how to interpret a rule, in our case, Article 13 of *Regulation 1/2003*, the Commission should pursue an interpretation that is more conducive to achieving an effective application of the Competition Law provisions.

3. RULING OF THE GENERAL COURT

However, on 17 December 2014, the General Court upheld the Commission Decision, *without any resort whatsoever whatsoever to the general principle of EU law when interpreting Regulation 1/2003*. More specifically, Si.mobil had alleged that the UVK did not have an effective system to apply EU Competition law. Despite conceding that the «*objective pursued by the [R]egulation 1/2003*» is to safeguard «*the effective application of the EU competition rules is attained*»,¹⁹ the General Court found that Article 13(1) of the Regulation does not require the Commission to carry out such an assessment. In the words of the General Court:

*«the requirement to ensure the effective application of EU competition rules cannot [...] have the effect of imposing an obligation on the Commission to verify [...] whether the competition authority concerned has the institutional, financial and technical means available to it to enable it to accomplish the task entrusted to it by that regulation.»*²⁰

In doing so, the General Court disregarded unambiguous statements in reports of the Commission as to institutional failures of the UVK to handle telecommunications sector-related competition law complaints. Moreover, arguably contradicting its finding according to which the Commission could disregard whether an NCA has the ability to effectively apply EU Competition law, the GC found that a statement made by a former President of the UVK, «*to the effect that, at the material time, that competition authority was in favour of the Commission examining the case does not show that the UVK*

Competition Authorities (the «Joint Statement on the Network of Competition Authorities»): «*[t]he cooperation within the Network is dedicated to the effective enforcement of EC competition rules throughout the Community*», at para. 5. See also para. 2, where it is stated that «*[i]n order to ensure that the Community competition rules are applied effectively and consistently, the Commission and the national competition authorities designated by the Member States [...] form together a network of competition authorities [...] for the application in close cooperation of Articles [101] and [102] of the Treaty*».

¹⁹ See Case T-201/11 *Si.Mobil v. Commission* [2014], at para. 56.

²⁰ See Case T-201/11 *Si.Mobil v. Commission* [2014], at para. 57.

did not have the capacity to deal with it».²¹ I.e., as long as an NCA has begun to deal with a case, even if the NCA in question clearly indicates that the Commission should take it, the Commission will not be able to.

4. CONCLUSION

«I will show you fear in a handful of dust»

(T. S. Eliot, «The Waste Land»)

The *Si.mobil* is disturbing in its disregard of the EU general principle of law of effectiveness and the Commission's preeminent Role as the Guardian of the exclusive competences of the Union. It should be highlighted, in this regard, that curtailing the powers of the discretionary powers of public authorities is a role that general principles of law usually enjoy in public law proceedings. In the words of Professor Tridimas, this principle turns the discretion left by the law to the authorities of the communities «*into an obligation so as to enhance the protection of Community Rights*».²²

The *Si.mobil* Ruling will place additional power (and burdens) on the NCAs during times where these face budgetary cuts and when the broader *ethos* in Europe is arguably sliding towards nationalism. The *Si.mobil* Ruling will make it (even more) difficult to make big national champions in countries more prone to regulatory capture subject to the EU Competition rules: all the national incumbents will need is to convince a national NCA to claim

²¹ See Case T-201/11 *Si.Mobil v. Commission* [2014], at para. 65.

²² See Tridimas, T., *The General Principles of EU law*, Oxford EC Law Library, at p. 422, quoting Joined Cases C-430 and C-431/93 *van Schijndel and van Veen v SPF* [1995] ECR I-4705. Note that this would also be the case under the laws of several decentralized Member States. For example, both under German and Spanish Public Law, the Administration, even when exercising discretionary powers, can never act in an unfettered manner, and one of its limits is set forth in the General Principles of Law (Proportionality, Human Rights, etc.). See regarding German law the rulings of the *Bundesverfassungsgericht* (German Federal Constitutional Court) BVerfGE volume 8 (1959), p. 155, 169 ff.; volume 40 (1976), p. 237, 247 ff.; volume 114 (2006), p. 196 ff and the *Bundesverwaltungsgericht* (German Federal Administrative Court), BVerwGE volume 117 (2003), 313, 317 ff. Regarding Spanish Law, and in the words of García de Enterría and Tomás Ramón Fernández: «*the law, which awarded the Administration the power to act in a discretionary manner in the first place, did not, in order to do so, derogate the entire Legal Order which, including the General Principles of Law, is still binding on the Administration*» (see GARCÍA DE ENTERRÍA, E. and FERNÁNDEZ, T. Ramón, *Curso de Derecho Administrativo. I*, Thomson Civitas, 2004 at p. 482; see further PARADA, R. *Derecho Administrativo I Parte General*, Marcial Pons, 2007, at pp.107 and 108). There are also rulings by the *Tribunal Supremo* (Spanish Supreme Court) to this effect (see, *inter alia*, rulings of 28 June 1978, 30 November 1980, 6 November 1981, 22 February 1984, 12 June 1985 and 1 and 15 of December of 1986).

it is investigating the case and the Commission will be pre-empted from taking it. We fail to see why the Commission and the General Court have cornered themselves into such scenario.

TITLE: Algunas breves consideraciones sobre la discrecionalidad 'no ilimitada' de la Comisión rechazando recursos de la Ley de Competencia conforme a la Regulación 1/2013 – La Resolución del Tribunal General en el caso T-201/11 Si.Mobil vs Comisión Europea.

RESUMEN: A finales de 2014 la Asamblea Legislativa ha publicado una Decisión en el contexto del caso Si.mobil que interpreta el artículo 13 de la Regulación 1/2003 en un camino que apuesta por la «no ilimitada» discrecionalidad de la Comisión para rechazar recursos. La mencionada Decisión estriba en la interpretación del ya mencionado artículo 13 que se interpreta por Si.mobil a la luz del principio general de eficacia de la ley de la Unión Europea. En efecto, la red formada por las autoridades de competencia debería asegurar tanto el reparto eficiente de trabajo como una efectiva y constante aplicación de las reglas de competencia de la Comunidad Europea. Mientras tanto, la Comisión propone que el artículo 13 de la Regulación 1/2003 debería ser interpretado de tal manera que el mero hecho de que una Autoridad de Competencia Nacional aduzca que está conociendo de un asunto resulte suficiente para incapacitar a la Comisión a que conozca del asunto. A pesar de esa disputa, lo cierto es que el 17 de diciembre de 2014, la Asamblea Legislativa ha secundado la Decisión de la Comisión.

PALABRAS CLAVE: discreción «no ilimitada», artículo 13, principio de eficacia, Autoridad de Competencia Nacional.

ABSTRACT: In late 2014, the General Court has recently issued a Ruling in the context of the Si.mobil case interpreting the first of these provisions in a way which further enhances the Commission's «not unlimited» discretion when rejecting complaints (the «Si.mobil Ruling»). The Si.mobil Ruling hinged on the interpretation of Article 13(1) Regulation 1/2003 that is interpreted by Si.mobil in the light of the general principle of effectiveness of EU law. Indeed, the network formed by the competition authorities should ensure both an efficient division of work and an effective and consistent application of EC competition rules. Meanwhile, The Commission proposes that Article 13 of Regulation 1/2003 should be interpreted in such a manner that the mere fact that a NCA claims to be dealing with a case is sufficient in and of itself to enable the Commission not to take the case. Despite the fact that dispute, the truth is that on 17 December 2014, the General Court upheld the Commission Decision.

KEY WORDS: «not unlimited» discretion, Article 13, principle of effectiveness, National Competition Authority.

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