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Reopening EU Competition Investigations After Judicial Annulment: Beyond Procedural Errors

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I. Introduction

In case T-68/09 *Soliver v Commission*[1] the General Court (the 'GC') held that Soliver was not aware of the overall *Car glass* cartel and fully annulled the decision with respect to Soliver. At the same time, however, the GC found that Soliver had engaged in anticompetitive conduct, in particular a series of bilateral contacts with the three other *Car glass* cartel participants.[2] Despite this finding, Soliver escaped unpunished because the Commission had not explicitly qualified this narrower anticompetitive conduct as a separate infringement in the *Car glass* decision and, therefore, the GC was unable to partially annul the decision. The Commission has not followed up since on this finding by reopening proceedings against Soliver. A new investigation against Soliver in relation to the narrower infringement may have been deemed to violate the principle of 'ne bis in idem'. In particular, the *PVC II* case law[3] essentially ruled that the adoption of a new decision is only possible when Commission decisions are annulled for procedural reasons.

Yet, *Soliver* and other recent cases[4] beg the question whether this case law is too lenient because it allows undertakings, whose participation in a serious breach of competition rules is beyond doubt, to escape unscathed if the Commission errs in defining the scope or the legal qualification of their wrongdoings.

This article discusses whether reopening EU competition investigations is lawful in *Soliver*-type cases and concludes that in these cases the Commission should have the power to adopt a new decision.

Key Points

- The PVC II case law on the principle of 'ne bis in idem' prevents the reopening of proceedings if the EU Courts have already ruled on the substance of the case.
- In the Soliver and Aalberts cases, the EU Courts annulled the respective Commission decisions in their entirety while, at the same time, finding that the undertakings concerned had violated EU competition law.
- This article challenges the PVC II case law by arguing that the Commission could reopen proceedings against Soliver and Aalberts because in such cases the EU Courts, which only carried out a review of legality, could not render a 'final judgment' within the meaning of the principle of 'ne bis in idem'.

II. The legal framework

According to the *PVC II* case law, the principle of 'ne bis in idem', which is a fundamental principle of Union law enshrined in Article 4(1) of Protocol No 7 to the European Convention on Human Rights (the 'ECHR') and in Article 50[5] of the Charter of Fundamental Rights of the European Union (the 'Charter'), precludes, in competition matters, an undertaking from being found guilty or from proceedings being brought against it a second time on the grounds of anticompetitive conduct with respect to which it was penalised or declared not liable by a previous decision which is not subject to appeal.

This case law also held that, on the other hand, the principle of 'ne bis in idem' does not in itself preclude the resumption of proceedings with respect to the same anticompetitive conduct where the first decision was annulled for procedural reasons—without any ruling having been given on the substance of the alleged facts,

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1 Case T-68/09, *Soliver v Commission*, EU:T:2014:867. The names of judgments referred to in this article are written in italics.

2 *Soliver*, paras 82, 87, 103, 107.

3 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P, and C-254/99 P *Limburgse Vinyl Matschappij and Others* v *Commission* ('PVC II'), EU:C:2002:582, paras 59-60.

4 See Case T-104/13, *Toshiba v Commission*, EU:T:2015:610, paras 78, 86-87 and article 1 of the operative part; Cases C-287/11 P, *Commission v Aalberts Industries and Others*, EU:C:2013:445 and T-385/06—*Aalberts Industries and Others v Commission*, EU:T:2011:114.

5 Article 50 reads: 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence. No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

since the annulment decision cannot in such circumstances be regarded as an acquittal within the meaning given to that expression in penal matters. In such a case, the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them.[6]

Paragraphs 1 and 2 of Article 4 of Protocol No 7 to the ECHR state that:

> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

A court decision is 'final' if it has acquired the force of *res judicata*, when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.[7]

III. Did the court deliver in *Soliver* a 'final judgment' in the meaning of the principle of 'ne bis in idem'?

In my view the interpretation that 'any ruling having been given on the substance of the facts alleged',[8] set out in *PVC II,* amounts to a final acquittal or conviction in any circumstance is debatable. There are situations where a judgment on the substance of the facts should not lead to final acquittal or conviction within the meaning of the ECHR.

The principle of 'ne bis in idem' was drafted against the backdrop of 'hard core' criminal cases where national courts have wide powers to deliver a judgment acquitting or convicting an individual or prosecuted entity. Generally, national criminal courts may hear witnesses, obtain evidence and adapt the legal qualification of the facts[9] and the scope of wrongdoings without being bound by the prosecution.

By contrast, when enforcing EU competition rules an administrative authority like the European Commission adopts a decision finding an infringement. Leaving aside full jurisdiction regarding the fines imposed, the EU Courts only exercise a review of legality with respect to the findings made by the Commission. Reflecting the separation of powers in the EU order,[10] the role of the EU Courts consists in assessing whether the evidence and other information relied on by the Commission in its decision are sufficient to establish the existence of the alleged infringement.[11] The review of legality involves a review of both the law and the facts and means that the EU Courts have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine.[12]

The review of legality can only lead to an annulment (in full or in part) or a confirmation of the contested decision. The EU Courts are required to assess the legality of the contested decision on the basis of the facts and the law as they stood at the time when the decision was adopted.[13] Moreover, the court proceedings are *inter partes*, meaning that it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.[14] Contrary to national criminal courts, the EU Courts do not have the power to substitute their own reasoning[15] for that of the Commission,

6 *PVC II*, para. 62

7 European Court of Human Rights (the ECtHR), *Zolotukhin v. Russia,* Grand Chamber, 10 February 2009 (Appl. No. 14939/03): '107. The Court reiterates that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a "final" decision (see Franz Fischer, cited above, § 22, and Gradinger, cited above, § 53). According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them'". This approach is well entrenched in the Court's case law (see, for example, Nikitin v. Russia, no. 50178/99, § 37, ECHR 2004-VIII, and Horciag v. Romania (dec.), no. 70982/01, 15 March 2005)." See also the Opinion of AG Colomer 8 April 2008 in Case C-297/07, Staatsanwaltschaft Regensburg against Klaus Bourquain, EU:C:2008:206, at para. 58: 'Dans l'idéal, la res judicata confère au jugement un état juridique non modifiable par quelque moyen que ce soit, faute de voie de recours ou parce que le recours n'a pas été introduit dans le délai légal'.

8 *PVC II,* para. 62.

9 For example, articles 377 and 386 of the Romanian Code of Criminal Procedure provide that the court can change the legal qualification of the facts and, if required by this change of legal qualification, it may assess additional items of evidence. For another example relating to Spain, see articles 733, 746, and 788 of the Spanish Code of Criminal Procedure.

10 See José Carlos Laguna de Paz, *Understanding the limits of judicial review in European competition law* in Journal of Antitrust Enforcement, (2014) 2 (1): 203–224.

11 Joined cases T-67/00, T-68/00, T-71/00, and T-78/00, *JFE Engineering v Commission*, EU:T:2004:221, para. 175.

12 Case C-389/10 P, *KME Germany and Others v Commission*, EU:C:2011:816, para. 133.

13 Case C-501/11 P, *Schindler Holding and Others v Commission,* EU:C:2013:522, para. 31.

14 *KME*, para. 131.

15 Case C-603/13 P, *Galp Energia España and Others v Commission*, EU:C:2016:38, para. 73: 'It should be noted, however, that the EU Courts cannot, in the context of the review of legality referred to in Article 263 TFEU, substitute their own reasoning for that of the author of the

for example by acquiring new evidence[16] or by finding a separate infringement. Therefore, in a nutshell, the EU Courts cannot act as a competition authority.

In some Member States where a single administrative authority investigates cases and takes enforcement decisions, the national courts have wider powers of review than the EU Courts.

For example, the Competition Appeal Tribunal in the UK may confirm or set aside a decision (even partially) which is the subject of an appeal and may remit the matter to the CMA (Competition and Markets Authority), give directions or take other steps, as the CMA itself could have given or taken and it can take other decisions which the CMA could itself have taken.[17]

In France the Paris *Cour d'Appel* may not only annul the decisions of the *Autorité de la Concurrence* but also amend those decisions (*réformation*).[18] In the past, the *Cour d'Appel* has substituted the decision regarding the existence of concerted practices, the delineation of the relevant market and the level of the fines but tended to send abuse of dominance cases back to the *Autorité* for reassessment rather than deciding on the matter itself.[19]

In several other Member States, such as Bulgaria, Finland, Greece, Luxembourg, Malta, Netherlands, and Portugal, the national courts may 'reform' competition decisions and/or refer a case back to the competition authorities.[20]

While a decision of the EU Courts acquires the force of *res judicata* when no further appeal is possible, nevertheless, it is arguable that in *Soliver*-type situations the EU Courts lack the power to deliver a final acquittal or conviction in the meaning of Article 4(1) of Protocol No 7 to the ECHR and Article 50 of the Charter. The EU Courts do not have the power to change the legal qualification of an anticompetitive conduct[21] and are thus bound to leave anticompetitive conduct unpunished.

For example, going back to the *Soliver* case, although Soliver was found to not have participated in the single and continuous infringement involving the big three car glass producers, the GC in an *obiter dictum* confirmed nevertheless that Soliver's bilateral contacts were anticompetitive (like in *Aalberts*). Although *prima facie* this appears to be a ruling on the substance it could be argued that it is not a 'final' ruling in the meaning of the ECHR and the Charter.[22] The GC could not deliver a final acquittal or conviction with respect to Soliver's anticompetitive conduct because the Commission decision did not qualify that conduct as a separate infringement[23] and the GC lacked the power to amend the decision. Paragraph 113 of *Soliver* is very clear: 'In accordance with the principles set out in paragraph 110 above, the European Union judicature cannot, in such circumstances, carry out such a qualification itself, as this would have the effect of encroaching on the powers conferred on the Commission by Article 85 EC as regards the investigation and punishment of infringements of EU competition law'.

Another case similar to *Soliver* is *Aalberts*.[24] In this case the GC, upheld by the ECJ, found that the infringing undertaking, Aalberts, had only participated in

contested act (see, to that effect, judgment in Frucona Košice v Commission, C-73/11 P, EU:C:2013:32, para. 89 and the case-law cited)'. See also Case T-495/07, *PROAS v Commission*, EU:T:2013:452, para. 181: 'Au demeurant, si le Tribunal entendait, dans le cadre du présent litige, lequel porte sur une infraction à l'article 81 CE, juger, ne serait-ce qu'en vue d'une réduction du montant de l'amende, que la Commission, eu égard aux preuves à sa disposition, aurait dû établir l'existence d'une infraction portant sur un marché plus large que celui qu'elle a retenu, il statuerait au-delà de ce que sa compétence d'annulation, laquelle est limitée à l'infraction retenue dans la décision attaquée, ainsi que sa compétence de pleine juridiction, laquelle ne lui permet pas de constater l'existence d'infractions non retenues par la Commission dans la décision attaquée, l'autorisent à accomplir (voir, en ce sens, arrêt du Tribunal du 15 juin 2005, Tokai Carbon e.a./Commission, T-71/03, T-74/03, T-87/03 et T-91/03, non publié au Recueil, point 370)'.

16 The Commission is also not allowed to produce new inculpatory evidence during the Court proceedings (*JFE Engineering v Commission,* para. 176).

17 Schedule 8, para. 3(2) of the Competition Act 1998.

18 See article L464-7 of the Code de Commerce.

19 Laura Melusine Baudenbacher, *Aspects of competition law enforcement in selected European jurisdictions* published in E.C.L.R. 2016, 37(9), 343–364, Section V.ii.

20 See the Decision-making powers report of 31 October 2012, pages 20–24, of the ECN Working Group Cooperation Issues and Due Process available at (http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf) (visited on 9 August 2016).

21 However, in some cases the General Court has re-qualified an infringement from single and continuous to single and repeated even though the Commission has not made such alternative finding. See for example Case T-655/11, *FSL and Others v Commission*, EU:T:2015:383, para. 498 and Case T-18/05, *IMI and Others v Commission*, EU:T:2010:202, para. 97. In these cases, the GC found that the respective infringements have not been proven for a certain period and considered that those infringements were repeated and not continuous. However, this re-qualification relates only to the duration of the infringement and it was seemingly necessary to partially annul those decisions.

22 It can also be argued that 'ne bis in idem' would not be applicable at all because Soliver has not been penalised or declared not liable with respect to its bilateral contacts. In this respect see *Limburgse Vinyl Matschappij,* para. 59: 'In that regard, it should be observed that, as is apparent from the grounds of the contested judgment, the principle of non bis in idem, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision'.

23 It is true that the Commission could have made an alternative finding that Soliver's conduct is standalone infringement. However, no rule of EU law requires the Commission to define all possible alternative infringements in the first decision and failure to do so should not deprive the Commission of its possible right to reopen proceedings.

24 Case C-287/11 P, *Commission v Aalberts Industries and Others*, EU:C:2013:445, paras 61–67.

certain meetings (the FNAS meetings) and did not take part in the two other parts of the infringement. However, since it was not established that Aalberts had been aware of the wider cartel its conduct could not be regarded as part of a single, complex and continuous infringement.[25] The GC annulled article 1 of the contested decision in its entirety as regards Aalberts because the Commission decision did not qualify Aalberts' conduct as a separate infringement, even if the FNAS meetings were anticompetitive.[26,27] Therefore, as Soliver, Aalberts was left unpunished because the Commission did not qualify its conduct as a separate infringement.

In a typical criminal case or even in a competition case a national court in some Member States could have re-qualified Soliver's conduct as a separate infringement and delivered a final acquittal or conviction (provided that Soliver's rights of defence were respected). Therefore, it is not possible to treat a *Soliver*-type annulment and a genuine acquittal in the same way.[28] The former finds that the applicant violated EU competition law but cannot reflect that in a proper finding of liability while the latter is a final decision on the substance of the dispute. There is a major difference between an annulment due to a mistake by the Commission in the legal qualification of an anticompetitive conduct (like in *Soliver* and *Aalberts*) and an annulment for lack of evidence of a violation of EU competition rules (like in the *Wood Pulp* case[29]).[30]

In the area of free movement of persons, the GC also ruled that a final decision in the meaning of Article 54 of the CISA[31] on 'ne bis in idem' requires 'a determination as to the merits of the case' which includes a 'detailed investigation'.[32]

Yet, in EU competition law the EU Courts do not carry out 'a determination as to the merits of the case' in *Soliver*-type cases because the GC lacks the power to qualify the anticompetitive conduct at stake. Similarly to procedural errors, annulments for errors in legal qualification/scope of anticompetitive conduct cannot be regarded as an acquittal within the meaning given to that expression in penal matters since no final ruling is given on the substance of the facts.

IV. Solving the problem: reopening of proceedings

In the same way as annulments for procedural errors, in *Soliver*-type cases, a resumption of proceedings by the Commission after the EU Court's judgment should be allowed.[33] Since the EU Courts lack the power to change the reasoning of Commission decisions, in these cases, the set-up of EU competition law justifies the resumption of proceedings by the Commission after a judicial annulment even in the absence of procedural errors.

This would ensure that undertakings that have violated competition law are punished. It is all the more justified because in only a few cases the GC fully annuls Commission decisions while in others it applies only partial annulment.[34] The Commission would define the scope/legal qualification of the anticompetitive conduct in light of the EU Court's judgment. The penalties imposed by the new decision would not be added to those imposed by the annulled decision but would

25 *Aalberts*, para. 62.

26 *Aalberts*, para. 65–66.

27 In *Aalberts*, para. 110, and in a parallel case (see Case T-384/06, *IBP and International Building Products France v Commission*, EU:T:2011:113, para. 72) the GC found that the FNAS meetings were anticompetitive.

28 See the Opinion of AG Mischo in *PVC II*, EU:C:2001:575: '55. The appellant is also wrong to consider that it is necessary to apply Article 4 of Protocol No 7 to the ECHR in the sense that the appellant has been finally acquitted or convicted' within the meaning of that provision and is therefore finally immune from any further proceedings. 56. In this case, there was no final decision on the substance of the dispute, but only a judgment finding a formal defect. It is not possible to place these two on the same footing, any more than it is possible to treat an acquittal in the same way as a judgment annulling a measure for a formal defect, to take up the analogy with criminal law, on which the appellant seems to insist. An acquittal, once final, makes it impossible to bring further proceedings, whereas annulment for a formal defect simply means that the accused will be judged again'.

29 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* ('Wood Pulp'), EU:C:1993:120, paras 70–127.

30 Another author opined that the principle of 'ne bis in idem' opposes a second decision if the first decision has been annulled for lack of evidence (Wouter P.J. Wils, 'The Principle of "Ne Bis in Idem" in EC Antitrust Enforcement: A Legal and Economic Analysis' published in World Competition, Vol 26, No 2, 2003, pp. 131–148).

31 The Convention Implementing the Schengen Agreement of 14 June 1985 (OJ 2000 L 239, p. 19).

32 Case C-486/14, *Kossowski*, EU:C:2016:483, paras 52–53.

33 Another author considers that the reopening of the proceedings following the annulment of a conviction on procedural grounds may only partially be justified by substantive legitimacy prevailing over the defendant's right and disciplinary considerations. In his view a better approach would be a test that balances the protection of the right of the individual, the substantive legitimacy of the system, and the requirement to ensure that competition authorities act in accordance with the law and in an efficient way on a case-by-case basis. (Renato Nazzini, 'Ne Bis in Idem in EU Competition Law' published in the Journal of Antitrust Enforcement, Vol. 2, No. 2 (2014), pp. 270–304).

34 In several other cases the GC partially annulled Commission decisions without checking first whether the Commission had found a narrower infringement: Case T-28/99, *Sigma Tecnologie v Commission*, EU:T:2002:76, paras 93–95 and 129–130; Joined cases T-109/02 etc., *Bolloré v Commission*, EU:T:2007:115, paras 238 and 429; article 1 of the judgment in Case T-208/06, *Quinn Barlo and Others v Commission*, EU:T:2011:701; Case T-59/06, *Low & Bonar and Bonar Technical Fabrics v Commission*, EU:T:2011:669, para. 71; Case C-441/11 P, *Commission v Verhuizingen Coppens*, EU:C:2012:778, para. 53; article 1 of the judgment in Case T-422/10, *Trafilerie Meridionali v Commission*, EU:T:2015:512; article 1 of the judgment in Case T-398/10, *Fapricela v Commission*, EU:T:2015:498.

replace them.[35] This would essentially add an exception to the principle of 'ne bis in idem' on top of annulments for procedural errors.

The ECtHR in its *Zolotukhin* case held that a decision is final 'when no further ordinary remedies are available'. In the type of cases discussed here the EU Courts could specify that the Commission may reopen proceedings as regards the matter left undecided by the EU Courts (comparable to the situation in Member States where the courts may remit the matter to the competition authorities after an annulment). The judgments in question would acquire *res judicata* with respect to the finding that the initial legal qualification was incorrect but it would make it clear to the parties that a further remedy is available to the Commission. Therefore, the reopening of proceedings would be in line with the principle of 'ne bis in idem'.

As regards fines, the Commission already resumes proceedings in cases where the EU Courts find an error in the calculation of the fine but do not set the final amount of the fine. For example, the Commission amended[36] the 2007 *GIS* decision[37] by changing the fines in light of the judgments in the *Toshiba* and *Mitsubishi* cases[38] which annulled the fines imposed on Melco and Toshiba on account of violation of the principle of equal treatment in the choice of a reference year for the purpose of calculating the fine.

However, if a resumption of proceedings with respect to the finding of an infringement is to be 'in accordance with the law' as required by Article 4 of Protocol No 7 to the ECHR, the EU Courts would have to change their *PVC II* case law. *PVC II* appears to exclude reopening of proceedings if the judgment contains 'any ruling having been given on the substance of the facts'. *PVC II* does not take into consideration whether the EU Courts actually rendered a final judgment in the meaning of the ECtHR case law.

Alternatively, if the judgment in *Soliver* is deemed to be a final decision according to the *PVC II* case law, the Commission could nonetheless reopen proceedings pursuant to Article 4(2) of Protocol No 7 to the ECHR. It could be argued that an incorrect legal qualification of anticompetitive conduct amounts to 'a fundamental defect in the previous proceedings, which could affect the outcome of the case'. According to this provision, the EU law is supposed to define this concept. The ECtHR case law shows that 'fundamental defect(s)' are not limited to procedural errors.[39] However, the ECHR requires that authorities respect the binding nature of a final judicial decision and allow the resumption of criminal proceedings only if serious legitimate considerations outweigh the principle of legal certainty.[40] Given the risk of hampering the effectiveness of EU competition law, including private enforcement, in the type of cases discussed here, the incorrect legal qualification of the facts should outweigh the principle of legal certainty. If limited to the type of cases discusses here, this would be a reasonable approach that would not create an unrestrained possibility for the Commission to abuse process by requesting the reopening of finalised proceedings.[41]

It would be even better if the EU Courts themselves were able to reform Commission decisions so that undertaking would face shorter proceedings and less uncertainty as regards the reopening of proceedings. However, this would require changing Article 264 of the Treaty which only refers to annulment of an act.

V. Conclusion

The EU Courts in *PVC II* have adopted a restrictive approach regarding the principle of 'ne bis in idem' in EU competition law. However, this principle needs to be interpreted in light of the ECtHR case law and the specificities of EU competition law, in particular the review of legality of decisions by the EU Courts. 'Ne bis in idem' should not block the possibility to reopen proceedings in cases where the EU Courts have annulled in full Commission decisions for incorrect legal qualification whilst acknowledging that undertakings have violated EU competition law.

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35 *Limburgse Vinyl Matschappij,* para. 62.

36 Commission Decision C(2012)4381 of 27 June 2012 in Case COMP/39.966—Gas Insulated Switchgear—Fines.

37 Commission Decision C(2006)6762 final of 24 January 2007 in Case COMP/F/38.899—Gas Insulated Switchgear.

38 Case T-113/07, *Toshiba* v *Commission*, EU:T:2011:343 and Case T-133/07, *Mitsubishi Electric* v *Commission,* EU:T:2011:345.

39 The ECtHR specified in its case law related to Article 6 ECHR that fundamental defects consists in 'serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice'. (COMPCAR, S.R.O. v. Slovakia, 9 June 2015, no. 25132/13, para. 63). In *Nikitin v Russia,* 20 July 2004, no. 50178/99 the supervisory procedure considered by the ECtHR to be a reopening of the proceedings was not limited to procedural errors. It included 'wrongful application of the law governing official secrets, the vagueness of the indictment—which had led to procedural prejudice against the applicant—and other defects in the criminal investigation, in particular the lack of an expert report as to whether the disputed information had originated from public sources' (para. 17).

40 ECtHR *Fadin v. Russia*, 21 July 2006, no. 58079/00, para. 33.

41 ECtHR, *Radchikov* v *Russia*, 24 May 2007, no. 65582/01, para. 48.