Horizontal Agreements

ECJ Judgments

Feralpi v. Commission (Case C-85/15 P); Ferriera Valsabbia and Others v. Commission (Joined Cases C-86/15 P and C-87/15 P); Ferriere Nord v. Commission (Case C-88/15 P); and Riva Fire v. Commission (Case C-89/15 P)

On September 21, 2017, the Court of Justice upheld[1] the appeals brought by Feralpi Holding SpA, Ferriera Valsabbia SpA, Ferriere Nord SpA, and Riva Fire SpA (together, the "Steel Manufacturers") to set aside the General Court's judgments[2] that confirmed the Commission's entitlement to readopt its *Reinforcing Bars* decision.[3]

In 2002, the Commission fined 11 Italian companies a total of €85.04 million for participating in a cartel relating to the production of steel reinforcing bars in Italy. In 2007, the General Court annulled the Commission's decision,[4] finding that the Treaty constituting the European Coal and Steel Community ("ECSC Treaty") was the sole legal basis for the Commission's decision, but that it was no longer in force when the decision was taken.[5] In 2009, the Commission readopted its decision on the basis of Articles 7(1) and 23(2) of Regulation 1/2003.[6] The Steel Manufacturers appealed.

In 2014, the General Court reduced Riva Fire SpA's and Ferriere Nord SpA's fines on the basis of a shorter infringement period and annulled the fines imposed jointly and severally on SP SpA and Lucchini SpA on the basis that the Commission had failed to establish that they formed a single undertaking at the time of the decision. It also dismissed six other appeals.

On appeal, the Steel Manufacturers sought the annulment of the General Court's judgments alleging, among other things, that the General Court had erred in law by finding that the Commission could adopt the second decision without sending Feralpi an additional statement of objections and without providing the affected parties with the opportunity to take part in an oral hearing. They also claimed that the General Court had failed to rule within a reasonable time.

The Court of Justice held that the General Court was correct in concluding that the Commission was not required to issue an additional statement of objections, because the expiration of the ECSC Treaty that rendered the first Commission decision unlawful occurred prior to the decision being adopted, therefore the validity of the preparatory acts was not affected. The Court of Justice also rejected the Steel Manufacturers' argument that the General Court failed to rule on their cases within a reasonable time in

[1] *Feralpi v. Commission* (Case C-85/15 P) EU:C:2017:709; *Ferriera Valsabbia and Others v. Commission* (Joined Cases C-86/15 P and C-87/15 P) EU:C:2017:717; *Ferriere Nord v. Commission* (Case C-88/15 P); and *Riva Fire v. Commission* (Case C-89/15 P) EU:C:2017:713.

[2] *SP v. Commission* (Case T-472/09) EU:T:2014:1040; *Leali and Acciaierie e Ferriere Leali Luigi v. Commission* (Joined Cases T-489/09 and T-490/09) EU:T:2014:1039; *IRO v. Commission* (Case T-69/10) EU:T:2014:1030; *Feralpi v. Commission* (Case T-70/10) EU:T:2014:1031; *Riva Fire v. Commission* (Case T-83/10) EU:T:2014:1034; *Alfa Acciai v. Commission* (Case T-85/10) EU:T:2014:1037; *Ferriere Nord v. Commission* (Case T-90/10) EU:T:2014:1035; *Lucchini v. Commission* (Case T-91/10) EU:T:2014:1033; and *Ferriera Valsabbia and Valsabbia Investimenti v. Commission* (Case T-92/10) EU:T:2014:1032.

[3] *Ronds à Béton* (Case COMP/37.956), Commission decision of December 17, 2002.

[4] *S.P. v. Commission*, *Leali v. Commission*, *IRO v. Commission*, *Lucchini SpA v. Commission*, *Ferriera Valsabbia and Valsabbia Investimenti v. Commission*, *Alfa Acciai v. Commission* (Joined Cases T-27/03, T-46/03, T-79/03, T-80/03, T-97/03, and T-98/03) EU:T:2007:317; *Riva Acciao v. Commission* (Case T-45/03) EU:T:2007:318; *Feralpi Siderurgica v. Commission* (Case T-77/03) EU:T:2007:319; and *Ferriere Nord v. Commission* (Case T-94/03) EU:T:2007:320.

[5] The ECSC Treaty expired on July 23, 2002.

[6] *Ronds à Béton* (Case COMP/37.956), Commission Decision of September 30, 2009.

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breach of Article 47(2) of the EU Charter of Fundamental Rights. It held that such a claim should be brought before the General Court and cannot be raised for the first time in an appeal to the Court of Justice. This is because the action would constitute an effective remedy and a claim for compensation for damages may not be made directly to the Court of Justice.

The Court of Justice upheld the Steel Manufacturers' claim that the General Court had erred in law by concluding that the Commission was not obliged to hold a new hearing before readopting the decision. The Member States' representatives did not participate in the first oral hearing, concerning the substance of the case, because their participation was not required under the then applicable ECSC Treaty. They only participated in the second oral hearing, concerning the legal consequences of the expiration of the ECSC Treaty on the proceedings, as provided for in the European Community Treaty ("EC Treaty") that had come into force. As a result, the Steel Manufacturers were not heard on the substance of the case by Member States' representatives before the Commission adopted its decision.

The Court of Justice concluded that, before adopting its decision, the EC Treaty rules required the Commission to give the Steel Manufacturers the opportunity to be heard at an oral hearing—that included Member States' representatives—concerning the substance of the case. Failure to do so in this case infringed an essential procedural requirement, regardless of whether the breach might have influenced the proceedings and content of the Commission's decision.

The Court of Justice, therefore, set aside the General Court's judgments under appeal as well as the contested Commission decision.

ECJ Advocate General Opinions

F. Hoffmann-La Roche and Others (Case C-179/16), Opinion of Advocate General Saugmandsgaard Øe

On September 21, 2017, Advocate General Saugmandsgaard Øe issued an opinion following a preliminary ruling request from the Italian administrative court to the Court of Justice.[7] In 2014, the Italian Competition Authority ("ICA") fined the Italian subsidiaries of F. Hoffmann-La Roche Ltd ("Roche") and Novartis AG ("Novartis") approximately €180 million for violating Article 101 TFEU.

Roche had developed two medicines with different active substances but obtained from the same antibody and with the same therapeutic mechanism: Avastin for the treatment of cancer and Lucentis for ophthalmological conditions. Roche marketed Avastin itself and licensed Lucentis to Novartis. The marketing authorization ("MA") for Lucentis was granted approximately two years later than for Avastin. In the meantime, doctors prescribed Avastin off-label to treat ocular pathologies. This practice continued after Lucentis was granted a MA due to the Italian health authority's decision to allow reimbursement for the off-label use of Avastin.

The ICA found that the two companies had agreed to communicate to regulators, doctors, and the general public that Avastin was less safe and efficacious than Lucentis for treatment of ophthalmologic conditions. According to the ICA, this was a form of market-sharing aiming to shift demand in favor of Lucentis. Both companies had an interest in the outcome of this practice: Novartis by the increase of the sales of more expensive Lucentis, and Roche through the collection of royalties on the sales of Lucentis.

Roche and Novartis's first appeal to the Italian administrative court was dismissed. The companies appealed to the higher Italian administrative court, which requested a preliminary ruling on whether: (i) the parties to a licensing agreement can be viewed as competitors when the licensee only operates in the relevant market because of the licensing agreement, and the consequences of such a conclusion on the application; and (ii) emphasizing the relative safety or

[7] *F. Hoffmann-La Roche and Others* (Case C-179/16), opinion of Advocate General Saugmandsgaard Øe, EU:C:2017:714.

efficacy of one product over another can be a restriction by object.

Regarding the first question, Roche and Novartis argued that their relationship was based on a licensing agreement falling under Regulation 772/2004. Under the regulation, the parties of a licensing agreement are not considered competitors when the licensee operates in the relevant market solely on the basis of the agreement. On this basis, Roche and Novartis claimed that the communications in question did not fall under Article 101 and were ancillary to the licensing agreement. Advocate General Saugmandsgaard Øe acknowledged that the licensing agreement did fall under Regulation 772/2004, but held that the practices created a competitive relationship independent of the licensing agreement. The purpose of the agreement was not to prevent Roche from selling the licensed technology but rather to induce third parties to use one medicine over the other, which, in turn, affected doctors' demand for Avastin. Advocate General Saugmandsgaard Øe concluded that the agreement at stake was different from a typical licensing agreement and dismissed the argument that the restrictions were ancillary to the licensing agreement. He held that the doctrine of "ancillary restraints" only applies to restrictions of the commercial autonomy of one of the parties to the agreement, not third parties. In any event, the restrictions could not be viewed as "objectively necessary" as they post-dated the conclusion of the agreement by several years. The restrictions at issue therefore could still be subject to Article 101(1) TFEU.

On the second question, Advocate General Saugmandsgaard Øe analyzed whether the collusive conduct was a restriction by object by examining the agreement's content, objectives, and economic and legal context. On this basis, Advocate General Saugmandsgaard Øe concluded that the communication of misleading allegations that one medical product is less safe than another is a restriction by object and that an examination of its effects is not necessary. First, the misleading allegations adversely affected consumers' decision-making process. Second, the objective of communicating misleading information was to exclude Avastin to the advantage of Lucentis, or at least to reduce demand of Avastin. This conduct can only be justified by an anticompetitive purpose. Third, medical practitioners are sensitive to safety considerations, in particular regarding off-label use of medicines. The communication of misleading information is likely to discredit the product among practitioners and increase the demand for competing products. On the other hand, if the allegations had not been misleading, then the practice does not restrict competition but is instead procompetitive as it improves the quality of available information. The determination as to whether the communication is misleading falls within the jurisdiction of the national court.

Fining Policy

ECJ Judgments

Toshiba v. Commission (Case C-180/16 P)

On July 6, 2017, the Court of Justice dismissed the appeal by Toshiba Corporation ("Toshiba") against the Commission's decision to reimpose a fine on Toshiba for its participation in the worldwide *Gas Insulated Switchgear* cartel between 1988 and 2004.[8] The Court of Justice decided that Toshiba's rights of defense had not been breached and affirmed the fine.

The Commission decided to reimpose a fine on Toshiba (the "2012 decision") because the General Court annulled its original decision[9] on the grounds that it had infringed the principle of equal treatment when calculating the fines by using different reference years[10] for the Japanese (2001) and European (2003)

[8] *Gas Insulated Switchgear Re-adoption* (Case COMP/39.966), Commission decision of June 27, 2012, upheld by the General Court in *Toshiba v. Commission* (Case T-404/12) EU:T:2016:18.

[9] *Gas Insulated Switchgear* (Case COMP/F/38.899), Commission decision of January 24, 2007.

[10] A reference year stands for the last full year of the infringement, and is relevant to determine the value of the cartelists' worldwide sales. The value of worldwide sales is, in turn, used to calculate the starting amount of fine.

cartelists.[11] Toshiba had no gas insulated switchgear ("GIS") sales in 2003 because it had transferred the business to a joint venture with Mitsubishi Electric Corporation ("Melco"), another cartelist, the year before. In the 2012 decision, the Commission calculated the starting amount of Toshiba's fine on the basis of the hypothetical starting amount of a fine for the joint venture (based on its turnover in 2003), rather than by reference to Toshiba's (non-existent) GIS turnover in 2003. More specifically, the Commission determined the starting amount of Toshiba's fine by splitting the joint venture's starting amount between Toshiba and Melco on the basis of their shares of GIS sales in the year before they transferred this business to the joint venture (2001).

After unsuccessfully appealing the Commission's 2012 decision to the General Court, Toshiba appealed to the Court of Justice.

First, Toshiba argued the Commission breached its right to be heard by not issuing a new statement of objections before adopting a new decision. In particular, Toshiba claimed the Commission was obliged to provide it with additional information on how it intended to ensure the deterrent effect of the reimposed fine. The Court of Justice rejected this claim and recalled that the annulment of an EU act does not necessarily affect the validity of the prior procedural measures. Because the statement of objections issued prior to the Commission's 2007 decision already set out the factual and legal elements necessary for the calculation of the fine, and because these elements were not affected by annulment of the 2007 decision, the Commission was not required to issue a new statement of objections. Moreover, the Court of Justice emphasized that the Commission had informed Toshiba about new elements for determining its fine in a letter of facts, and Toshiba could state its position both in writing and during a meeting.

Second, Toshiba contended that the Commission infringed the principle of equal treatment by calculating its fine on the basis of the hypothetical starting amount of a fine for its joint venture, rather than by reference to the joint venture's turnover. In contrast, the Commission had calculated the fines for the European producers on the basis of their GIS turnover. Toshiba argued that this approach did not reflect its individual weight in the infringement before it transferred its GIS business to the joint venture.

The Court of Justice held that it would have been inappropriate to calculate Toshiba's fine on the basis of its hypothetical turnover in 2003, determined as a proportion of the joint venture's turnover in 2003, because Toshiba had no GIS sales in that year. The Court of Justice stated that Toshiba's lack of GIS sales in 2003 objectively differentiated it from the other cartel participants, and therefore merited an alternative fine calculation method. Accordingly, the Commission was right to rely on different methods to calculate the starting amount of the fines for the European producers—which actually had GIS sales in 2003—on the one hand, and for Toshiba, on the other hand. In addition, the Court of Justice dismissed the calculation method suggested by Toshiba as unlikely to more directly use the joint venture's turnover or to provide a more accurate picture of Toshiba's market position in 2003 than the method used by the Commission.

Finally, Toshiba argued that its fine should be lowered because it did not participate in an agreement sharing the EEA market, and therefore its culpability for the infringement was less than that of the European producers'. The Court of Justice dismissed this plea, stating that Toshiba's non-participation in that agreement was a consequence of the participants' common understanding that Toshiba would not operate in the EEA market.

LG Electronics and Philips v. Commission (Joined Cases C-588/15 and C-622/15)

On September 14, 2017, the Court of Justice dismissed the appeals by LG Electronics Inc. ("LG") and Koninklijke Philips Electronics NV ("Philips") against the General Court's judgments[12] dismissing their

[11] *Toshiba v. Commission* (Case T-113/07) EU:T:2011:343.

[12] *LG Electronics v. Commission* (Case T-91/13) EU:T:2015:609; and *Philips v. Commission* (Case T-92/13) EU:T:2015:605.

actions for annulment of the Commission's December 5, 2012 decision.[13]

The Commission found that the main global producers of cathode ray tubes ("CRTs"), including LG and Philips, had participated in two separate infringements of Article 101 TFEU by agreeing to fix prices, share markets, allocate customers, and exchange sensitive commercial information.

LG and Philips challenged the Commission's decision before the General Court, but their appeals were dismissed. The General Court held that LG and Philips—which had merged their worldwide CRT activities in a joint venture (the "LPD group")—had a decisive influence over the LPD group's conduct and, therefore, should have been regarded as a single economic entity. As a result, LG and Philips were found to be jointly and severally liable for the LPD group's participation in the infringement. The General Court also held that, when a vertically integrated undertaking incorporated CRTs into finished products, competition in the finished product market was affected. Finally, the General Court found that the LPD group's sales of CRTs were intra-group sales, and agreed with the Commission's fine calculation taking into account the sales of transformed goods within the EEA.

LG and Philips sought the annulment of the General Court's judgment arguing that it had erred in law in concluding that the Commission was not required to send a statement of objections to the LPD group, because this violated of the LPD group's rights of defense.

The Court of Justice held that the General Court was correct because the Commission had the intention to investigate the parent companies LG and Philips, rather than their subsidiary. The Commission rightly sent a statement of objections to the parent companies, giving them the opportunity to exercise their rights of defense. Therefore, the General Court was correct in finding that LG and Philips had an opportunity to exercise their rights of defense, and that LPD group's rights of defense were not infringed, as it was not being investigated.

LG and Phillips also claimed that the General Court had erred in law by concluding that the Commission could consider the direct sales through transformed products to calculate the fine. According to LG and Philips, they did not constitute a vertically integrated undertaking with the LPD group. Consequently, LG's and Philips' independent sales could not be considered as belonging to the same group/undertaking. LG and Phillips also claimed that the Commission erred in taking into account the sales of transformed products—not subject to the cartel—when calculating the fines.

The Court of Justice held that the General Court did not err in law by finding that LG and Phillips formed part of the same economic group because they exercised joint decisive influence over the conduct of the LPD group. Furthermore, the Court of Justice noted that the sales of transformed goods were taken into account proportionately to the value of the cartelized goods incorporated in the transformed products.

The Court of Justice, therefore, upheld with the General Court's conclusion that the Commission had correctly calculated the fines, in accordance with point 13 of the Commission Guidelines on the calculation of fines.[14]

Abuse

ECJ Judgments

Intel v. Commission (Case C-413/14 P)

On September 6, 2017, the Court of Justice[15] set aside and referred back the General Court's judgment[16] upholding a €1.06 billion fine against Intel Corporation ("Intel") for abuse of dominance in the market for x86 central processing units ("CPUs") by

[13] *TV and Computer Monitor Tubes* (Case COMP/AT.39.437), Commission decision of December 5, 2012.

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

[15] *Intel v. Commission* (Case C-413/14 P) EU:C:2017:632.

[16] *Intel v. Commission* (Case T-286/09) EU:T:2014:547.

offering rebates and other payments to computer manufacturers and retailers in exchange for exclusivity.[17] The Court of Justice held that the General Court had erred in law by failing to examine the rebates in light of all the circumstances, including whether they were capable of foreclosing a hypothetical "as-efficient" competitor ("AEC"). The Court of Justice also clarified important aspects of jurisdictional and procedural law.

Exclusivity rebates. The Court of Justice observed that exclusionary effects are not necessarily detrimental to competition. In particular, Article 102 TFEU does not prohibit an undertaking from acquiring a dominant position and foreclosing less efficient competitors.[18] It does, however, prevent dominant undertakings from adopting pricing practices that are not competition on the merits and that can have an exclusionary effect on AECs .

The Court of Justice challenged the General Court's formalistic view that exclusivity rebates by a dominant undertaking are necessarily abusive under Article 102 TFEU. While it confirmed the presumption of illegality against rebates conditional on an obligation to purchase all or most of the customer's requirements exclusively from a dominant undertaking,[19] the Court of Justice observed that the dominant undertaking may rebut that presumption by showing that its conduct was not capable of restricting competition and foreclosing AECs. The dominant undertaking may also argue that any exclusionary effects are "counterbalanced, or outweighed" by efficiencies that benefit consumers.

To determine whether rebates are capable of restricting competition, the following must be taken into account: (i) the strength of the undertaking's position in the relevant market; (ii) the share of the market covered by the rebates; (iii) the conditions and arrangements governing the rebates, including their duration and amount; and (iv) the possible existence of a strategy to exclude AECs. The Court of Justice confirmed the relevance of the AEC test (which is based on a comparison between pricing and costs[20]) in this context. At the very least, the General Court should have examined the substance of Intel's rebuttal of the Commission's AEC test, and not refused to do so on the sole basis that exclusionary rebates were *per se* anticompetitive.

Jurisdiction and procedural considerations. The Court of Justice upheld the General Court's ruling that the Commission may apply EU competition law to an undertaking established outside the EU if its conduct was implemented within the EU (the "implementation test") or had foreseeable (*i.e.*, probable), immediate, and substantial effects in the EU (the "qualified effects test"). Both tests aim to prevent non-EU conduct from having anticompetitive effects in the EU.

The General Court found that Intel's conduct toward Lenovo formed part of an "overall strategy" aimed at preventing Lenovo notebooks equipped with a competitor's CPU from reaching the market, including the EU market. The Court of Justice therefore concluded that such conduct "viewed as a whole" satisfied the qualified effects test.

On procedure, Intel had criticized the Commission for not recording an interview with a customer, which the Commission used to establish that customer's exclusive supply obligation with Intel. The Court of Justice rejected the General Court's "artificial distinction" between formal and informal interviews. It observed that the Commission's obligation to record interviews applied to "any interview conducted for the purpose of collecting information relating to the subject matter of the investigation." It was also insufficient to communicate a brief summary of the interview, which did not contain any indication of the discussion's content and the nature of the information provided by the interviewee.

The Court of Justice found, however, that the absence of an interview record did not breach Intel's right of

[17] *Intel* (Case COMP/37.990), Commission decision of May 13, 2009.

[18] *See Post Danmark* (Case C-209/10) EU:C:2012:172.

[19] *See, e.g.*, *Hoffmann-La Roche v. Commission* (Case C-85/76) EU:C:1979:36.

[20] The test assumes the dominant undertaking has the same costs as the AECs. If it is capable of foreclosing those AECs, it is pricing below its own costs and is deemed anticompetitive.

defense. Intel was not able to find any exculpatory evidence in the more detailed interview summary (communicated before the General Court) and from a "follow-up" document containing written responses to the questions discussed during the interview.

Autortiesību un Komunicēšanās Konsultāciju Aģentūra - Latvijas Autoru Apvienība (Case C-177/16)

On September 14, 2017, the Court of Justice decided on a reference for a preliminary ruling from the Latvian Supreme Court on abuse of dominance through excessive pricing.[21]

The Latvian Competition Council ("LCC") fined the dominant copyright collecting society, Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība ("AKKA/LAA"), for charging excessive rates in breach of Article 102 TFEU. The LCC found that AKKA/LAA's rates were appreciably higher than rates in neighboring countries and were among the highest in the EU. On appeal, the referring court asked: (i) whether it was appropriate to compare prices across neighboring States to determine the excessive character of AKKA/LAA's prices; and (ii) whether, for the purpose of calculating the fine, the turnover of a copyright management organization must include the sums collected as remuneration for rightholders.

The Court of Justice recalled that charging prices that are excessive compared to the economic value of a service may amount to an abuse of dominance under Article 102 TFEU. A price is abusive if it excessively exceeds costs and is unfair in itself or when compared to the prices of competing products.[22] The Court of Justice recognized, however, that there may be other methods of establishing whether a given price is excessive. For example, authorities may compare, on a consistent basis, the prices applied in a given Member State with the prices in other Member States selected based on objective, appropriate, and verifiable criteria. Such criteria may include consumption habits and other economic and sociocultural factors, such as the purchasing power parity index ("PPP index") and cultural heritage. Any comparison must be consistent. It would notably be inappropriate to compare prices in various Member States without taking into account relevant differences in the PPP index.

The Court of Justice specified that differences in prices across Member States are indicative of an abuse of dominance if they are appreciable, *i.e.*, both significant and persistent. In addition, the dominant undertaking may always justify any price difference based on objective dissimilarities between Member States if these are not the consequence of a lack of competition (for example, higher costs merely reflecting inefficient management by the collecting society).

On the fine calculation, the Court of Justice observed that the concept of "turnover" refers to the value of an undertaking's sales of goods or services reflecting its real economic situation. The referring court should therefore consider whether the rightholders' remuneration is included in the value of AKKA/LAA's collecting services. The Court of Justice notably recommended that the referring court take into account the legal and economic links between AKKA/LAA and the rightholders to determine if they constitute a single economic unit. If so, the value of the service provided by AKKA/LAA would include the portion of the fees corresponding to the remuneration paid to rightholders.

Vertical Agreements

ECJ Advocate General Opinions

Coty Germany GmbH v. Parfümerie Akzente GmbH (Case C‑230/16)

On July 26, 2017, Advocate General Wahl delivered his opinion on a request for a preliminary ruling from the Higher Regional Tribunal of Frankfurt am Main concerning the prohibition for authorized retailers in a selective distribution network from selling luxury

[21] *Autortiesību un Komunicēšanās Konsultāciju Aģentūra - Latvijas Autoru Apvienība* (Case C-177/16) EU:C:2017:689.
[22] *United Brands v. Commission* (Case C-27/76) EU:C:1978:22, para. 252.

goods on third-party platforms, *e.g.*, Amazon or eBay.[23]

The Court of Justice was asked to clarify whether selective distribution systems for luxury goods are compatible with Article 101 TFEU, and whether distribution agreements implementing such systems can prohibit distributors from selling the luxury goods through third-party online platforms.

Coty Germany ("Coty"), one of the main suppliers of luxury cosmetic products in Germany, sells certain luxury cosmetic brands through a selective distribution network. Parfümerie Akzente ("PA") has been distributing Coty's products for many years in its brick and mortar shops and online. Online sales were made through PA's boutique website and the third-party website amazon.de. In March 2012, Coty amended its selective distribution agreement with PA, requiring that PA sell Coty products online only through an agreed "electronic shopfront" and prohibiting the discernible use of unauthorized third parties (such as amazon.de) for online sales of the contracted luxury goods.

At the outset, Advocate General Wahl noted that a selective distribution system based on objective qualitative criteria (relating to technical qualifications, specific requirements, suitability of staff, and premises) may, under certain conditions, have procompetitive effects; and such legitimate restrictions would be compatible with Article 101(1) TFEU. Advocate General Wahl concluded that the objective of preserving the image of luxury and prestige products is always legitimate when justifying qualitative selective distribution systems.

When analyzing the compatibility of selective distribution systems for luxury and prestige goods (principally aimed at preserving the "luxury image" of these goods) with Article 101(1) TFEU, Advocate General Wahl first referred to the diverging interpretations of the *Pierre Fabre*[24] judgment, which some considered had overturned previous case law. In that case, a manufacturer of cosmetics had imposed a contractual clause on its authorized distributors that contained a general and absolute ban on internet sales of the contracted goods. This was found to be a violation of Article 101(1) TFEU. In the *Coty* opinion, Advocate General Wahl pointed out that the Court of Justice's reasoning in *Pierre Fabre* does not concern cases in which there is no absolute ban (*i.e.*, where, as in *Coty*, there is only a partial restriction on online sales aiming to preserve the prestigious image of the products).

In Advocate General Wahl's view, selective distribution systems, owing to their beneficial ("or at least neutral") effects, should be compatible with Article 101(1) as long as: (i) the specific properties and characteristics of the product (*i.e.*, its high quality, highly technical nature, and luxury image) legitimately require such a selective distribution system, which preserves the product's quality and ensures that it is correctly used; (ii) resellers are chosen based on objective, qualitative criteria, which need to be applied uniformly and in a non-discriminatory manner for all potential resellers; and (iii) the criteria are proportional and do not exceed what is necessary. These criteria must be assessed by the national court.

On whether the prohibition against luxury retailers (which are part of the selective distribution system) from using third-party platforms in a discernible manner for online sales is compatible with Article 101(1) TFEU, Advocate General Wahl explained that such a prohibition may be justified by the "objective of preserving and monitoring the quality criteria"[25] of a luxury product. This requires that certain services be provided when the products are sold or that products be presented in a specific manner.

In other words, just as a supplier can justify imposing promotional, advertising, or quality requirements on

[23] *Coty Germany GmbH v. Parfümerie Akzente GmbH* (Case C-230/16), opinion of Advocate General Wahl, EU:C:2017:603.

[24] *See Pierre Fabre Dermo-Cosmétique* (Case C-439/09) EU:C:2011:649.

[25] *See Coty Germany GmbH v. Parfümerie Akzente GmbH* (Case C-230/16), opinion of Advocate General Wahl, EU:C:2017:603, para. 101.

brick and mortar retailers, a supplier also should be able to ensure that its products are sold in an online environment that meets similar qualitative requirements and improves the luxury image of its products.

Coty prohibited its authorized distributors from selling the contracted products through third-party websites because, according to the network in place, these platforms were not required to comply with the qualitative requirements imposed on the authorized distributors. Advocate General Wahl concluded that the clause at issue may be considered compatible with Article 101(1) TFEU, and that, when addressing this question, the referring court should analyze whether the contractual clause is dependent on the nature of the product, and whether it is applied uniformly, proportionally, and in a non-discriminatory manner.

Finally, Advocate General Wahl noted that even if the restriction were to be contrary to Article 101(1) TFEU, the prohibition may not constitute an illegal restriction given that it may satisfy the conditions of Article 101(3) TFEU as laid down in the Vertical Block Exemption Regulation 330/2010.[26]

Mergers And Acquisitions

ECJ Judgments

Austria Asphalt v. Bundeskartellanwalt (Case C-248/16)

On September 7, 2017, the Court of Justice delivered its judgment on a request for a preliminary ruling from the Austrian Supreme Court, the first on the subject of EU merger control.[27] The case concerns the reportability under Article 3 EUMR[28] of an acquisition of joint control by two companies over a business previously solely controlled by one of the companies that has no autonomous presence in the market.

The Austrian construction company Austria Asphalt GmbH & Co OG ("AA") owns an asphalt mixing plant that supplies AA almost exclusively. Following the transaction, AA and Teerag Asdag AG ("TA") will jointly control the plant, which will continue to supply asphalt exclusively to its parent companies and therefore will not act in the market as an autonomous economic entity. The Austrian Supreme Court asked the Court of Justice to determine whether this change of control over the plant constitutes a reportable concentration under Article 3(4) EUMR.

The Court of Justice examined the question in accordance with the wording and objectives of Article 3(4) EUMR, and within the general scheme of the EUMR (thereby closely following the line of reasoning adopted by Advocate General Kokott in her opinion on April 27, 2017[29]).

Article 3(4) EUMR states that: "[t]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a [reportable] concentration."

The Court of Justice noted that a textual interpretation of Article 3(4) EUMR provided no clear answer to the question. On the one hand, it could be argued that the requirement of "performing on a lasting basis all the functions of an autonomous economic entity" applies to all joint ventures. Under this interpretation, the transaction would not be a reportable concentration because the plant does not meet the autonomy requirement. On the other hand, the autonomy requirement might be understood as applying only to "the creation" of a joint venture. Under this interpretation, the establishment of joint control over an already existing undertaking would constitute a reportable concentration regardless of whether the target undertaking has an autonomous presence in the market.

As to the objectives pursued by Article 3(4), the Court of Justice found that the EUMR sought to ensure that the process of reorganization of undertakings does not result in lasting damage to competition and should

[26] Commission Regulation No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1, Articles 4(b) and 4(c).
[27] *Austria Asphalt* (Case C-248/16) EU:C:2017:643.
[28] Council Regulation No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1 ("EUMR").
[29] *Austria Asphalt* (Case C-248/16), opinion of Advocate General Kokott, EU:C:2017:322.

therefore apply only to significant structural changes in the market. Structural changes arise only when a joint venture performs on a lasting basis all the functions of an autonomous economic entity.

With respect to the interpretation of Article 3(4) within the general scheme of the EUMR, the Court of Justice noted that while merger control applies only to structural market changes, companies' behavior that does not result in such changes is still subject to Articles 101 and 102 TFEU. Therefore, to apply the notion of concentration to a transaction involving an undertaking with no autonomous presence in the market would unduly extend the scope of merger control to an issue already covered by Article 101 TFEU.

The Court of Justice therefore concluded that the autonomy/full functionality requirement should apply to both existing and newly created joint ventures and that, accordingly, the proposed transaction was not a reportable concentration.

Commission Decisions

Phase II Decisions Without Undertakings

Deutsche Börse/London Stock Exchange Group (Case COMP/M.7995)

On March 29, 2017, following a Phase II investigation, the Commission prohibited the proposed merger between Deutsche Börse AG ("DB") and London Stock Exchange Group ("LSEG"), the two largest European stock exchange operators.[30] DB operates the Frankfurt stock exchange and LSEG operates the London Stock Exchange and Borsa Italiana, the Italian stock exchange. Through Borsa Italiana, LSEG operates MTS, the Italian fixed income trading platform. DB and LSEG also control two of the largest European clearing houses,[31] Eurex and LCH.Clearnet SA ("LCH SA"), respectively.

Horizontal and Vertical Concerns. The Commission blocked the merger due to the following main concerns. First, the merger would create a *de facto* monopoly in the European markets for clearing fixed income instruments including bonds and repurchase agreements ("repos").

Second, this *de facto* monopoly would affect competition in the downstream markets for the settlement, custody, and collateral management of fixed income instruments. Post-trade service providers active downstream depend on transaction feeds from clearing houses. The Commission found that, as DB is active downstream through its subsidiary Clearstream, the merged entity would have the ability and incentive to divert cleared fixed income transaction feeds to Clearstream, and foreclose competing post-trade service providers.

Third, the merger would affect competition in the market for trading and clearing of single stock equity derivatives because it would eliminate the horizontal bundle-to-bundle competition between Eurex and Euronext. Trading and clearing services are typically purchased as a bundle. The Commission noted that in situations where the counterparties to a financial transaction demand the full composite product and not only individual service components, competition takes place between the available service bundles. Assessing the competitive implications of a merger in such cases requires evaluating the impact of the transaction on the bundle, and not merely on a component-by-component basis. Eurex offers integrated trading/clearing bundles; Euronext bundles its own trading services with LCH SA's clearing services. The Commission found that, as the combined entity would control clearing for single stock equity derivatives, it would enjoy market power in clearing and be able to exert pricing control over competing trading/clearing bundles. The merged entity would likely increase prices both of its own and competing bundles.[32] The Commission also found that

[30] *Deutsche Börse/London Stock Exchange Group* (Case COMP/M.7995), Commission decision of March 29, 2017.

[31] Clearing services ensure the execution of trades made on the stock exchange. They are provided by clearing houses, which assume the risk of default of each trading party—the seller and buyer—*vis-à-vis* the other.

[32] The Commission noted that the merged entity would not necessarily divert customers away from Euronext to Eurex (and thereby inflict harm on Euronext). Rather, the main competitive injury would be inflicted on customers, which

the merged entity would have the ability and incentive to leverage its market power at clearing level by fully or partially foreclosing[33] Euronext, which relies on LCH SA's clearing services, to eliminate competition at trading level.

Remedies. In Phase II, LSEG submitted its first structural remedy package and proposed to divest LCH SA to Euronext. The market test suggested that access to trade feeds from MTS was an essential condition for LCH SA to remain a viable competitor in fixed income clearing and retain market shares, because LCH SA's bonds and repos clearing volumes came predominantly from MTS. Based on the market test results, a large share of customers trading on MTS—the main dealer to dealer platform, with quite a large user base and significant liquidity—would continue to do so and would rather switch clearing houses if necessary than change trading platforms so as to continue clearing with LCH SA. This would make LCH SA less attractive for those that would initially stay. BrokerTec, the largest competing trading platform, was considered a suboptimal alternative to MTS due to Italian domestic regulation incentivizing banks to trade on MTS. To be clear-cut and sufficient, the commitments should have also included the divestment of MTS. The Commission concluded that the proposed commitments were insufficient to prevent the creation of a *de facto* monopoly in the markets for clearing income instruments.

LSEG and DB submitted a second remedy package including the structural remedy proposed in the first package and behavioral commitments including granting LCH SA access to MTS trade feeds for three years. The Commission could not conclude with certainty that the behavioral remedies could achieve the same effect as a clear-cut structural divestment such as the divestment of MTS. The behavioral remedies proposed were very broadly phrased,[34] required intensive monitoring, and raised issues as to whether their enforcement could be effectively monitored. Also, according to the Commission, a promise to maintain a link for three years could not produce the same effect as the transfer of ownership on a lasting basis.

The Commission also noted that the revised commitments were submitted at a very late stage of the procedure—15 days after the deadline—when the Commission was not able to perform another market test and assess that the divestment business would exert a competitive constraint on the merged entity similar to the one that existed between LSEG and DB. The commitments had to be assessed on the basis of information already received in the course of the investigation, including the results of prior market testing.

HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia (Case COMP/M.7878)

On April 5, 2017, the Commission prohibited the acquisition by German cement producers Heidelberg Cement AG ("HeidelbergCement") and Schwenk Zement KG ("Schwenk") through their joint venture in Hungary, Duna-Dráva Cement ("DDC"), of joint control over Cemex Hungária Építőanyagok Kft ("Cemex Hungary") and Cemex Hrvatska dd ("Cemex Croatia"), both part of Cemex, S.A.B. de C.V ("Cemex Group").[35] The transaction would have combined the largest cement producer with the largest cement importer in Croatia.[36]

Procedural issues. HeidelbergCement and Schwenk argued that the transaction did not have an EU dimension, and the Commission did not have jurisdiction over the transaction, because DDC's

would face higher prices both for Euronext's and Eurex's trading/clearing bundles.

[33] According to the Commission, a vertical foreclosure strategy could be undertaken through price (*e.g.*, margin squeeze) and non-price (*e.g.*, degrading access) measures.

[34] According to the Commission, the behavioral commitments provided very little detail about the required conduct and what recourse LCH SA could have if the obligations were infringed.

[35] *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* (Case COMP/M.7878), Commission decision of April 5, 2017.

[36] The Commission referred the Hungarian aspects of the transaction to the Hungarian Competition Authority.

turnover—which was below the notification threshold—should have been taken into account to assess whether the threshold of the EUMR was met.[37] They claimed that DDC was the driver behind the transaction because it would receive the most benefits and bear the risks of the transaction, and that the transaction was not a vehicle through which HeidelbergCement and Schwenk sought to control the Croatian cement market. The Commission concluded, however, HeidelbergCement and Schwenk were the undertakings concerned within the meaning of the EUMR. The Commission therefore took into account HeidelbergCement's and Schwenk's turnover for the notification threshold. The parties ultimately notified the transaction on September 5, 2016. Their challenge to this part of the decision is pending before the General Court.[38]

Market definition. Consistent with its previous practice, the Commission identified a distinct product market for grey cement, but made no further segmentation. Also in line with previous practice, the Commission identified the relevant geographic market for grey cement as circular catchment areas around different cement plants. Given cement's high transport costs, the radiuses of these catchment areas correspond to the distance from the plants at which cement may be sold—250 kilometers.

Horizontal concerns. The Commission found that the transaction would significantly impede competition because: (i) it would eliminate competition between two major cement competitors and lead to a dominant position; (ii) the merged entity would not face sufficient competitive constraints from existing and potential competitors; (iii) the merged entity could make market entry difficult and costly; and (iv) even large competitors would not have sufficient countervailing buyer power to prevent potential price increases post-transaction.

[37] Article 1(2) of the EUMR lays out turnover thresholds to be met by "undertakings concerned" for a transaction to have a Union dimension, although it does not define "undertakings concerned."

[38] *HeidelbergCement v. Commission* (Case T-902/16).

First, the merged entity would have a market share between 40–60% in Croatia, with a share in Dalmatia of 70–90%, and would eliminate competition between two major cement suppliers that had previously competed head-to-head in the Croatian cement market.

Second, the merged entity would not face sufficient competition, given geographic distance and other factors including high transport costs, security of supply, and a lower market acceptance of competitors' concrete,. Only LafargeHolcim, which operates a plant in Koromačno in western Croatia, would have been a credible competitor. LafargeHolcim would not, however, have been able to sufficiently constrain the merged entity because: (i) its plant is 150km further from Cemex Croatia's Split plant than DDC's plant and it has limited presence in Southern Dalmatia; (ii) it has capacity constraints preventing it from substantially increasing supply in response to a potential price increase; and (iii) even if there were no capacity constraints, legal barriers to entry due to construction and planning laws would prevent such capacity expansion. As regards other cement producers and suppliers, imports via land and sea face high transport costs that put competitors at a disadvantage, and extensive port facilities are not available. In addition, potential entry would not be timely or sufficient, either because entrants would not grow into a viable competitive force quickly enough or because they were unlikely to invest. Most potential entrants were uninterested in the Croatian market and of the two that were—Fortis and Fassa Groups—neither had made concrete plans.

Third, the merged entity would likely consolidate its dominant position by retaliating against potential entry. Pricing transparency and the consumer base in the cement market allow entry to be detected easily. DDC is seen as aggressive by competitors, having retaliated against would-be entrants by targeting their customers and issuing legal proceedings. This makes it costly for potential entrants to compete, notwithstanding the disadvantage they would face already from cement's high transport costs.

Fourth, customers would have insufficient countervailing buyer power to constrain the merged

entity. Neither Cemex nor DDC rely on any individual customer such that the customer would have significant buyer power. Instead, Cemex and DDC have a fragmented customer base with limited power to discipline the parties, let alone the merged entity. Similarly, customers could no longer constrain the parties by threatening to switch from one to another.

Remedies. The parties proposed terminating Cemex Croatia's lease on a cement handling and storage terminal at the Port of Ploče to lease the terminal to a competitor, and to provide the new entrant with logistical support. The Commission found these commitments lacking, due to the challenges for a new lessee to become a self-sufficient, effective, and viable business given its higher costs of reaching customers in Croatia compared to the merged entity and the terminal's insufficient capacity.

As a result, the Commission concluded that the commitments offered would not eliminate the competition concerns and therefore prohibited the transaction.

Phase I Decisions With Undertakings

Broadcom/Brocade (Case COMP/M.8314)

On May 12, 2017, the Commission conditionally approved the acquisition by Broadcom Limited ("Broadcom"), a semiconductor devices company, of sole control over Brocade Communications Systems Inc. ("Brocade"), a networking hardware, software, and services company.[39] The Commission's approval was conditional on behavioral remedies to ensure continuing interoperability and protection of competitors' confidential information.

Market definition. The Commission found a number of vertical and conglomerate relationships between Broadcom's and Brocade's products. Broadcom supplies application specific integrated circuits ("ASICs"), semiconductors that are custom-made for a specific original equipment manufacturer ("OEM"). Broadcom's market share in ASICs was 30–40%. Broadcom also manufactures application specific standard products ("ASSPs"), which are off-the-shelf integrated circuits that can be purchased by different OEMs. Broadcom's share in the overall market for ASSPs was 40–50%, while in the market for ASSPs for IP/Ethernet switches it was 70–80%. Broadcom's ASICs can be an input to Brocade's fiber channel ("FC") storage area network ("SAN") switches, a component for SAN high-speed data communication networks. Brocade's market share in FC SAN switches was 70–80%. Broadcom's ASICs and ASSPs can also be an input to Brocades IP/Ethernet switches and routers, in which Brocade's market share was below 5%.

The Commission also identified a conglomerate relationship between Brocade's FC SAN switches and Broadcom's FC host bus adaptors ("HBAs"), which are cards mounted in servers or storage devices that connect the host server to an FC SAN switch that determines the device of origin and destination and forwards the data to the intended destination. Broadcom's market share in FC HBAs was 40–50%.

Vertical effects. The Commission was concerned about Broadcom's supply of ASICs to producers of FC SAN switches. The transaction would combine the second largest supplier of ASICs for FC SAN switches (Broadcom) and the largest supplier of FC SAN switches (Brocade). Although the Commission found it unlikely that the combined entity would engage in input foreclosure, it identified the risk that it could misuse Cisco's, Brocade's closest competitor in FC SAN switches, commercially sensitive information to favor Brocade's business. As ASICs are custom-made microchips, their development requires the customer and supplier to share intellectual property ("IP") and confidential information . The Commission also found that the ASICs supplier also has visibility over the customer's product roadmap, costs, sales information, and specific characteristics of the produced FC SAN switches. Following Cisco's submission, the Commission found that the confidentiality agreements between Broadcom and Cisco were insufficient safeguards against the combined entity misusing the confidential information post-merger.

[39] *Broadcom/Brocade* (Case COMP/M.8314), Commission decision of May 12, 2017.

Conglomerate effects. The Commission identified two adverse conglomerate effects arising from the transaction. The combined entity could degrade interoperability between its own FC SAN switches and third-party HBAs and misuse confidential information of competing FC HBA suppliers.

The Commission concluded that the combined entity would foreclose competing suppliers of FC HBAs by degrading interoperability with Brocade's FC SAN switches. First, the Commission found that the combined entity could likely degrade interoperability because: (i) there is a significant overlap between customers of FC SAN switches and FC HBAs; (ii) for customers, the costs of replacing the FC HBA vendor are lower than replacing the FC SAN switch vendor; (iii) FC SAN switches are considered the "driving" products for interoperability; and (iv) Brocade enjoys significant market power in FC SAN switches. Moreover, although FC SAN components must comply with certain technical standards, the Commission noted that these standards alone were not sufficient to ensure interoperability. Second, the Commission found that the combined entity would have an economic incentive to foreclose competitors. Customers are reluctant to change their FC SAN switch suppliers and networking technology. Therefore, the risk of losing sales as a result of a foreclosure strategy was not high enough to deter the combined company. Third, the Commission found that such foreclosure would push its only FC HBA competitor—Cavium—out of the market in the long term and create a significant detrimental effect on competition. Notably, Cavium's FC HBA centric business activities were an important factor in the Commission's assessment of vulnerability against foreclosure.

As to the misuse of FC HBA suppliers' commercially sensitive information, the Commission found that FC HBA suppliers share confidential information about their products with FC SAN switch suppliers during "qualification" to ensure interoperability and post-product support. The Commission further found the current protections insufficient for the same reasons as it provided in the vertical assessment.

Remedies. To address the Commission's concerns, Broadcom and Brocade proposed to ensure the same level of interoperability for competing FC HBA suppliers as between its FC SAN switches and FC HBAs—subject to certain technical limitations—and to establish extra safeguards for its competitors' confidential information. These behavioral remedies were to be monitored by a trustee and subject to a fast-track arbitration mechanism. Broadcom and Brocade narrowed the technical limitations, ensured the same level of qualification support for all competitors and its own FC HBA business, and introduced additional confidentiality safeguards when the Commission deemed the initial commitments insufficient.

J&J/Actelion (Case COMP/M.8401)

On June 9, 2017, the Commission cleared the acquisition of Actelion Pharmaceuticals Ltd ("Actelion") by multinational Johnson & Johnson ("J&J"), subject to Phase I commitments.[40] The transaction was largely complementary: whereas J&J is active in producing consumer goods, medical devices, and pharmaceutical products, Actelion is only active in the research, development, and commercialization of prescription medicinal products, with a focus on cardiovascular drugs. The Commission identified two areas of overlaps.

Treatment of multiple sclerosis. Both Actelion and J&J were active in the market for multiple sclerosis medications, with J&J distributing four Biogen drugs in the Baltics (with market share below 20%) and Romania (with market share between 30–40%), and Actelion developing a Phase III pipeline drug. The Commission found no competition concerns. First, there were at least five other competing drugs in the market, with Novartis's drug competing more closely with Actelion's pipeline drug in terms of mode of action, route of administration, and type of treatment than Biogen's drugs. Second, Biogen could easily find an alternative distributer quickly in the event the merged entity favored sales of Actelion's pipeline drug at the expense of Biogen's drugs.

[40] *J&J/Actelion* (Case COMP/M.8401), Commission decision of June 9, 2017.

Treatment of insomnia. Both companies were developing a so-called orexin-antagonist pipeline product, which was intended to treat primary insomnia. The Commission defined a distinct market for orexin-antagonists because they are: (i) based on a novel mechanism of action; (ii) particularly promising in treating sleep disturbances while at the same time limiting dependency, risk of abuse, and side effects; (iii) intended to treat long-term insomnia, which no other drug does; and (iv) projected to be priced higher than currently marketed treatments. No orexin-antagonist products were marketed in the EEA.[41] Only one was currently in an advanced stage of clinical development (Phase III) in the EEA, in addition to the Actelion's and J&J's products, which were both in an early stage (Phase II).

— **J&J's project**. J&J was co-developing its insomnia drug with a third party, Minerva Neurosciences ("Minerva"), which was responsible for marketing the drug in the EEA. J&J held an 11% stake in Minerva, contributed 60% of the developments costs, and had a final say on development or manufacturing issues in case of disagreement. The Commission found that J&J would therefore have the ability to influence the development of the project.

— **Actelion's project**. Actelion and J&J in their notification specified that, prior to the acquisition, Actelion would transfer the development of its drug to a newly-formed third party—Idorsia. J&J would initially hold 16% of Idorsia's shares, with an option to increase up to 32%; no other shareholder would hold more than 5%. If J&J were to exercise the option, it would also acquire the right to nominate one or two board members, possibly giving J&J access to sensitive information on Idorsia's commercial strategy. J&J would also offer a significant credit facility for 15 years and provide IP rights to Idorsia to operate its R&D activities. The Commission found that the strong structural and economic ties on a lasting basis between J&J and Idorsia would allow J&J to acquire *de facto* control and influence Idorsia's strategic decisions.

The Commission concluded that, post-transaction, J&J would have the ability and incentive to discontinue, delay, or re-orient[42] either of the two projects. This would likely reduce future competition and increase prices for orexin-antagonist products.

Remedies. Actelion and J&J offered two sets of commitments designed to remedy the Commission's concerns while at the same time avoiding clear-cut divestiture of one of the two projects and obtaining approval in Phase I.

— **Idorsia commitments**. The first set aimed at reducing J&J's structural links to Idorsia. J&J committed to limit its shareholding in Idorsia below 10% (or up to 16% if J&J is not the largest shareholder), waive its right to nominate board members, and restrict its access to Idorsia's commercially sensitive information relating to Actelion's project.

— **Minerva commitments**. The second set consisted of structural and behavioral commitments aimed at reducing J&J's ability and incentive to influence the Minerva project. J&J committed to divest its minority shareholding in Minerva, grant Minerva a final say on all development decisions, waive its royalty rights on Minerva's sales in the EEA, and continue to fund the project.

The decision is noteworthy for two reasons. First, it confirms that the Commission does not limit its assessment to advanced-stage (Phase III clinical trials) pipeline drugs, but also scrutinizes overlaps related to early-stage (Phases I and II) pipeline drugs, even though the majority fail to reach the market.[43] Second, it demonstrates the low threshold for establishing the

[41] Merck marketed its orexin-antagonist product in the United States, but not in the EU.

[42] *I.e.*, focus on specific therapeutic indications or patients to reduce the degree of competition between the two drugs.

[43] The Commission for the first time found concerns related to pipeline drugs in a stage of development earlier than Phase III in *Novartis/GlaxoSmithKline Oncology Business* (Case COMP/M.7275), Commission decision of January 28, 2015.

ability to exercise *de facto* decisive influence, including even potential (*i.e.*, the option to take additional stock) minority shareholdings as low as 32%.

State Aid

ECJ Judgments

ENEA S.A. v. Prezes Urzędu Regulacji Energetyki (Case C-329/15)

On September 13, 2017, the Court of Justice ruled on a preliminary question referred by the Polish Supreme Court regarding the notion of state aid under Article 107(1) TFEU.[44]

The ruling relates to Article 9a(8) of the Polish law on energy, which obliges electricity providers to sell a minimum quantity of electricity from cogeneration to end consumers. In 2006, a company wholly owned by the Polish state, ENEA S.A. ("ENEA"), which produces and sells electricity, did not comply with the 15% quota set for that year. Consequently, the Polish energy regulator fined ENEA. ENEA challenged the decision before the Polish Supreme Court, arguing that the purchasing obligation constitutes unlawful state aid. The Polish Supreme Court concluded that the purchasing obligation satisfies the relevant conditions of Article 107(1) TFEU but was unsure whether there was an intervention through state resources. The referring court asked the Court of Justice whether the obligation to purchase electricity produced by cogeneration constitutes state aid prohibited by Article 107 TFEU.

The Court of Justice reiterated the four cumulative conditions that have to be met for a measure to fall within Article 107(1) TFEU: (i) there must be an intervention by the State or through state resources; (ii) the intervention must be capable of affecting trade between Member States; (iii) the intervention must confer a selective advantage; and (iv) the intervention must distort or threaten to distort competition. The Court of Justice noted that it is apparent from the decision of the referring court that the last three conditions are satisfied. The Court of Justice therefore focused on the first condition.

The Court of Justice recalled that this condition is met when: (i) the measure can be imputed to the State; and (ii) the measure is granted by or through state resources. The Court of Justice found that the measure at issue could be imputed to the State because the purchasing obligation was imposed by law. As to whether the measure was granted by or through state resources, the Court of Justice reiterated that this prong is met when the granting authority is the State or any public or private body established or designated by the State to administer the aid.

The Court of Justice noted that the purchasing obligation did not provide for a full offset mechanism that would allow the suppliers to pass on the financial burden to end users. Consequently, the Court of Justice concluded that the supply undertakings were funding a purchase obligation, which was imposed on them by the State, with their own financial resources, and were not appointed by the State to manage state resources.

The Court of Justice also held that the fact that the State was the majority shareholder in some of the undertakings concerned cannot lead to the conclusion that the State exercised a dominant influence that would enable it to direct the use of the resources of the undertakings concerned. The Court of Justice noted further that the purchase obligation applied equally to all—public and private electricity suppliers.

The Court of Justice added that a measure being attributable to the State does not automatically mean that the State has *exercised its dominant influence* over an undertaking in which it is the majority shareholder. The Court of Justice held in this regard that "there is nothing in the State's conduct as legislator to suggest that it exercised such influence in its capacity as majority shareholder in an undertaking."[45]

Therefore, the Court of Justice concluded that the purchasing obligation, which was imposed by national legislation on private and public undertakings equally,

[44] *ENEA S.A. v. Prezes Urzędu Regulacji Energetyki* (Case C-329/15) EU:C:2017:671, ("*ENEA*").

[45] *See ENEA*, para. 35.

did not constitute an intervention by the State or through state resources.

This judgment is noteworthy because prior jurisprudence, as embodied in the *Stardust Marine*[46] case, indicated that resources from public undertakings would constitute state resources because the State is capable of directing the use of these resources.[47] In a more recent judgment,[48] the Court of Justice also concluded that public undertakings' resources are presumed to be *de facto* state resources. The present case suggests that the fact that the State is a majority shareholder and therefore *can* direct the resources does not necessarily mean that the State *would* exercise the requisite potential influence. Here, the Court of Justice did not find any evidence that the State, acting as a legislator, actually exercised its capacity as majority shareholder.

Consequently, the ruling has introduced an element of uncertainty in interpreting the condition of state resources.

Commission v. Frucona Košice (Case C-300/16 P)

On September 20, 2017, the Court of Justice dismissed an appeal by the Commission against the General Court's March 2016 annulment[49] of the Commission's 2013 decision[50] that found that a Slovak write-off of tax debt in favor of Frucona Košice a.s. ("Frucona") was incompatible with state aid rules.

In 2004, Frucona—then a producer of spirits and spirit-based beverages in Slovakia (currently operating as a distributor)—was in financial difficulty, with accumulated tax debts of almost €17 million. In July 2004, the local tax office agreed to write off 65% (approximately €11 million) of Frucona's tax debt in accordance with the applicable insolvency legislation.

In June 2006,[51] the Commission found that the tax office would have obtained a higher repayment of its claims through a bankruptcy procedure or the tax execution procedure. It concluded that the write-off gave Frucona an advantage over its competitors and thus constituted state aid. Frucona appealed to the General Court, which dismissed the appeal.[52] It then appealed to the Court of Justice, which annulled the General Court's judgment.[53] The Court of Justice held that: (i) by failing to take into account the duration of the bankruptcy procedure in the assessment of the private creditor test, the Commission had committed a manifest error of assessment; or, (ii) in so far as it had taken that factor into consideration, the Commission had failed to state to the requisite legal standard the reasons for the initial decision. The Court of Justice referred the case back to the General Court.

In the meantime, to remedy the shortcomings of the initial decision, the Commission adopted the contested decision in October 2013. It again concluded that the tax office did not act like a private creditor in a market economy, this time holding that the duration of the bankruptcy procedure had no significant influence on the decision of a hypothetical private creditor. It reaffirmed that the 65% write-off constituted unlawful state aid. Frucona appealed to the General Court.

In March 2016, the General Court upheld Frucona's appeal and annulled the Commission's 2013 decision. Notably, the General Court held that the Commission must prove that the conditions for applying the private creditor test have been fulfilled. It agreed with Frucona that the Commission had failed to show that the bankruptcy procedure was more advantageous than the 65% write-off arrangement, *i.e.*,: (i) that the likely proceeds from a sale of its assets in the context of bankruptcy would have been higher; and (ii) that the

[46] *France v. Commission* (Case C-482/99) EU:C:2002:294, *("Stardust Marine")*.

[47] Commission notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016 C 262/1, para. 49.

[48] *Commission v. TV2/Danmark* (Case C-656/15 P) EU:C:2017:836.

[49] *Frucona Košice v. Commission* (Case T-103/14) EU:T:2016:152.

[50] Commission Decision C (2013) 6261 of October 16, 2013 (State Aid C 25/2005 (ex NN 21/2005)), OJ 2014 L 176/38.

[51] Commission Decision C (2006) 2082 of June 7, 2006 (State Aid C 25/2005 (ex NN 21/2005)), OJ 2007 L 112/14.

[52] *Frucona Košice v. Commission* (Case T-11/07) EU:T:2010:498.

[53] *Frucona Košice v. Commission* (Case C-73/11 P) EU:C:2013:32.

duration of the bankruptcy procedure was of no significant influence, so that a private creditor would have opted for the bankruptcy procedure.

The General Court also analyzed whether the Commission had made a manifest error of assessment in concluding that the tax execution procedure would have been more advantageous for private creditors (had it been available to them) than the 65% write-off arrangement. The General Court concluded that it did. The General Court noted that, with regard to the tax execution procedure, the Commission merely "assumed that it would be conducted in a speedy manner," not taking into account the duration of such a procedure. It concluded that the Commission did not have material evidence enabling it to claim that a private creditor would manifestly have opted for the tax execution procedure instead of the 65% write-off arrangement. The Commission appealed the General Court's judgment to the Court of Justice, alleging, in relevant part, that the General Court had: (i) disregarded the conditions of applicability of the private creditor test; and (ii) misapplied them in the present case.

On September 20, 2017, the Court of Justice dismissed the Commission's appeal.[54] Regarding the applicability of the private creditor test, the Court of Justice rejected the Commission's argument that the test can only be invoked by the Member State concerned and may not usefully be relied on by the recipient of the aid. The Court of Justice clarified that, when it appears that the private creditor test might apply, it is for the Commission to examine that possibility, irrespective of any request to that effect. Regarding the application of the test, the Court of Justice affirmed that the Commission must consider all information relevant to determining whether the conditions for applying the test are satisfied and that the only "relevant" evidence is the information that was available and the developments that were foreseeable at the time when the decision was taken. Notably, the Court of Justice clarified that the information "available" to the Commission includes what "could have been obtained" in the course of the administrative procedure if the Commission had requested it. It concluded that the General Court's assessment did not imply any new requirements incompatible with established case law and did not misapply the legal test.

This judgment is important because it: (i) clarifies that the Commission bears the burden of applying the private creditor test; and (ii) provides guidance as to what constitutes "available" information when applying the test.

General Court Judgments

SNCM v. Commission (Case T-1/15)

On July 6, 2017, the General Court[55] confirmed the Commission's 2012 revised decision,[56] which considered the capital injection and privatization measures adopted by France in favor of Société Nationale Maritime Corse Méditerranée ("SNCM"), a state-owned shipping company that provided regular maritime services from Mainland France, constitute unlawful state aid. This judgment is the last chapter of a long-running case that began in 2002. While this ruling closes the capitalization side of the SNCM case, the public service side ended in March 2017 following another General Court ruling.[57]

In 2008, the Commission declared the SNCM restructuring plan compatible with the internal market. This plan provided for: (i) the sale of the SNCM at a "negative" price of €158 million with the transfer of all SNCM liabilities to the buyer; (ii) an additional contribution from a state-owned entity of €8.75 million; and (iii) an account advance of €38.5 million to finance the early retirement of some SNCM employees in case of future social plans. Following an appeal from SNCM's main competitor, the General Court annulled the Commission's decision in 2012 on

[54] *Commission v. Frucona Košice* (Case C-300/16 P) EU:C:2017:706.

[55] *SNCM v. Commission* (Case T-1/15) EU:T:2017:470.

[56] Commission Decision C (2008) 3182 of July 8, 2008 (State Aid C 58/02 (ex N 118/02)), OJ 2009 L 225/180.

[57] *SNCM v. Commission* (Case T-454/13) EU:T:2017:134.

the ground of "manifest error of assessment."[58] The Court of Justice upheld this ruling in 2014.[59] To comply with the General Court ruling, before the Court of Justice judgment, the Commission adopted a revised decision that required SNCM to repay €220 million to the French state because the SNCM privatization plan was considered to be unlawful state aid.[60] France and SNCM each brought an action for annulment of the revised decision before the General Court, which the General Court dismissed in this July 6, 2017 judgment, notably because France failed to successfully establish that the plan's measures fulfilled the market private investor test.

First, with respect to SNCM's disposal at a negative price of €158 million, the General Court, rejected the defendant's argument that the liquidation would have been more costly. According to the General Court, the Commission correctly established that a private investor would not have sold the company at such a price because it was not established "with a sufficient degree of probability" that the French courts would have ordered payment of damages to employees, and even less that such an order would have exceeded the negative price at which SNCM was sold. The General Court also rejected the argument that such a price could be justified by the need to protect the state's image because the French state failed to demonstrate the existence, among private investors, of a sufficiently established practice of making provision for social plans in comparable situations to protect their images.

Second, regarding the capital injection of €8.75 million, the General Court also found that the Commission correctly applied the private investor test to establish the existence of state aid. Although a private investor had also contributed €26.25 million, according to the General Court, the concomitance or simultaneity of public and private investments is a strong, but not sufficient, indicator to prove that the State is acting as a private investor. It was not in this case because, contractually, if the SNCM was in difficulty, the private investors would exit and the French state would then hold 100% of the company and be entirely liable for the costs of possible liquidation. The General Court stated that the defendants had failed to establish before the capital contribution injection that the 10% rate of return on the state contribution of €8.75 million would have been acceptable to a private operator.

Finally, regarding the current account advance of €38.5 million, the General Court considered that the Commission correctly concluded that the measure created an advantage for SNCM by allowing it to not bear the entire cost of the possible future departure of certain employees.

Policy and Procedure

ECJ Judgments

AGC Glass Europe and Others v. Commission (Case C-517/15 P)

On July 26, 2017, the Court of Justice upheld the General Court's judgment[61] rejecting an action for annulment of the Commission's decision[62] concerning a request for confidential treatment submitted by AGC Glass Europe ("AGC Glass") under Article 8, Decision 2011/695/EU.[63] Building on its recent judgment in *Evonik Degussa*,[64] the Court of Justice broadened the Hearing Officer's scope of review concerning confidentiality requests, and clarified the protection afforded to leniency applicants regarding the publication of information contained in confidential decisions.

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[58] *Corsica Ferries France v. Commission* (Case T-565/08) EU:T:2012:415.

[59] *SNCM and France v. Corsica Ferries France SAS* (Joined Cases C-533/12 P and C-536/12 P) EU:C:2014:2142.

[60] Commission Decision C (2013) 7066 of November 20, 2013 (State Aid C 58/2002 (ex N 118/2002)), OJ 2014 L 357.

[61] *AGC Glass Europe and Others v. Commission* (Case T-465/12) EU:T:2015:505.

[62] Decision 2011/695/EU of the President of the European Commission on the function and terms of reference of the Hearing Officer in certain competition proceedings, OJ 2011 L 275/29 ("Article 8, Decision 2011/695").

[63] *AGC Glass Europe and Others v. Commission* (Case C-517/15 P) EU:C:2017:598.

[64] *Evonik Degussa v. Commission* (Case C-162/15 P) EU:C:2017:205.

In 2008, AGC Glass received a fine reduction for submitting information to the Commission on its involvement in the *Car Glass* cartel.[65] In 2009, the Commission informed AGC Glass of its intention to publish a non-confidential version of the decision. AGC Glass requested confidentiality for information submitted under the 2002 Leniency Notice,[66] but the Commission denied the request.

On AGC Glass's referral, the Hearing Officer rejected the confidentiality requests concerning customer names and product descriptions because the information was historic, known outside AGC Glass, and concerned the essence of the infringement. He also held that the 2002 Leniency Notice did not give rise to a legitimate expectation preventing the Commission from publishing information not covered by professional secrecy. In addition, the Hearing Officer declined competence to decide whether to publish information not covered by professional secrecy, or assess an alleged breach of the principle of equal treatment.

In October 2012, AGC Glass brought an action for annulment before the General Court, which was dismissed. AGC Glass appealed the dismissal to the Court of Justice, claiming that the Hearing Officer infringed Article 8(2) and 8(3) of Decision 2011/695 by failing to examine its request for confidential treatment. It also alleged that such a violation of its procedural rights breached the principles of legitimate expectations and equal treatment.

Contrary to the findings of the General Court, the Court of Justice held that the Hearing Officer must examine confidentiality requests of leniency applicants based on any ground arising from rules or principles of EU law. However, the Court of Justice did not find the General Court's error to be sufficient for an annulment of the decision. It concluded that, because the Hearing Officer effectively examined these arguments (even as a preliminary point), the General Court was correct to conclude that AGC Glass's procedural rights—and the right to an effective remedy—were not violated.

The Court of Justice further held that the Leniency Notice does not create a legitimate expectation, nor prohibit the Commission from publishing information that relates to the elements constituting the infringement. It clarified that the only available protection under the Leniency Notice concerns: (i) the determination of the amount of the fine; and (ii) the non-disclosure of documents and written statements submitted under the Leniency Notice. Publication in compliance with the protection of professional secrecy does not undermine protection claimed by leniency applicants under the Leniency Notice.

Concerning equal treatment, the Court of Justice confirmed that leniency applicants and other cartel participants are in a comparable situation regarding the conditions of publication of the infringement decision. A leniency applicant benefiting from a fine reduction is not protected from the civil law consequences of its cartel participation. Consequently, the General Court did not err in law in its analysis of the treatment to be given to the information submitted by AGC Glass to the Commission. The appeal was thus dismissed in its entirety.

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[65] *Car Glass* (Case COMP/39125), Commission decision of November 12, 2008.

[66] 2002 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 298/17 ("2002 Leniency Notice").

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