Horizontal Agreements

ECJ Judgments

F. Hoffmann-La Roche and Others (Case C-179/16)

On January 23, 2018, the Court of Justice (Grand Chamber) issued a preliminary ruling on a request from the Italian Council of State.[1] 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 having entered into an agreement contrary to Article 101 TFEU, which, according to the ICA, was designed to distinguish artificially between pharmaceuticals Avastin and Lucentis by manipulating the perception of the risks of using Avastin in the field of ophthalmology.[2]

Although Avastin and Lucentis contain different active ingredients, Roche developed both from the same antibody and both have the same therapeutic mechanism. Avastin was marketed for the treatment of cancer, while Lucentis was marketed for ophthalmological conditions. Roche marketed Avastin and licensed Lucentis to Novartis. Avastin became commercially available two years before Lucentis. In the meantime, doctors had started prescribing Avastin off-label for ocular pathologies. The Italian health authority also decided to allow reimbursement for the off-label ophthalmological use of Avastin. Doctors continued to prescribe Avastin off-label for ocular pathologies even after Lucentis was granted an MA, because of Avastin's lower unit price.

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 the treatment of ophthalmologic conditions. According to the ICA, this was a form of market-sharing whose goal was to shift demand from Avastin to Lucentis, given that Avastin became Lucentis's main competitor because of its widespread off-label use in Italy in the field of ophthalmology. Both companies allegedly had an interest in the outcome of this practice: Novartis benefited as a result of the increase of the sales of more expensive Lucentis, and Roche benefited through the collection of royalties from the sales of Lucentis.

Roche and Novartis's first appeal to the Italian administrative court was dismissed. The companies then appealed to the Italian Council of State, which requested a preliminary ruling on, among other questions, 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 of the agreement; and (ii) emphasizing the relative safety or efficacy of one product over another can be a restriction by object.

While the conduct did not fall within the categories traditionally regarded as "by object" infringements, both the Advocate General's opinion (issued on September 21, 2017)[3] and the Court of Justice's ruling emphasized that the form of an agreement is by itself insufficient to determine whether an agreement is a restriction of competition "by object". Rather, the nature of the agreement as well as its legal and economic context must also be taken into account.

Regarding the first question, Roche and Novartis argued that their relationship was based on a licensing

[1] *F. Hoffmann-La Roche and Others* (Case C-179/16) EU:C:2018:25.

[2] ICA, decision of February 27, 2014, *Roche-Novartis/Farmaci Avastin e Lucentis* (Case I760).

[3] *F. Hoffmann-La Roche and Others* (Case C-179/16), opinion of Advocate General Saugmandsgaard Øe, EU:C:2017:714. European Competition Report, July–September 2017, pp. 2–3.

agreement falling under Regulation 772/2004.[4] Under the regulation, the parties to a licensing agreement are not considered competitors when the licensee operates in the relevant market solely on the basis of the agreement, and, accordingly, the parties' communications did not fall under Article 101 TFEU and were ancillary to the licensing agreement.

The Court of Justice noted that Article 101(1) does not prohibit a restriction necessary to implement an activity if Article 101(1) does not prohibit the activity, and that a restriction is ancillary, if in its absence, the activity could not be carried out at all, rather than being simply more difficult or less profitable. The Court of Justice, in line with the Advocate General's opinion, held that the restriction in this case fell within the scope of Article 101(1) TFEU because it was not ancillary to the parties' licensing agreement as it was not designed to restrict the commercial autonomy of the parties, but rather the conduct of third parties.

As to the second question, the Court of Justice reiterated that the category of restrictions of competition by object must be interpreted strictly and in light of the conduct's context, as the Advocate General noted in his opinion. The Court of Justice noted that the EU rules for pharmaceutical products outline the process for collecting information on the risks of medicinal products, the system through which new information about the product is provided to the relevant regulatory authorities, and the system for the dissemination of information on medicinal products to the public and healthcare professionals. These obligations apply to the holder of the marketing authorization and not third parties, and provide for penalties for failure to comply.

Against the background of these EU rules, the Court of Justice observed that the parties' attempts to manipulate the risk perception as regards Avastin, marketed by one of the parties, show that the dissemination of information pursued objectives not related to pharmacovigilance. This exaggeration could further trigger public concern, affect doctors' choice of medicines, and influence the European Medicines Agency's views on the risks of Avastin, decreasing the demand for it. Furthermore, the Court of Justice held that the information disseminated was misleading and the subject of a cartel agreement between Roche and Novartis, which constitutes a restriction of competition by object because it revealed a sufficient degree of harm to competition to render the examination of the effects of this practice unnecessary.

Fining Policy

ECJ Judgments

***Deutsche Bahn and Others v. Commission* (Case C-264/16 P); *Kühne + Nagel International and Others v. Commission* (Case C-261/16 P); *Panalpina World Transport (Holding) and Others v. Commission* (Case C-271/16 P); and *Schenker v. Commission* (Case C-263/16 P)**

On February 1, 2018, the Court of Justice dismissed the appeals[5] by Deutsche Bahn AG ("Deutsche Bahn"), Kühne + Nagel International AG ("Kühne + Nagel"), Panalpina World Transport (Holding) Ltd. ("Panalpina"), and Schenker Ltd. ("Schenker") against the General Court's judgments[6] upholding the Commission's Freight Forwarding decision.[7]

In 2012, the Commission fined 14 companies a total of €169 million for participating in the following four cartels relating to the pricing and other conditions of air freight forwarding services: (i) the new export

[4] Commission Regulation (EC) No. 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123/11.

[5] *Deutsche Bahn and Others v. Commission* (Case C-264/16 P) EU:C:2018:60; *Kühne + Nagel International and Others v. Commission* (Case C-261/16 P) EU:C:2018:56; *Panalpina World Transport (Holding) and Others v. Commission* (Case C-271/16 P) EU:C:2018:59; and *Schenker v. Commission* (Case C-263/16 P) EU:C:2018:58.

[6] *Deutsche Bahn and Others v. Commission* (Case T-267/12) EU:T:2016:110; *Kühne + Nagel International and Others v. Commission* (Case T-254/12) EU:T:2016:113; *Panalpina World Transport* (*Holding*) *and Others v. Commission* (Case T-270/12) EU:T:2016:109; and *Schenker v. Commission* (Case T-265/12) EU:T:2016:111.

[7] *Freight Forwarding* (Case COMP/AT.39462), Commission decision of March 28, 2012.

system ("NES") cartel, which concerned a surcharge based on customer size; (ii) the advanced manifest system ("AMS") cartel, which introduced a surcharge for the electronic communication of certain required data to US customs authorities; (iii) the currency adjustment factor ("CAF") cartel, which was an agreement to convert all contracts with customers into renminbi and to introduce a CAF surcharge; and (iv) the peak season surcharge ("PSS") cartel, which introduced seasonal surcharges at certain times of increased demand.[8]

The appeals to the General Court challenged the Commission's findings of infringement or, in the alternative, the amount of the fines imposed. The General Court dismissed most appeals and further appeals to the Court of Justice followed.

Among other claims, the companies alleged that the General Court had wrongfully held that the Commission could use the value of sales of international air freight forwarding services as a whole as the basis for calculating the amount of the fines. The companies argued that the Commission should have considered solely the various services that were part of the infringement.

The Court of Justice disagreed, concluding that the companies' arguments confused the infringements with the definition of the relevant market affected by those infringements. The 2006 Fining Guidelines[9] indicate that the basic amount of fines is calculated on the basis of the value of sales of goods or services to which the infringement directly or indirectly relates. The agreements all concerned the market for international air freight forwarding services as a package of services, even though each related to specific services.

The Court of Justice thus ruled that the concept of "value of sales" cannot be limited only to the value of sales proven to have been actually affected by that infringement, even though it cannot be extended to cover sales that do not fall within the scope of the infringement. The concept of "value of sales" must be understood as referring to sales in the market concerned by the infringement, but it is not necessary to distinguish or deduct the prices of the specific services included in the freight forwarding service.

To determine the basic amount of the fine, it was appropriate to take account of the value of the sales in the market for international air freight forwarding services, because the sales falling within the sphere of the infringements at issue were made in that market. The Court of Justice, therefore, dismissed this plea and the appeals in their entirety.

Mergers and Acquisitions

Commission Decisions

Phase II Decisions with Undertakings

***Qualcomm/NXP Semiconductors* (Case COMP/M.8306)**

On January 18, 2018, following a Phase II investigation, the Commission conditionally approved the proposed acquisition of NXP Semiconductors N.V. ("NXP") by Qualcomm Incorporated ("Qualcomm").[10] Both undertakings are active in the development and manufacturing of chipsets for smartphones and other applications. Qualcomm is the global leader in baseband chipsets, which allow smartphones to connect to cellular networks. NXP is the global leader in near-field communication ("NFC") and secure element ("SE") chips for smartphones, which enable short-range connectivity and in particular secure payment transactions on smartphones. NFC chips enable short-range wireless connectivity necessary for data exchanges between devices brought within a few centimeters of one another. SE chips securely host applications and their confidential and cryptographic

[8] The claim brought by UTi Worldwide was partially upheld and the company received a fine reduction (*UTi Worldwide and Others v. Commission* (Case T-264/12) EU:T:2016:112).

[9] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006 C 210/2, para. 13.

[10] *Qualcomm/NXP Semiconductors* (Case COMP/M.8306), Commission decision of January 18, 2018.

data. SE and NFC chips can be combined to enable secured contactless data communications. NXP is also active in the worldwide market for transit service technology through MIFARE, its proprietary leading technology used in particular in transit ticketing/fare collection and similar applications. MIFARE is used in connection with NFC and SE chips on mobile and other devices. MIFARE can be included in the SE chip on mobile devices with NFC capabilities.

The Commission found NXP to be dominant in transit service technology through MIFARE with a 77% share, and to hold a certain degree of market power in NFC and SE chips with shares of 70–80% and 60-70%, respectively. It also found Qualcomm to be dominant in baseband chipsets with a 60–70% share. As NXP's NFC and SE chips and MIFARE are highly complementary to Qualcomm's baseband chipsets and sold to the same customers, *i.e.*, mainly original equipment manufacturers ("OEMs") (*e.g.*, Apple or Samsung) and transport authorities, the Commission concluded that the transaction would raise anticompetitive conglomerate effects. Three theories of harm were proposed:

— **Mixed-bundling and refusal to license MIFARE/royalties' increase**. The results of the market investigation showed that rival suppliers perceive MIFARE as a crucial input. The Commission found MIFARE to be a dominant technology requested by most OEMs and used by most transport companies. The Commission found that the merged entity could, and would have the incentive, to make it more difficult for competing NFC/SE solutions suppliers to access MIFARE by raising its licensing royalties or by ceasing to license it altogether. In addition, the merged entity would could, and would have the incentive to, mix-bundle baseband chipsets and NFC and SE chips. This strategy was considered unlikely to have significant anticompetitive effects due to customers' mix-and-match and in-house sourcing capabilities. This conclusion applied regardless of whether the bundle included MIFARE-enabled SE chips. The Commission concluded that the merged entity could, and would have the incentive to, add MIFARE to the mixed bundle and in parallel increase the royalties of MIFARE or cease to license it. This strategy would prevent competing suppliers of baseband chipsets and NFC and SE chips from offering a counter-bundle including MIFARE or from doing so at a competitive price. This would ultimately affect customers' mix-and-match choices.

— **Degradation of interoperability**. The Commission found that the merged entity could, and would have the incentive to, degrade interoperability between Qualcomm's baseband chipsets and other suppliers' NFC and SE chips, or between NXP's NFC and SE chips and other suppliers' baseband chipsets. Degradation of interoperability could take various forms, *e.g.*, technical integration, refusal to provide the necessary information and support to rival suppliers of NFC/SE solutions, or reengineering interfaces to degrade the performance of competing mix-and-match solutions. This strategy would hamper OEMs' mix-and-match choices and likely compound the foreclosure effects of the strategy of increasing royalties for MIFARE or ceasing to license it to competitors, against the backdrop of mixed bundling.

— **NFC intellectual property ("IP")**. The Commission found that the transaction would combine significant and complementary NFC IP portfolios. The merged entity would hold the largest NFC patent portfolio globally. This portfolio would disproportionately strengthen the merged entity's bargaining power in licensing negotiations, and could be leveraged to negotiate significantly higher royalties for the merged entity's NFC patents.

The transaction was cleared subject to the following commitments:

— **Mixed-bundling and refusal to license MIFARE/royalties increase**. Qualcomm committed to offer licenses to MIFARE IP rights worldwide, for eight years, on terms at least as advantageous as those available to competitors today.

— **Degradation of interoperability**. Qualcomm committed to provide, for eight years, the same level of interoperability between the merged entity's baseband chipsets and NFC and SE chips and those of competitors.

— **NFC IP**. Qualcomm offered to refrain from acquiring NXP's standard essential NFC patents, as well as certain of NXP's non-standard essential NFC patents. Qualcomm offered to transfer NXP patents to a third party, which would be bound to grant worldwide royalty-free licenses to these patents for three years. Qualcomm would still acquire certain other NXP non-standard essential NFC patents and, in relation to those, committed: (i) not to enforce its rights against other companies; and (ii) to grant worldwide royalty-free licenses to these patents.

Phase I Decisions with Undertakings

***BD/Bard* (Case COMP/M.8523)**

On October 18, 2017, the Commission approved the acquisition by Becton, Dickinson and Company ("BD") of C. R. Bard, Inc. ("Bard").[11] Both BD and Bard are active in medical devices—including biopsy devices—and Bard is also active in tissue markers.

Market definitions. The Commission identified a series of biopsy device markets and a single market for tissue markers.

— **Biopsy devices**. Biopsy devices are used to extract tissue for examination and fall into three categories: (i) core needle biopsy ("CNB"); (ii) fine needle aspiration ("FNA"); and (iii) vacuum-assisted biopsy ("VAB") devices. The Commission clarified for the first time the scope of the relevant product market for biopsy devices, distinguishing first between soft tissue and bone marrow biopsy devices on functional grounds: bone is harder to penetrate than soft tissue and bone marrow biopsy devices require larger needles and more force. The Commission then identified six distinct product markets, corresponding to the three device categories above for both bone marrow and soft tissue biopsy devices. The Commission further concluded that manual, automatic, and semi-automatic CNB devices belong to the same product market, and left the geographic market definition and any further product segmentation open, as the transaction already raised serious doubts on the widest plausible definitions.

— **Tissue markers**. Tissue markers are items placed following biopsy procedures to help the physician locate the biopsy site for future reference. The Commission considered a distinction between tissue markers designed for specific procedures (VAB and CNB) but left the matter, as well as the geographic market definition, open.

Innovation concerns. Aside from more traditional and fairly straightforward horizontal concerns, the Commission identified innovation concerns related to BD's biopsy and tissue marker pipeline products, as well as to soft tissue CNB devices in general.

— **Biopsy device pipeline product**. BD had a biopsy device pipeline product under development at the time of the transaction. The Commission observed that this product could compete with soft tissue CNB and VAB devices, and concluded that Bard's existing presence in VAB devices (where BD was not active) would reduce the merged entity's incentive to continue developing the pipeline product. The Commission concluded that these concerns would persist regardless of the pipeline product's final positioning, because the combined company would also hold a strong position in soft tissue CNBs.

— **Tissue marker pipeline product**. At the time of the transaction, Bard was the largest of only three tissue marker suppliers with market shares exceeding 5−10%. BD was not active in tissue markers but had a CNB marker under development, which according to the Commission

[11] *BD/Bard* (Case COMP/M.8523), Commission decision of October 18, 2017.

could have had positive effects on choice and innovation in this market. This project was, however, cancelled after the announcement of the transaction. For the Commission this was sufficient to suspect that the project would have been preserved but for the transaction, thereby raising concerns in this market.

— **Soft tissue CNB devices**. In the market for soft tissue CNB devices—where the merged company would be a market leader and no significant competition would remain—the Commission echoed concerns expressed in the market investigation that the merger would not only decrease the combined company's incentives to compete in innovation and R&D, but also those of any actual or potential competitors.

Remedies. To remedy the Commission's innovation concerns in biopsy device and tissue marker pipeline products, the parties committed to divest BD's biopsy device and tissue marker pipeline products. This follows an increasing emphasis on innovation concerns and a trend toward divesting R&D programs to remedy them.[12]

Lufthansa/Certain Air Berlin Assets* (Case COMP/M.8633*)

On December 21, 2017, the Commission conditionally approved the acquisition by Deutsche Lufthansa AG ("Lufthansa") of certain assets of the insolvent Air Berlin plc ("Air Berlin").[13] The transaction initially comprised the acquisition of control of the whole of Air Berlin's subsidiaries NIKI Luftfahrt GmbH ("NIKI") and Luftfahrtsgesellschaft Walter mbH ("LGW"). Subsequently, in the course of the Commission's investigation, Lufthansa decided not to acquire NIKI due to concerns that the Commission would not approve this part of the transaction. The Commission's investigation focused on Lufthansa's acquisition of all shares in LGW and of additional aircraft, crew, and an airport slot package that would be transferred from Air Berlin to LGW prior to closing.

Derogation decision. Following Lufthansa's request, on October 27, 2017, the Commission granted a derogation from the suspension obligation, allowing Lufthansa to continue the operation of 49 out of 57 planes from the two companies. This measure prevented further flight cancellations to the detriment of consumers, while at the same time safeguarding the competitive status quo.

Market definition. The Commission identified the provision of passenger air transport services as a relevant product market, and found that access to airport infrastructure is a necessary pre-condition for the provision of these downstream services. The Commission therefore defined the holding and access to slots as a separate product market on which airlines are active on the demand side (as opposed to their supply activity in the air passenger transport services market). For either of those two product markets, the Commission assessed degrees of substitutability to determine their geographic scope and concluded that the airports of Dusseldorf, Munich, Stuttgart, and Zurich constitute separate geographic markets. The geographic assessment on the remainder of affected airports was left open.

Counterfactual. The Commission assessed the counterfactual with reference to relevant legislation regulating the acquisition and transfer of slots. The Commission noted that the assets to be acquired, including the additional slot package, would most likely not be transferred to a third party in the framework of Air Berlin's insolvency proceedings. Consequently, the slots would be allocated to "slot pools" for the respective airports. As Lufthansa is an incumbent airline at those airports, it would have had the opportunity to subscribe to a portion of such slots, even if the transaction did not materialize. The

[12] *See, e.g.*, *Dow/DuPont* (Case COMP/M.7932), Commission decision of March 27, 2017.

[13] *Lufthansa/Certain Air Berlin Assets* (Case COMP/M.8633), Commission decision of December 21, 2017. One week earlier, the Commission unconditionally cleared easyJet's acquisition of certain Air Berlin assets mainly relating to Berlin Tegel airport (*easyJet/Certain Air Berlin Assets* (Case COMP/M.8672), Commission decision of December 12, 2017).

Commission distinguished in its competitive assessment between "net" and "gross" increments of the transaction to take account of this regulatory particularity.

Competitive assessment. The Commission found that the lack of access to slots may constitute a significant barrier to entry, disabling carriers provision of downstream air transport services to passengers. Further, the Commission found that, as the market test indicated, a broader presence at an airport (*i.e.*, by holding and using a considerable amount of slots), not only enables airlines to realize economies of scale, but also facilitates the scheduling of transfer flights and allows airlines to exercise a higher degree of bargaining power towards airport operators.

The Commission identified a set of circumstances enabling Lufthansa to foreclose actively access in the market for airport slots. First, the slots held by Lufthansa post-transaction would need to represent a significant share of the airport's capacity, in particular at peak times. Second, the transaction would need to materially impact Lufthansa's slot holding at the airport, in particular at peak times. Third, the large slot holding share needs to affect negatively the overall availability of input for the passenger air transport markets from or to the relevant airport. The latter point requires, in turn, that the airport be generally congested and hardly substitutable with other airports.

Dusseldorf airport. After an assessment on the degree of congestion and the highest as well as the average slot holding by Lufthansa at all affected airports, the Commission identified Dusseldorf airport as particularly congested over its summer schedule, with Lufthansa holding the majority share of slots. The Commission also concluded that, after Air Berlin's exit from the market, Lufthansa would hold sufficient slots to station more than 40 aircraft at the airport, whereas the next largest competitor could only deploy 4 aircraft. Lufthansa's net increment of its slot portfolio during the summer schedule at Dusseldorf airport would have been 5%, with an overall slot holding of 54%, post-transaction. Due to the overall shortage of slots at the airport and Lufthansa's respective grandfather rights[14] over those, the Commission did not expect this situation to change and concluded that the transaction would give rise to detrimental effects on the efficient operations of Lufthansa's competitors.

Commitments. To address the Commission's competitive concerns at Dusseldorf airport, Lufthansa submitted a third and final set of remedies, after two earlier proposals had been rejected by the Commission. Lufthansa tailored the transaction in such a way that it would only receive a portion of the slots previously held by LGW in Dusseldorf airport, ensuring that the increment of its portfolio of slots would be limited to 1%, instead of 5% absent the commitment.

The decision is noteworthy because of the Commission's in-depth assessment of the "access-to-infrastructure" market, as opposed to the traditional investigation of affected flight routes. This assessment needs to take account of air transport-specific provisions such as the slot regulation, which enables incumbent airlines to assume a share of airport slots, regardless of competitive concerns.

***Discovery/Scripps* (Case COMP/M.8665)**

On February 6, 2018, the Commission conditionally approved the acquisition of Scripps Network Interactive, Inc. ("Scripps") by Discovery Communications, Inc. ("Discovery"), both U.S.-based global media companies active in providing basic Pay-TV channels to TV distributors in the EEA.[15]

Market definition. The Commission found that Discovery and Scripps both had significant activities in three levels of the TV value chain. With respect to

[14] Under the Slot Regulation, an air carrier is entitled to retain every slot that it operated for at least 80% in the preceding year.

[15] *Discovery/Scripps* (Case COMP/M.8665), Commission decision of February 6, 2018.

these three levels, the Commission identified the following relevant product markets:[16]

— Three separate markets for the wholesale supply of TV channels: (i) free-to-air ("FTA"); (ii) basic Pay-TV; and (iii) premium Pay-TV;

— Two markets for the retail supply of television services: (i) FTA; and (ii) Pay-TV; and

— A market for the sale of advertising space on TV channels.

In each case, the Commission concluded that the geographic market was national or confined to a linguistic region.

The parties are particularly active in Norway, Sweden, the United Kingdom, and Poland. For the first three countries, the Commission concluded that the proposed transaction would raise no competition issues given the limited overlap between the companies' activities. However, in Poland, the Commission had several concerns.

Horizontal concerns. The Commission concluded that the transaction would result in negative horizontal effects in the market for the wholesale supply of basic TV channels in Poland, where the parties would have a combined market share of 30–40%, as wells as a combined market share of 50–60% in the segment for factual TV channels. The Commission found that: (i) certain TV channels in the parties' portfolios were particularly important to TV distributors in Poland (*e.g.*, Discovery's Eurosport and Discovery Channel and Scripps's TVN24); (ii) TVN24, Scripp's main news channel in Poland, was widely perceived as one of the few channels offering high-quality news and particularly important for Pay-TV distributors; and (iii) the combined entity would likely have the ability and incentive to jointly offer the licensing of its TV channel portfolio. For these reasons, the Commission concluded that the transaction would lead to an increase in Discovery's bargaining power vis-à-vis TV distributors in Poland.

Vertical concerns. The Commission considered but eventually dismissed vertical concerns in relation to the Polish market for the wholesale supply of basic Pay-TV channels, where the parties would have a 30–40% combined share, and the market for the retail supply of Pay-TV services, where the parties would have market shares below 5%. The Commission found that the merged entity would likely lack the incentive to reserve its channel portfolio to its own downstream over-the-top ("OTT") platform, and even if it were to do so, such conduct would be unlikely to foreclose downstream competitors in the retail supply of Pay-TV services.

The Commission also dismissed both input and customer foreclosure concerns in relation to the market for the sale of TV advertising in Poland and the market for purchasing of airtime to resell to media agencies, where Scripps has a market share above 30%. In particular, the Commission held that no input foreclosure effects would arise from the transaction because several competing suppliers of airtime would remain active Poland. No customer foreclosure effect would arise because competing channels could sell airtime to several competing media agencies active in Poland.

Remedies. To address the Commission's horizontal concerns in the market for the wholesale supply of basic Pay-TV channels in Poland, Discovery committed to make TVN24 and TVN24 Bis available for seven years to current and future TV distributors in Poland for a reasonable fee determined by reference to comparable agreements.

Referral request. The Commission rejected a request from Poland to refer the merger to the Polish competition authority for assessment under Polish competition law. The Polish competition agency argued that the transaction would significantly affect competition only in the Polish market. The

[16] In its prior decisions, the Commission has identified five levels in the TV value chain: (i) the production and supply of commissioned TV content (including the supply of pre-produced TV content); (ii) the licensing of broadcasting rights for pre-produced TV content; (iii) the wholesale supply of TV channels; (iv) the retail provision of TV services to end customers; and (v) the sale of advertising on channels.

Commission concluded that it was the most appropriate authority to deal with the transaction because: (i) there was a need to ensure consistency in the way mergers falling into the Commission's competence in this sector are assessed throughout the EU; and (ii) the Commission had recent sector-specific knowledge of the TV audiovisual market across EEA Member States.[17] This outcome is consistent with Commission's prior decisions, in which the Commission found itself better placed to review mergers related to the TV and telecommunications sectors.[18]

State Aid

ECJ Judgments

***Commission v. FIH Holding and FIH Erhvervsbank* (Case C‑579/16 P)**

On March 6, 2018, the Court of Justice set aside the General Court's 2016 annulment[19] of the Commission's 2014 decision[20] that had authorized aid (in the form of loans and guarantees) to FIH Erhvervsbank A/S ("FIH"), a Danish bank.[21] The Court of Justice's judgment concerned the application of the private operator principle to the assessment of whether measures constitute state aid.

In 2009, the Kingdom of Denmark granted FIH: (i) a hybrid tier 1 capital injection; and (ii) a state guarantee ("the 2009 measures"), which were approved by the Commission as aid schemes compatible with the internal market.[22]

In 2011, it became apparent that FIH would experience liquidity problems in 2012 or 2013 that could lead to the loss of its banking license and, therefore, to its liquidation. Consequently, in 2012, the Kingdom of Denmark, adopted a series of additional measures to avoid this ("the 2012 measures"). These included: (i) the transfer of FIH's most problematic assets to a new FIH subsidiary, NewCo; (ii) the purchase of NewCo's shares by the Financial Stability Company ("FSC"), a public body, with a view to wind up NewCo within four years; (iii) the repayment to FSC by FIH of the 2009 capital injection to enable FSC to buy NewCo; (iv) the grant of loans from FIH to NewCo; and (v) the provision of an unlimited loss guarantee to FSC.

The Commission found that the 2012 measures were not compatible with the private investor test—primarily because of the insufficient level of remuneration provided in consideration for the resources that had to be committed by the Danish state—and, therefore, conferred an economic advantage on FIH.[23]

In 2014, FIH appealed the Commission's decision claiming, inter alia, the incorrect application of the private operator principle. It argued that, to assess whether the measures at issue constituted state aid within the meaning of Article 107(1) TFEU, the Commission was obliged to compare the behavior of the Danish state at the time of their adoption not to that of a private investor, but to that of a private creditor in a market economy, taking into account the financial risks the Danish state was exposed to on account of the

[17] *See, e.g., Fox/Sky* (Case COMP/M.8354), Commission decision of April 7, 2017; and *Vivendi/Telecom Italia* (Case COMP/M.8465), Commission decision of May 30, 2017.

[18] *See, e.g., Liberty Global/Ziggo* (Case COMP/M.7000), Commission decision of October 10, 2014, para. 20. The Commission refused a referral request of the Dutch Competition Authority on the ground that there is a "need to ensure a coherent and consistent approach when assessing mergers in the converging TV-related and telecommunication sectors in different Member States falling under the Commission's competence and the fact that the Commission has developed significant expertise in the European Union's telecommunication markets in recent years."

[19] *FIH Holding and FIH Erhvervsbank v. Commission* (Case T 386/14) EU:T:2016:474.

[20] Commission Decision C (2014) 884 of March 11, 2014 (State aid 12/C (ex SA.34445)), OJ 2014 L 357/89.

[21] *Commission v. FIH Holding and FIH Erhvervsbank* (Case C‑579/16 P) EU:C:2018:159.

[22] Commission Decision C (2009) 776 of February 3, 2009 (State aid N31a).

[23] The Commission however ultimately approved the 2012 measures as compatible with the internal market following commitments offered by the Kingdom of Denmark.

2009 measures.[24] The General Court agreed with FIH and annulled the Commission's decision.

The Commission appealed to the Court of Justice, claiming that the General Court committed an error of law in its application of the private operator principle.

The Court of Justice first outlined that the private operator principle is applied to assess the conditions under which the advantage was granted. This is necessary because the definition of "aid," within the meaning of Article 107(1) TFEU, cannot cover a measure granted to an undertaking through state resources where it could have obtained the same advantage in normal market conditions.[25]

The private operator principle covers both the private investor and private creditor tests. The Court of Justice explained that, when the private operator principle is applied, the nature of the transaction envisaged by the Member State concerned must be one of the factors used to determine whether the private investor or private creditor test is to be employed.

The Court of Justice recalled settled case law that, in applying the private operator principle, only the benefits and obligations linked to the situation of the state as a private operator, and not those linked to its situation as a public authority, are to be taken into account.[26] The Court of Justice reasoned that, because the 2009 measures constituted state aid, the Commission was entitled not to take into account risks related to those measures when applying the private operator principle. The risks to which the state is exposed that are the result of previously granted state aid are linked to its actions as a public authority and are not among the factors that a private operator would, in normal market conditions, have taken into account in its economic calculations.

Consequently, the Court of Justice held that the Commission correctly applied the private investor test, rather than the private creditor test. The Court of Justice referred the case back to the General Court to examine the second plea that FIH had raised before it alleging errors of calculation in the amount of aid.

The case is important because it clarifies the application of the private operator principle. Where previous measures have been classified as state aid, the Commission need not take those measures into account when applying the private operator principle.

General Court Judgments

***Alouminion tis Ellados v. Commission* (Case T-542/11 RENV)**

On March 13, 2018, following over six years of litigation before the European courts on the question of new/existing aid, the General Court dismissed an appeal by Alouminion tis Ellados VEAE ("AtE"), a Greek industrial aluminum producer, against the Commission decision of July 13, 2011.[27]

The roots of this case date back to 1960, *i.e.*, before Greece joined the EU, when Dimosia Epicheirisi Ilektrismou AE ("DEI"), a state-owned electricity company, contractually granted to AtE a preferential electricity tariff. In 1992, the Commission found that such preferential treatment under the 1960 contract constituted state aid, but that it was compatible with the internal market.[28] In 2006, when the 1960 contract was due to expire, DEI did not elect to extend it. AtE judicially challenged the contract's expiry. In January 2007, in interlocutory proceedings, the competent court of first instance suspended the termination and ordered the application of the preferential rate. In March 2008, however, the competent court of appeal terminated the 1960 contract.

In 2011, following a complaint, the Commission found that the application of a preferential price rate to AtE between January 2007 and March 2008, as ordered by the Greek competent court of first instance, constituted an illegal €17.4 million state aid. In line with

[24] The Danish state sought to limit the financial consequences of its 2009 measures.

[25] *Commission v. FIH Holding and FIH Erhvervsbank* (Case C‑579/16 P) EU:C:2018:159, para. 45.

[26] *Ibid*., para. 55.

[27] Commission Decision C (2011) 4916 of July 13, 2011 (State Aid C 2/10 (ex NN 62/09)), OJ 2012 L 166/83.

[28] Commission Decision SG (92) D/867 of January 23, 1992 (State Aid NN 83/91).

precedents according to which the extension of an existing aid constitutes new aid that must be notified, the Commission found that this was a new aid that had not been notified.[29] AtE appealed to the General Court, which annulled the decision in October 2014, by classifying the aid as existing aid. However, in October 2016, the Court of Justice annulled the General Court's judgment, finding the aid to be new, and referred the case back to the General Court.[30] On remittal, the General Court re-examined the case to align with the points made by the Court of Justice. AtE maintained nine grounds of appeal against the decision, all of which were dismissed in their entirety.[31]

Most notably, AtE argued that the preferential rate did not constitute an advantage under Article 107(1) TFEU, as a private investor similar to DEI would also have applied the preferential rate. The General Court disagreed and found the private investor test not to apply in this particular case. In the General Court's view, it is reasonable to exclude that a private investor would intend to charge, without any compensation, the amount of such a preferential price rate rather than the regular rate. The General Court further noted that AtE did not raise the existence of any compensation and the application of the preferential rate could therefore not rationally be voluntary.[32]

The General Court also recalled that such an advantage may not constitute state aid if it is objectively justified by economic reasons, but that Member States, rather than the Commission, bear the burden of proof. Yet Greece did not submit any such argument. The General Court concluded that the Commission was correct in finding that the preferential rate was not justified by economic reasons.

On the question of the Commission's lack of competence, the General Court held that, although the Commission does not have exclusive competence to assess the existence of an aid, it does so to assess the aid's compatibility. The General Court therefore found that the Commission was competent to interpret the contract between AtE and DEI to decide whether there was new aid.

Naviera Armas v. Commission **(Case T-108/16)**

On March 15, 2018, the General Court[33] partially annulled a 2015 decision in which the Commission decided not to open a formal investigation, notably because it concluded that an exclusive license granted to a port operator did not involve state aid.[34] The General Court found that the Commission failed to establish that the port owner acted as a private operator.

The case concerns the shipping company Naviera Armas SA ("Naviera Armas") and one of its principal competitors, Fred Olsen SA ("Fred Olsen"). Both companies operate commercial ferry routes on the Canary Islands. In 1993, Fred Olsen was the first company to apply for authorization to establish a commercial transport service between the ports of Puerto de Las Nieves and Santa Cruz de Tenerife. The Directorate General for Ports of the Canary Islands ("DGPC") approved the application. In the following years, Naviera Armas applied multiple times for a license to operate between the two ports, but the DGPC repeatedly rejected its applications, primarily on account of limited docking capacity at Puerto de Las Nieves and the need to ensure safety of vessel maneuvers, until a public tender was organized in 2014.

[29] Commission Decision C (2011) 4916 of July 13, 2011 (State Aid C 2/10 (ex NN 62/09)), OJ 2012 L 166/83.

[30] *DEI and Commission v. Alouminion tis Ellados* (Case C-590/14 P) EU:C:2016:797. The Court of Justice found that the termination of the contract in 2007 constituted an "extension of the duration of existing aid [which] must be considered to be an alteration of existing aid and therefore, … constitutes new aid."

[31] *Alouminion tis Ellados v. Commission* (Case T-542/11 RENV) EU:T:2018:132, paras. 38–41.

[32] *Ibid*., paras. 132–133.

[33] *Naviera Armas v. Commission* (Case T-108/16) EU:T:2018:145.

[34] Commission Decision C (2015) 8655 of December 8, 2015 (State Aid SA.36628 (2015/NN-2) (ex 2013/CP)), OJ 2016 C 25/01.

In 2013, Naviera Armas lodged a complaint with the Commission. It claimed that the exclusive license that was granted to Fred Olsen constituted unlawful state aid. On December 8, 2015, the Commission issued a decision not to initiate a formal investigation because the exclusive use of Puerto de Las Nieves by Fred Olsen did not involve state aid. In March 2016, Naviera Armas appealed the Commission's decision to the General Court.

The Commission's decision found that the exclusive license did not constitute state aid because the infrastructure of Puerto de Las Nieves was neither planned nor developed to specifically benefit Fred Olsen. The General Court recalled in this regard the objective nature of the notion of state aid—an advantage may be granted even when it is not instituted to benefit a particular undertaking, as measures of state intervention are defined in relation to their effects, not their object. On that basis, the General Court concluded that the finding that the Puerto de Las Nieves infrastructure was not developed to benefit Fred Olsen, even if true, cannot rule out the involvement of state aid.[35] Neither does the fact that the state-owned infrastructure can only be made available to a limited number of users or even a single user, "including when that limitation has its origins in considerations of safety."[36]

The General Court further confirmed that Naviera Armas had clearly defined the alleged advantage in its complaint (*i.e.*, Fred Olsen had not been required to pay consideration corresponding to the actual economic value of its exclusive right). It was then for the Commission—as part of its duty to conduct a diligent and impartial investigation—to assess whether the port dues paid by Fred Olsen "were at least equivalent in amount to the price a private investor … would have been able to obtain by way of consideration for such use."[37] Further, the General Court recalled that, while organizing an open, transparent, and non-discriminatory competitive tender is not the only way to comply with the private investor test and determine the market value of state-owned infrastructure, it nevertheless can ensure that no advantage is conferred.[38]

The General Court concluded that the Commission's decision did not dispel any serious difficulties in the assessment of the measure. Accordingly, the Commission was bound to open a formal investigation procedure under Article 108(2) TFEU to assess whether Fred Olsen's exclusive use of the Puerto de Las Nieves port infrastructure constituted state aid. As a result, the General Court partially annulled the Commission's decision.

The case is noteworthy for two main reasons. First, the judgment has practical consequences for Member States: state-owned infrastructure must be made available to users at prices that correspond to the market value. Second, it emphasizes the difficulty in determining that market value in the absence of a competitive tender procedure.

Policy and Procedure

General Court Judgments

Edeka v. Commission (Case T-611/15)

On February 5, 2018,[39] the General Court confirmed the Commission's decision to reject Edeka-Handelsgesellschaft Hessenring GmbH's ("Edeka") request to access the table of contents of the Commission's administrative file based on Regulation No. 1049/2001.[40] The decision confirmed that the exception in Article 4(2) of Regulation No. 1049/2001—allowing the Commission to refuse access to a document when this would undermine the purpose of an investigation—includes a table of contents, and

[35] *Naviera Armas v. Commission* (Case T-108/16) EU:T:2018:145, paras. 84–90.

[36] *Ibid*., para. 114

[37] *Ibid*., para. 124.

[38] *Ibid*., para. 120.

[39] *Edeka-Handelsgesellschaft Hessenring v. Commission* (Case T-611/15) EU:T:2018:63.

[40] Regulation No. 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43 ("Regulation No. 1049/2001").

applies in particular when there are still hold-outs in a hybrid settlement procedure.

Edeka, a German cooperation of supermarkets, was considering a private damages claim following the Commission's decision to fine a number of banks for cartel activity in the Euro interest rates derivatives sector (the "EIRD cartel").[41] To better assess its claim for damages, Edeka requested access to the table of contents of all documents in the Commission's file in the EIRD cartel proceedings. At the time, these hybrid proceedings were still ongoing because decisions against a number of hold-out banks were not yet published. The Commission refused to grant Edeka access on the basis of Article 4(2) of Regulation No. 1049/2001,[42] stating that to provide access would undermine the ongoing investigation. On April 8, 2015, Edeka asked the Secretary General of the Commission to review the Commission's decision, which it confirmed.

On November 2, 2015, Edeka appealed the Commission's decision to the General Court. The General Court observed that, under settled EU case law:[43] (i) there is a presumption of confidentiality for all documents in the Commission's file related to any Article 101 TFEU proceedings; but (ii) parties may show that the presumption of confidentiality does not apply in a specific case or that there is an overriding public interest in the disclosure of the document in question.

First, with respect to the alleged breach of Edeka's fundamental rights by failing to state reasons, the General Court held that this was not sufficient to justify the annulment of the decision. The Commission set out in detail its reasons for adopting its decision as part of two related processes in which Edeka participated, and simply referring to those previous explanations was sufficient to satisfy the Commission's obligation to state reasons.

Second, the General Court dismissed Edeka's claim that the table of contents was not sufficiently specific on its own to be protected by the presumption of confidentiality in Article 4 of Regulation No. 1049/2001. The General Court noted that the information contained in the table of contents was sufficiently relevant and specific—*e.g.*, it included sufficient information to identify all steps taken by the Commission in the cartel proceedings—such that access to it could jeopardize the underlying proceedings in the same way disclosure of the documents referenced in the table of contents would.

Finally, the General Court held that Edeka's assessment of its ability to bring a private damages action was not an overriding public interest sufficient to justify access to the Commission's file prior to publication. The General Court held that, while it was in principle possible to show such necessary overriding public interest in granting access to the file as part of a private damages claim, this was not the case for Edeka's request. Although Edeka had claimed that access to the table of contents was necessary "to form an opinion on whether the documents listed in the [the table of contents] may be needed to support a future action for compensation,"[44] the General Court concluded that this argument was not sufficient to demonstrate that Edeka would be unable to make a claim for damages without the table of contents. The General Court therefore held that the necessary overriding public interest was not present and refused Edeka access.

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[41] *Euro Interest Rate Derivatives* (Case COMP/AT.39914), Commission decision of December 4, 2013.

[42] Article 4(2) of the Regulation No. 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."

[43] *See, e.g., Commission v. EnBW* (Case C-365/12 P) EU:C:2014:112, paras. 79 and 93; and *Netherlands v. Commission* (Case T-380/08) EU:T:2013:480, para. 42.

[44] *Edeka-Handelsgesellschaft Hessenring v. Commission* (Case T-611/15) EU:T:2018:63, para. 102.

Our Offices

New York
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

Washington, D.C.
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

Paris
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

Brussels
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

London
2 London Wall Place
London EC2Y 5AU, England
T: +44 20 7614 2200
F: +44 20 7600 1698

Moscow
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

Frankfurt
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

Cologne
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

Rome
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

Milan
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

Hong Kong
Cleary Gottlieb Steen & Hamilton (Hong Kong)
37th Floor, Hysan Place
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

Beijing
Cleary Gottlieb Steen & Hamilton LLP Beijing Representative Office
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District, Beijing, 100020
China
T: +86 10 5920 1000
F: +86 10 5879 3902

Buenos Aires
CGSH International Legal Services, LLP-
Sucursal Argentina
Carlos Pellegrini 1427 – Floor 9
C1011AAC Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

São Paulo
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Prof. Atílio Innocenti, 165 – 14th Floor
São Paulo, SP Brazil 04538-000
T: +55 11 2196 7200
F: +55 11 2196 7299

Abu Dhabi
Al Sila Tower, 27th Floor
Abu Dhabi Global Market Square
Al Maryah Island, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

Seoul
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 04539, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099