Abuse

ECJ Judgments

Meo – Serviços de Comunicações e Multimédia (Case C-525/16)

On April 19, 2018, the Court of Justice delivered its preliminary ruling following a request from the Portuguese Competition, Regulation, and Supervision Tribunal (the "Portuguese Tribunal") on the interpretation of the concept of placing an undertaking at a competitive disadvantage under Article 102(c) TFEU. The Portuguese Tribunal inquired in particular whether, as part of this analysis, it is necessary to examine the seriousness of the effects that differentiated prices have on the affected undertaking's competitive position.[1]

In 2014, MEO - Serviços de Comunicações e Multimédia SA ("MEO"), a provider of retail television services, filed a complaint against the dominant collecting society in Portugal, Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes ("GDA"), alleging that GDA had been charging discriminatory royalties for artists' rights licenses.

On March 19, 2015, the Portuguese Competition Authority ("PCA") rejected the complaint, concluding that GDA's practice of charging different prices for equivalent transactions was not likely to place MEO at a significant competitive disadvantage, because MEO was able to absorb that differentiation. MEO challenged the PCA's decision before the Portuguese Tribunal, which then requested a preliminary ruling from the Court of Justice.

The Court of Justice confirmed Advocate General Wahl's opinion, delivered on December 20, 2017,[2] holding that the discriminatory behavior of the dominant undertaking may be considered abusive only if it leads to a distortion of competition between the favored and disfavored trading partners. The Court of Justice held that a competitive disadvantage cannot be presumed, but should be established in light of all relevant circumstances.[3] The Court of Justice further clarified that fixing a seriousness or an appreciability (*de minimis*) threshold to determine whether a behavior is abusive is not justified.

In particular, to carry out an examination of all relevant circumstances, competition authorities and national courts must conduct a detailed assessment evaluating the amount and duration of the tariffs charged, the conditions and arrangements for charging those different tariffs, the negotiating power of the undertakings concerned, and the possible existence of a strategy aiming to exclude the disfavored entity from the market. The dominant undertaking's behavior is likely to be abusive if the results of this analysis show an effect on the costs, profits, or any other interest of the affected undertaking. Additional proof of an actual, quantifiable deterioration in the competitive position of the affected undertaking is not required for a finding of a "competitive disadvantage."

Commission Decisions

Upstream Gas Supplies in Central and Eastern Europe (Gazprom) (Case COMP/AT.39816)

On May 24, 2018, the Commission imposed binding commitments on PJSC Gazprom and its wholly-owned subsidiary Gazprom export LLC (together

[1] *Meo – Serviços de Comunicações e Multimédia* (Case C-525/16) EU:C:2018:270.

[2] *Meo – Serviços de Comunicações e Multimédia* (Case C-525/16), opinion of Advocate General Wahl, EU:C:2017:1020.

[3] *British Airways v. Commission* (Case C-95/04 P) EU:C:2007:166.

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"Gazprom"), under Article 9 of Regulation 1/2003.[4] These commitments address the Commission's concerns that Gazprom may have abused its dominant position in Central and Eastern European markets for the upstream wholesale supply of gas, in breach of Article 102 TFEU.[5]

This commitments decision concludes the formal investigation opened in 2012, with the statement of objections issued in April 2015.[6]

The Commission found that the upstream wholesale supply of natural gas (from gas producers and exporters to gas wholesalers and importers) constitutes a separate product market that is national in scope. The Commission observed that Gazprom holds a dominant position in each of the relevant markets with market shares ranging from 70–100% in Bulgaria, the Czech Republic, Estonia, Latvia, Lithuania, and Slovakia, and from 40–70% in Hungary and Poland.

The Commission noted that Gazprom plays a crucial role in these countries as customers may not be able to cover their demand for gas in the short- or mid-term without its gas supply. The Commission also found that barriers to entry stemming from the gas connecting infrastructure and Gazprom's long-term contract and take-or-pay obligations strengthen its dominant position.

First, Gazprom may have pursued an overall strategy to partition gas markets along national borders. In particular, the Commission found that Gazprom may have implemented territorial restrictions (*e.g.*, use of export bans and destination clauses) in supply agreements with customers, and used various contractual provisions on delivery points and access to metering points with the objective of isolating the Baltic States' and Bulgarian gas supply markets from neighboring countries.

Second, Gazprom may have pursued an unfair pricing policy in Bulgaria, Estonia, Latvia, Lithuania, and Poland by charging significantly higher prices than in Western Europe. In particular, Gazprom used unfair indexation formulae and refused to implement price revision clauses based on Western European benchmarks.

Finally, the Commission found that Gazprom may have abused its dominance by making the supply of gas to Bulgarian customers dependent on customers' investments in the "South Stream" pipeline project.

Gazprom disagreed with the Commission's preliminary assessment. Nevertheless, it offered a final set of commitments on March 18, 2018 to eliminate the concerns expressed by the Commission.

Gazprom offered to remove any restrictions placed on customers to resell gas cross-border, in order to remedy the concern that Gazprom imposed territorial restrictions in its supply agreements with wholesalers and some industrial customers, and committed to adapt clauses on metering points that isolated the Bulgarian gas market from neighboring EU gas markets.

The commitments decision also requires Gazprom to facilitate gas flows to and from isolated markets, namely the Baltic States and Bulgaria. Customers that have bought gas, originally for delivery to Hungary, Poland, or Slovakia, will now have the choice to have it supplied to Bulgaria and the Baltic States instead.

Furthermore, Gazprom committed to give customers an effective tool to verify that their gas price reflects the price level in competitive Western European gas markets in order to address concerns relating to excessive pricing. New gas prices must now be set in line with the price level in continental western gas markets and customers can refer the matter to an arbitration tribunal in case of disagreement. The Commitments require the arbitration to take place in the EU and to apply EU competition law. The Commission also reserves its right to intervene as *amicus curiae* in the arbitration proceedings.

[4] Council Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1 ("Regulation 1/2003").

[5] *Upstream Gas Supplies in Central and Eastern Europe (Gazprom)* (Case COMP/AT.39816), Commission decision of May 24, 2018.

[6] At the time of the statement of objections, despite the advanced stage of its investigation, the Commission indicated its willingness to close the case in exchange for commitments under Article 9 of Regulation 1/2003.

Finally, to address the concern that Gazprom may have leveraged its dominance in gas supply by obtaining preferential access to or control of gas infrastructure, Gazprom committed not to benefit from advantages obtained or seek damages from its Bulgarian partners following the termination of the South Stream project and to ensure that the supply of gas would no longer depend on customers' investment in the Bulgarian gas infrastructure.

Mergers and Acquisitions

ECJ Judgments

Ernst & Young (Case C-633/16)

On May 31, 2018, the Court of Justice issued its judgment on a preliminary ruling on premature implementation of concentrations ("gun-jumping").[7] The Court of Justice held that "a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to a change in control of the target undertaking." The ruling represents a clarification following the Commission's increased focus on gun-jumping and the General Court's judgment in *Marine Harvest*.[8]

Background. On November 18, 2013, Ernst & Young ("EY") and KPMG Denmark ("KPMG DK") entered into a merger agreement. Under Danish competition law, the implementation of this transaction was subject to prior approval of the national competition authority (Konkurrencerådet, or "DCCA"). At that time, KPMG DK operated under the KPMG trade name further to its affiliation with KPMG International Cooperative ("KPMG International"), an international network of independent auditing firms. According to a provision in the merger agreement, upon signing, KPMG DK announced that it would terminate its agreement with KPMG International on September 30, 2014. At the same time, KPMG International established a new Danish business to maintain local presence even after termination of the cooperative agreement.

Meanwhile, as the DCCA's review of the EY/KPMG DK merger proceeded, several former clients left KPMG DK for the new KPMG International affiliate company or other competitors. Having granted its approval to the merger with EY, the DCCA subsequently ruled that the termination of KPMG DK's cooperation agreement with KPMG International violated gun-jumping prohibitions under Danish law on the grounds of its merger-specificity, irreversibility, and likely market effects prior to approval of the concentration.

On appeal, the Danish Maritime and Commercial Court sent a preliminary reference to the Court of Justice requesting clarification of the standstill obligation provided for by Article 7(1) EUMR.[9] In particular, it asked the Court of Justice whether a change in control in the target undertaking is required for a transaction to be considered implemented in violation of Article 7(1), whether the termination of the cooperation agreement could cause the implementation of a concentration, and whether, to that effect, it would be relevant to consider any market effects.

Opinion. Advocate General Wahl argued that measures preceding and severable from measures that lead to the "possibility of exercising decisive influence" do not fall within the scope of the standstill obligation.[10] He argued that a broader definition of gun-jumping would result in the standstill obligation catching measures unrelated to concentrations, impermissibly extending the scope of the EUMR.[11] Advocate General Wahl also dismissed potential market effects as a relevant criterion, which would almost always be satisfied and risk being conflated with the substantive assessment of the concentration.

Judgment. The Court of Justice followed Advocate General Wahl in finding that the termination of the cooperation agreement did not amount to gun-

[7] *Ernst & Young* (Case C-633/16) EU:C:2018:371 ("*Ernst & Young*").
[8] *Marine Harvest v. Commission* (Case T-704/14) EU:T:2017:753 ("*Marine Harvest*").

[9] Council Regulation No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1 ("EUMR").
[10] *Ernst & Young* (Case C-633/16), opinion of Advocate General Wahl, EU:C:2018:23, para. 65.
[11] *Ibid*, paras. 68–69.

jumping. By reference to the purpose and general scheme of Article 7(1), it observed that a "concentration," as defined in Article 3 EUMR, only arises where a lasting change in control of the target undertaking takes place.[12] Operations that do not contribute to such an effect, even if carried out within the context of a concentration, do not violate the standstill obligation in Article 7(1) and may only be treated as ancillary or preparatory. The Court of Justice also clarified that its conclusion would not change regarding operations that had market effects.

Finally, the Court of Justice found that the termination of a cooperation agreement, in circumstances similar to those under examination (*e.g.*, in light of KPMG DK's independence from KPMG International), would not contribute to a change in control and therefore not amount to gun-jumping: regardless of any conditional link to the concentration and despite its likely effects in the market, this could only be deemed as an ancillary or preparatory action.[13]

Conclusions. In October 2017, the General Court upheld the Commission's decision fining Marine Harvest €20 million for gun-jumping following its acquisition of a minority stake in Morpol that was sufficient to confer control.[14] Likewise, in April 2018, the Commission fined Altice €124.5 million for implementing its acquisition of PT Portugal before it had secured clearance, finding that it had exercised decisive control over PT Portugal, in some instances even before the transaction had been notified.[15] These cases are the Commission's first gun-jumping decisions since *Electrabel* in 2009,[16] and the Commission expects them to provide clarity on the scope of the standstill obligation.[17] The Court of Justice's judgment in this case is therefore noteworthy for providing some clarity following the General Court's judgment in *Marine Harvest* and the Commission's increased focus on gun-jumping.

General Court Judgments

Deutsche Lufthansa v. Commission (Case T-712/16)

On May 16, 2018, the General Court annulled a Commission decision rejecting an application for a partial waiver of merger commitments.[18] This was the first time that this type of decision had been challenged before the EU Courts.

The Commission cleared the acquisition of Swiss International Air Lines Ltd ("Swiss") by Deutsche Lufthansa AG ("Lufthansa") in 2005,[19] subject to commitments concerning landing slots and fares on the Zurich-Stockholm and Zurich-Warsaw routes. The Commission's concerns focused on the lack of competition post-transaction between Lufthansa, Scandinavian Airlines System ("SAS"), and Polish airline Polskie Linie Lotnicze LOT S.A. ("LOT"). Lufthansa had entered into multiple alliance agreements with SAS and LOT, and was part of Star Alliance, a large global airline alliance. The Commission concluded that, post-transaction, SAS and LOT would have little incentive to compete with Lufthansa/Swiss.

In November 2013, Lufthansa sought from the Commission a partial waiver from the slot and fare commitments concerning the Zurich-Stockholm and Zurich-Warsaw routes. Lufthansa argued that competitive conditions had changed since the commitments were rendered binding in 2005: Lufthansa had terminated one of its alliance agreements with SAS, the Commission no longer combined airline alliance members' market shares when assessing airline mergers, and there was strong competition between Swiss and SAS/LOT. The

[12] *Ernst & Young*, para. 46.
[13] *Ernst & Young*, para. 60.
[14] *Marine Harvest*. Marine Harvest has lodged an appeal with the Court of Justice.
[15] *Altice/PT Portugal* (Case COMP/M.7993), Commission decision of April 24, 2018.
[16] *Electrabel/Compagnie Nationale du Rhone* (Case COMP/M.4994), Commission decision of June 10, 2009.
[17] Janith Aranze, DG COMP Official Acknowledges Gun-Jumping Uncertainty, [2017] September, Global Competition Review, p. 1; and Charley Connor, DG COMP Official Says Altice Decision Will Provide Gun-Jumping Guidance, [2018] May, Global Competition Review, p. 1.
[18] *Deutsche Lufthansa v. Commission* (Case T-712/16) EU:T:2018:269.
[19] *Lufthansa/Swiss* (Case COMP/M.3770), Commission decision of July 4, 2005.

Commission rejected Lufthansa's application, and Lufthansa brought an annulment action before the General Court.

The General Court recalled its longstanding case law to the effect that the Commission has a certain discretion with respect to economic assessments, and in particular the need for commitments. Nevertheless, the Commission must examine waiver requests carefully, basing its conclusions on all relevant information. Moreover, once the parties prove that the conditions for the review of the commitments have been met, the burden shifts to the Commission to demonstrate otherwise.

The General Court criticized the Commission's failing to take into account both the termination of a joint venture agreement between Lufthansa and SAS—which, in the opinion of the monitoring trustee reporting to the Commission, amounted to a "substantial market change"—and Lufthansa's offer to terminate the bilateral alliance agreement underpinning its relationship with SAS.

The General Court also agreed that the Commission's policy towards airline mergers had changed since *Lufthansa/SN Airholding (Brussels Airlines)*,[20] so that the routes in question would not require commitments were the transaction notified today. The General Court distinguished its previous case law to the effect that the Commission is not bound by assessments made in previous decisions, as *Lufthansa/SN Airholding (Brussels Airlines)* concerned the same agreements made between the same parties in the same context and on the same issue.

Finally, the General Court found that the Commission had failed to properly evaluate the impact of a codeshare agreement between Swiss and SAS and examine the parties' evidence of continued competition between Swiss and SAS/LOT.

[20] *Lufthansa/SN Airholding (Brussels Airlines)* (Case COMP/M.5335), Commission decision of June 22, 2009. This case represented a change in the Commission policy in that the market shares of the parties' alliance partners are no longer taken into account in the determination of affected markets.

In light of the Commission's manifest error of assessment, the General Court partially annulled the decision with respect to the Zurich-Stockholm route commitments. However, the General Court concluded that the decision's deficiencies with respect to the Zurich-Warsaw route commitments were not sufficient for it to be completely annulled.

Commission Decisions

Phase I Decisions with Undertakings

Maersk Line/HSDG (Case COMP/M.8330)

On April 10, 2017, the Commission approved the acquisition of Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG ("HSDG") by Maersk Line A/S ("Maersk").[21] Both companies provide container liner shipping services worldwide. The clearance was subject to commitments, designed to address the identified horizontal concerns in deep-sea container liner shipping services.[22]

Market definition. Consistent with prior decisional practice, the Commission identified the relevant product market as the provision of regular, scheduled services for the carriage of cargo by container, which could be further segmented into the market for reefer (refrigerated) and non-reefer containers. The Commission defined the relevant geographic market as limited to legs of trade (for example, Northern Europe – North America eastbound).

Horizontal concerns. The analytical framework of the Commission's assessment took into account the prominent role that maritime consortia play in the industry. The Commission found that shipping companies provide their services: (i) individually; (ii) through vessel share agreements or alliances (consortia); or (iii) by means of slot charter agreements. Joining a consortium allows shipping

[21] *Maersk Line/HSDG* (Case COMP/M.8330), Commission decision of April 10, 2017.

[22] The Commission's investigation also included overlaps in short-sea container liner shipping services and tramp services, as wells as a number of vertical relationships. However, the Commission found no serious competition concerns in these areas.

companies to benefit from operating a joint service on an individual trade by using slots across all vessels contributed to the joint service. The Consortia Block Exemption Regulation ("BER") exempts such cooperative agreements between shipping companies from the scope of Article 101 TFEU, subject to certain conditions.[23] Similar to other BERs, the Consortia BER stipulates a set of "hardcore" restrictions, including price-fixing, which ensures the consortium members continue to compete with each other. The Commission, however, recognized that competition within a consortium may be limited. In its view, the links between the consortia members may increase their ability and incentive to control important parameters of competition such as capacity, prices, frequencies, schedule of services, and ports of call. Therefore, to account for the parties' membership in consortia, the Commission's competitive assessment included analysis of the parties' market shares on an individual basis, as well as the aggregate market shares of the parties' consortia. The Commission also found that, by creating a link between previously independent Maersk and HSDG's consortia, the transaction would have likely increased the parties' ability to influence decisions on important parameters of competition, which would be decided jointly by all members of a given consortium.

Applying these principles, the Commission identified concerns in the five trade routes where the transaction would have resulted in the parties' combined market shares up to 50–60% on an individual basis and 80–90% on the consortia basis in five trade routes: (i) Northern Europe – Central America/Caribbean; (ii) Northern Europe – West Coast South America; (iii) Northern Europe – Middle East; (iv) Mediterranean – West Coast South America; and (v) Mediterranean – East Coast South America.

Commitments. To address the Commission's concerns in relation to the market for deep-sea container liner shipping services, Maersk offered to terminate HSDG's participation in the consortia that were active in the five trade routes where the Commission identified horizontal concerns. The Commission accepted the proposed commitments.

State Aid

ECJ Judgments

Cellnex Telecom and Telecom Castilla-La Mancha v. Commission **(Joined Cases C-91/17 P and C-92/17 P)**

On April 26, 2018, the Court of Justice issued its judgment in *Cellnex and Telecom Catsilla-La Mancha v. Commission*.[24] Since 2005, Spain has adopted a series of regulatory measures to ensure the transition from analogue to digital terrestrial television ("DTT"). In the terrestrial network, this transition required upgrading the existing and building new transmission centers. The Spanish territory was divided in three distinct areas. In the less urbanized area, the so-called Area II, network operators had no commercial interest in providing the service. The Spanish authorities therefore established an aid scheme designed to subsidize the extension of coverage into this Area (Plan Avanza). This included the financing of new equipment and maintenance costs of new DTT broadcasting centers. Following a special procedure, instead of allocating the aid through an open and public tender, the Castilla-La Mancha authorities allocated the funds directly to each terrestrial operator previously operating the broadcasting centers. These operators included local authorities and two private companies, Telecom CLM and Cellnex Telecom.

Following two complaints from competing network operators, the Commission found the aid scheme in the region of Castilla-La Mancha to be illegal and incompatible aid.[25] In 2016, the General Court

[23] Commission Regulation (EC) No. 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ 2009 L 256/31.

[24] *Cellnex Telecom and Telecom Castilla-La Mancha v. Commission* (Joined Cases C-91/17 P and C-92/17 P) EU:C:2018:284.

[25] Commission Decision C (2014) 6846 of October 1, 2014 (State Aid C 24/10 (ex NN 37/10, ex CP 19/09)), OJ 2016 L 222/52. The Commission later adopted a Corrigendum Decision: Commission Decision C (2015) 7193 of October

confirmed the Commission's decision.[26] The Court of Justice's judgment rejected the appeal of the two aid recipients.[27]

Member States' margin of discretion in defining public services obligations. The appellants argued that the General Court misapplied the service of general economic interest ("SGEI") exception derived from the Court of Justice's case law in *Altmark* and Member States' discretion in its application. Concerning the first condition for clearly defined public service obligations, the Court of Justice found that although the General Court's control should be limited to a manifest error, the General Court is also competent to assess whether the public services obligations are sufficiently clearly defined.

SGEI definition by national law. The appellants also argued that the General Court erred in law in finding that Spanish law did not sufficiently clearly define the service at stake as being an SGEI as its title explicitly referred to it as a "service of general interest." First, the Court of Justice recalled that the factual interpretation of national law is of the sole competence of the General Court. The Court of Justice's control is, on this question, solely limited to the manifest distortion of facts. Second, the Court of Justice stressed that a national law calling a service a "service of general interest" does not suffice to fulfil *Altmark*'s first condition for clearly defined SGEI obligations. Finally, the Court of Justice concluded that the appellants submitted no proof of the General Court's distortion of facts.

SGEI definition and public mandate. The appellants also argued that the General Court erroneously concluded the absence of an SGEI because Spanish law did not contain a public entrustment act, adding that the General Court erred in law in requiring the national law delegating the SGEI to contain both the SGEI defining act and the entrustment act. The Court of Justice concluded that the appellants had wrongly interpreted the General Court's judgment as the General Court did not exclude the use of two separate regulatory acts respectively defining the mandate and the scope of the SGEI..

The notion of advantage. The appellants also argued that the General Court erred in law in acknowledging a market failure (*i.e.*, the recipients of the aid had no economic interest in providing the extension of coverage service) but nevertheless concluding that the recipients had benefited from an advantage. The Court of Justice observed that it was clear from the General Court's judgment that the appellants had obtained an economic benefit because, had the funds not been awarded, such costs would have been born by the operator. In addition, the Court of Justice concluded that a market failure does not challenge this conclusion and, to the contrary, confirms that the appellants would not have obtained such advantage in normal market conditions. The Court of Justice therefore dismissed the appellants' appeals in their entirety.

General Court Judgments

***Netflix International and Netflix v. Commission* (Case T-818/16)**

On May 16, 2018, the General Court dismissed as inadmissible an appeal against a German levy supporting German-language films and television programs.[28]

The applicants, Netflix, Inc. and its Dutch subsidiary Netflix International BV (together "Netflix"), offer users in all EEA countries access to films and television programs online for a monthly subscription fee.

The German aid scheme supporting the local film industry is financed by a special levy imposed on

20, 2015 (State Aid C 24/10 (ex NN 37/10, ex CP 19/09)), not published.

[26] *Abertis Telecom Terrestre and Telecom Castilla-La Mancha v. Commission* (Joined Cases T-37/15 and T-38/15) EU:T:2016:743. Spain appealed separately to the General Court on the basis of Article 263 TFEU. The appeal was dismissed: Spain v. Commission (Case T‑808/14) EU:T:2016:734.

[27] Spain appealed the General Court's judgment in Case T-808/14 before the Court of Justice. The appeal is still pending: *Spain v. Commission* (Case C-114/17 P).

[28] *Netflix International and Netflix v. Commission* (Case T-818/16) EU:T:2018:274.

undertakings in the cinema, video, and broadcasting industry. On December 3, 2013, the Commission declared the aid scheme—aimed at promoting culture and heritage conservation—compatible with the EU internal market.[29]

In 2014, Germany amended the existing aid scheme in two ways. First, it extended the liability for the levy to video-on-demand service providers established outside of Germany when the revenue is generated from customers in Germany and through internet presence in the German language.[30] Second, Germany extended the eligibility for aid to include non-domestic video-on-demand service providers. On September 1, 2016, the Commission declared the amended aid scheme compatible with the EU internal market.[31]

The amended aid scheme implied that Netflix had to pay a levy based on the turnover it generated from customers in Germany for content broadcast in German. In November 2016, Netflix appealed the Commission decision. To overcome the admissibility hurdle, Netflix claimed that the contested decision: (i) does not entail implementing measures and that it can therefore not challenge such measures before the German courts; and (ii) affects it individually.[32]

On the existence of a regulatory act that does not entail implementing measures, Netflix argued that the contested decision automatically (*i.e.*, without any further measure) made it liable to pay the levy and that it would have to infringe the law to have access to a court. The General Court disagreed. It ruled that the specific and actual consequences of the Commission decision must be given material form by national acts, such as tax notices defining the exact amount payable or decisions granting aid. Those acts constitute implementing measures that can be challenged before national courts.[33] The General Court therefore concluded that, irrespective of whether the contested decision constituted a regulatory act or was of direct concern, Netflix's appeal did not fulfill the condition of not entailing implementing measures.[34]

On direct and individual concern, the General Court first recalled settled law that applicants are individually concerned only if an act affects them because of certain attributes that are specific to them or because they are differentiated from all other market participants.[35] The fact that the statement of reasons for the amendment expressly referred to Netflix as a market leader and that Netflix was contacted after the adoption of the contested decision to discuss the payment of the levy did not establish that Netflix had a "special status."[36] The applicant's active participation as a concerned party during the preliminary examination stage was deemed insufficient to alter that conclusion. The General Court concluded that Netflix failed to demonstrate that its position was substantially affected by the amendment, and was therefore not individually concerned. The action was dismissed as inadmissible.

The case is noteworthy for two main reasons. First, the judgment of the General Court serves as a reminder of the difficult admissibility hurdle that market participants—not the addressees of a Commission decision—have to overcome before challenging the substance of state aid measures. Second, pending revisions to the EU Audiovisual Media Services Directive[37] (expected by the end of 2018), the case gives an indication as to the type of

[29] Commission Decision C (2013) 8679 of December 3, 2013 (State Aid SA.36753 (2013/N)), OJ 2013 C 363/3.

[30] Non-domestic providers were only under an obligation to pay the levy if the turnover of the undertaking was not subject to similar financial contributions at the place of establishment.

[31] Commission Decision C (2016) 5551 of September 1, 2016 (State Aid SA.38418 (2014/N)), OJ 2016 L 314/63.

[32] In accordance with Article 263(4) TFEU, an applicant has standing to appeal only where it is: (i) the addressee of a decision; (ii) directly and individually concerned by a decision; or (iii) directly concerned by a regulatory act that does not entail implementing measures.

[33] *Netflix International and Netflix v. Commission* (Case T-818/16) EU:T:2018:274, para. 33.

[34] *Ibid*., para. 44.

[35] *Ibid*., para. 52.

[36] *Ibid*., para. 58.

[37] European Parliament and Council Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ 2010 L 95/1 ("EU Audiovisual Media Services Directive").

levies that Member States can impose on foreign media service providers.

Groningen Seaports and Others v. Commission **(Case T-160/16)**

On May 31, 2018, the General Court dismissed in its entirety an action for annulment brought against the Commission's decision of January 21, 2016,[38] which found a Dutch corporate tax exemption for six publicly-owned seaport companies to constitute unlawful state aid.[39] The measure originally applied to most Dutch public undertakings. It was abolished in 2015 following exchanges with the Commission, but retained for certain publicly-owned seaports.

Unusually, the applicants did not challenge the Commission's finding that the measure constituted state aid. They rather claimed that the Commission should have either: (i) closed all its seaports investigations at the same time, including regarding Belgium, France, and Germany; or (ii) applied a transitional period so that the Dutch tax exemption would come to an end at the same time as those of neighboring countries.

First, the General Court dismissed the applicants' plea that the Commission breached the duty to give reasons under Article 296 TFEU and Article 41 of the Charter of Fundamental Rights of the EU. On the one hand, the General Court found that the Commission did explain why it had not adopted decisions on possible aid granted to Belgian, German, and French seaports, and notably why the situation of the competing seaports was not relevant. On the other hand, the General Court dismissed the argument that the decision failed to demonstrate that the Dutch public seaports did not primarily compete with the other public seaports between Hamburg and Le Havre. According to the General Court, the Commission did not breach its duty to give reasons, as it was sufficient that the decision took into account the competition faced by the applicants from other public ports in this zone, which potentially received state aid, but considered this fact to be irrelevant.

Second, the General Court dismissed the applicants' plea that the Commission infringed the objectives of state aid rules, in particular safeguarding a level-playing field among European companies. The General Court recalled that case law consistently found that a breach of Article 107(1) TFEU cannot be justified by the fact that other Member States also breach this provision.[40] Consequently, the General Court found that, even if other Member States granted illegal state aid to their seaports, this would not alter the legality of the Commission's finding regarding the Dutch measure.

Third, the General Court dismissed the applicants' plea that the Commission breached general principles of EU law such as the principle of equal treatment.

The General Court first recalled that the equal treatment principle must be consistent with the legality principle, which means that a company may not invoke an unlawful act committed against another for its own benefit.[41] According to the General Court, the applicants could therefore not rely on the fact that the Commission had not requested Belgium, Germany, and France abolish aid granted to their respective ports.

Next, the General Court acknowledged that the equal treatment principle requires that comparable situations are not treated differently, unless objectively justified. The General Court found no breach because there were objective differentiating reasons between the Dutch tax exemption and that of other Member States, which justified the Commission's decision. For instance, unlike the Dutch public seaports, French seaports were

[38] *Groningen Seaports and Others v. Commission* (Case T-160/16) EU:T:2018:317. This action for annulment was brought by the six beneficiaries of the measure found to constitute incompatible state aid (namely Groningen Seaports NV, Havenbedrijf Amsterdam NV, Havenbedrijf Rotterdam NV, Havenschap Moerdijk, NV Port of Den Helder, and Zeeland Seaports NV).

[39] Commission Decision C (2016) 167 of January 21, 2016 (State Aid SA.25338 (2014/C) (ex E 3/2008 and ex CP 115/2004)), OJ 2016 L 113/148.

[40] Steinike & Weinlig (Case C-78/76) EU:C:1977:52.

[41] *FLSmidth v. Commission* (Case T-65/06) EU:T:2012:103.

not completely exempted from corporate tax and Belgian seaports were subject to other types of taxes.

This judgment, although not groundbreaking, further clarifies the application of state aid rules to tax exemptions, most notably regarding the Commission's duty to give reasons and the application of the equal treatment principle.

Policy and Procedure

ECJ Orders

Nexans France and Nexans v. Commission (Case C-65/18 P(R))

On June 12, 2018,[42] the Court of Justice dismissed the appeal brought by Nexans France SAS and Nexans SA (together, "Nexans") against a General Court order rejecting, for lack of urgency, a request for interim measures ordering that the Commission refrain from publishing its decision in the power cables cartel. Nexans contended that the decision contained information seized during an unannounced inspection that Nexans claimed should be treated as confidential.

Background. Following an investigation into an alleged power cables cartel, the Commission issued a decision[43] finding a cartel and fined 11 producers of underground and submarine high voltage power cables, including Nexans, €302 million.

On June 17, 2014, Nexans lodged an action for annulment with the General Court[44] alleging that the Commission had acted beyond its powers during the dawn raid, removing company materials unlawfully and by block copying large volumes of electronic data. However, while the question of the lawfulness of the Commission's actions was still being decided, the Commission sought to publish its decision.

On May 3, 2016, the Commission informed Nexans of its intention to publish the entirety of the decision, with the exception of confidential material. On May 18, 2016, Nexans requested confidential treatment from the hearing officer, alleging that certain information contained in the decision should be regarded as confidential. On May 2, 2017, the Hearing Officer partially granted Nexans request for confidentiality.

On July 11, 2017, Nexans appealed the hearing officer's decision to the General Court in so far as it denied Nexans's request for confidentiality of some of the information obtained during the dawn raid. In parallel, Nexans applied for interim measures, pursuant to Articles 278 and 279 TFEU, asking the President of the General Court to suspend the operation of the decision and to order the Commission to refrain from publishing a version of the decision containing the contested information until the General Court had ruled on Nexans's claim that the Commission had acted beyond its powers during the dawn raid.

On July 12, 2017, the President of the General Court ordered that the Commission suspend the decision until the adoption of an order for interim relief and refrain from publishing the decision containing the disputed information until the General Court decided whether the Commission had acted beyond its powers. However, on November 23, 2017, the President rejected Nexans's application for interim measures for lack of urgency.[45]

Nexans's appeal to the Court of Justice. Nexans sought the annulment of the President's order on the grounds that, first, the General Court refused to start from the premise that the information at issue may be covered by professional secrecy, and, second, that it failed to assess Nexans's right to an effective judicial remedy. At the same time, Nexans applied for interim measure to the Court of Justice. Pursuant to the latter application, the Court of Justice issued an order on February 2, 2018 suspending the decision and requiring the Commission to refrain from publishing a non-confidential version of the decision containing the

[42] *Nexans France and Nexans v. Commission* (Case C-65/18 P(R)) EU:C:2018:426.

[43] *Power Cables* (Case COMP/AT.39610), Commission decision of April 2, 2014.

[44] *Nexans France and Nexans v. Commission* (Case T-449/14) EU:T:2018:456.

[45] *Nexans France and Nexans v. Commission* (Case T-423/17) EU:T:2017:835.

contested information until the adoption of an order bringing the interim proceedings to an end, or a ruling on the appeal.

Professional secrecy. When examining the condition of urgency, there are two cumulative conditions that must be satisfied before the judge hearing an application for interim measures is required to consider the information to be confidential: (i) the applicant alleges that the information that is to be disclosed constitutes business secrets or is covered by professional secrecy; and (ii) the allegation satisfies the condition that there is a *prima facie* case.[46]

Nexans contended that the General Court, for the purpose of assessing the existence of serious and irreparable harm, should have started from the premise that the information at issue was covered by professional secrecy.[47] The Court of Justice held that, although the structure of the President's analysis was ambiguous, it nevertheless emerged with a sufficient degree of clarity from the order that Nexans's claim that the information in question was confidential did not satisfy the condition of relating to a *prima facie* case.

The Court of Justice therefore held that it was insufficient, for the purposes of being granted interim measures, to claim that the information that would be disclosed is confidential, where the condition relating to a *prima facie* case is not satisfied. The Court of Justice considered that Nexans's claim did not satisfy the condition of relating to a *prima facie* case because the contested information, which was at least five years old, was historical.

Right to effective judicial remedy. Nexans claimed that, to respect their right to an effective remedy, the General Court should suspend the Commission's decision at issue until the lawfulness of the underlying seizure of information had been verified. In particular, Nexans was concerned that publication of the information would damage its reputation and lead to actions for damages by customers. Furthermore, Nexans considered that publication of the information would deprive it of the possibility to appeal the decision and would therefore be a violation of its right to an effective remedy.

The Court of Justice held that it was insufficient to "allege infringement of fundamental rights in the abstract" to establish that the resulting harm would necessarily be serious and irreparable. Moreover, even assuming that the Commission decision would be the cause of the harm, Nexans had failed to provide sufficient evidence showing such harm existed.

[46] *Nexans France and Nexans v. Commission* (Case C-65/18 P(R)) EU:C:2018:426, para. 21.
[47] In accordance with the established case-law, *see Commission v. Pilkington Group* (C-278/13 P(R)) EU:C:2013:558 and *Evonik Degussa v. Commission* (C-162/15 P) EU:C:2016:142.

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