Horizontal Agreements

General Court Judgments

Infineon v. Commission (Case T-758/14) and Philips v. Commission (Case T-762/14) (Smart Card Chips cartel)

On December 15, 2016, the General Court issued two judgments upholding the 2014 Commission decision[1] on the smart card chips cartel.

Smart card chips are used for mobile phones (SIM chips) and several other applications, including bank, identity, and pay-TV cards (non-SIM chips). In the contested decision, the Commission found that chip manufacturers Infineon Technologies AG ("Infineon"), Koninklijke Philips NV and Philips France ("Philips"), Samsung Electronics Co. Ltd and Samsung Semiconductor Europe GmbH ("Samsung"), and Renesas Electronics Corp. and Renesas Electronics Europe Ltd had exchanged competitively sensitive information between 2003 and 2005. The Commission fined the companies approximately €138 million. Infineon and Philips appealed the decision to the General Court.

The General Court rejected the claim that the information exchanged was not competitively sensitive and—as Philips argued—it should be considered "gossip." It found that the Commission had correctly concluded that the exchanges of detailed information about future capacity, expected profitability, and pricing strategies including with respect to specific customers had as their object the restriction of competition in violation of Article 101 TFEU.

The General Court noted that, in light of the market conditions (such as the constant drop in prices, the downstream pressure from the few, large customers, the rapid technological development, and the parallel negotiation of supply contracts), the undertakings likely benefited from the exchanges. The General Court held that, even if information exchanged was sometimes inaccurate or misleading, it was nonetheless capable of influencing the commercial positioning of the companies, thereby restricting competition among them.

The General Court upheld the Commission's finding of a single and continuous infringement. It noted that the collusive practices pursued the same overall objective of slowing price decreases due to the pressure exerted by the main customers and the entry of new aggressive suppliers, such as Samsung. Other circumstances confirmed the existence of a single infringement, such as the timing and similarity of content of the contacts between competitors, as well as the individuals involved in those contacts.

The General Court, however, distinguished the finding of a single infringement from the question of whether liability for the entirety of that infringement was imputable to each undertaking. Philips was held liable for the entire infringement because the company was aware of the collusive practices, although it had not participated. Infineon, however, was held liable for only the part of the single infringement in which it was directly involved, because the Commission could not establish that the company was (or should have been) aware of the collusion.

The appellants were also unsuccessful in arguing that statements and evidence provided by Samsung were unreliable. Although acknowledging that participants in a cartel may play down their role in the infringement and emphasize the contribution of other cartelists, the General Court concluded that a leniency application does not necessarily create an incentive to submit distorted evidence. The General Court found that providing information following a Commission's request does not diminish its probative value compared to information voluntarily submitted. Also, whether

[1] *Smart Card Chips* (Case AT.39574), Commission decision of September 3, 2014.

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evidence was provided before or after settlement negotiations with the Commission failed has no bearing on its reliability.

Commission Decisions

Steel Abrasives (Case AT.39792)

On May 25, 2016, the Commission fined Pometon S.p.A. ("Pometon"), a producer of steel abrasives (steel particles used to shape metal through abrasion, mainly used in the automotive and construction industries), €6.2 million in a hybrid cartel settlement case.[2] In 2013, the Commission engaged in settlement proceedings[3] with four other companies (Ervin Industries Inc., Winoa SA, MTS, and Eisenwerk Würth GmbH) and adopted a settlement decision in April 2014.[4] Pometon was not included in this settlement decision and its investigation continued under the standard cartel procedure.

The Commission found that Pometon infringed Article 101 TFEU by agreeing with the other cartel participants on the introduction of a common scrap surcharge calculation formula. The Commission based its findings on evidence that Pometon actively applied this agreement. The Commission concluded that Pometon agreed to coordinate prices, introduce price increases, and impose surcharges if a customer attempted to multisource. Pometon's participation in the price coordination, however, was not as extensive as that of other cartelists. The infringement lasted 3 years and 7 months and covered the entire EEA.

The Commission rejected Pometon's arguments that its rights of defense and presumption of innocence had been violated. The Commission found that Pometon's rights of defense had not been infringed as a result of an unintentional publication of the 2014 settlement decision with unredacted references to Pometon. The decision was publicly available for only two weeks, was practically unnoticed at the time, and the Commission did not draw adverse inferences against Pometon based on these references. Therefore, it did not violate Pometon's right to be considered innocent until its participation in the infringement was proven.

Pometon also argued that certain pieces of evidence cited in the Statement of Objections ("SO") did not relate to Pometon's conduct. The Commission noted that the inclusion of such evidence in the SO was necessary for the overall description of the cartel and that it did not undermine other incriminating evidence directly related to Pometon. The Commission also rejected Pometon's argument that there was insufficient evidence to establish the company's application of a scrap surcharge as of 2004. The Commission however granted a 10% fine reduction due to Pometon's limited contribution to the price coordination practices.

Finally, the Commission rejected the argument that its power to sanction Pometon was time-barred because Pometon's last contact with other cartelists occurred more than five years before the Commission's dawn raids. The Commission pointed in particular to evidence proving Pometon's participation in the infringement three years before the inspections.

On August 31, 2016, Pometon appealed the Commission's decision to the General Court.

Fining Policy

ECJ Advocate General Opinions

Akzo Nobel NV And Others v. Commission (Case C-516/15P), Opinion of Advocate General Wahl

On December 21, 2016, Advocate General Wahl advised the Court of Justice to annul the General Court's heat stabilizers cartel judgment[5] for incorrectly applying the rules of attribution of liability for competition law infringements.

[2] *Steel Abrasives* (Case COMP/39792), Commission decision of May 25, 2016. The non-confidential version of the decision was published on December 8, 2016.

[3] Commission notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C 167/1.

[4] *Steel Abrasives* (Case COMP/39792), Commission decision of April 2, 2014.

[5] *Akzo Nobel and others v. Commission* (Case T-47/10) EU:T:2015:506.

In November 2009, the Commission adopted its first decision in the heat stabilizers cartel[6] and fined several companies for participating in two price fixing, market sharing, and customer allocating cartels. In June 2011, the Commission amended its 2009 decision because the infringement was time-barred in relation to one of the undertakings addressed.[7] In July 2015, the General Court annulled the 2011 amended Commission decision on procedural grounds.[8] The Commission later readopted its 2011 amended decision and sanctioned Akzo Nobel for two of its subsidiaries' conduct.[9]

Akzo Nobel argued that the annulment of the time-barred fines on its subsidiaries also should have led to the annulment of the fines on Akzo Nobel because, as the parent company, it was not directly involved in the infringements but assumed responsibility for the acts of its subsidiaries.

Advocate General Wahl opined that the decision should be annulled because the Commission had failed to adjust the ambit of Akzo Nobel's liability to that of its subsidiaries. The Advocate General noted that, in light of the functional concept of an undertaking, liability may be imputed to a legal entity even if it was not directly involved in an infringement as long as the following conditions are fulfilled: (i) the undertaking in question could exercise decisive influence over its subsidiary; and (ii) such decisive influence was exercised.[10]

If a company holds 100% of its subsidiary's shares, there is a rebuttable presumption that such influence was exercised.[11] Advocate General Wahl considered that the *quid pro quo* for the Commission to sanction undertakings based on this presumption is that any factors affecting the subsidiary's liability should inevitably affect the parent company's as well.

Advocate General Wahl pointed out that the Court of Justice previously held, in *Commission v. Tomkins*,[12] that the derivative liability of a parent company must reflect—and therefore cannot exceed—that of its subsidiaries. He opined that, because the Commission was not able to prove that Akzo Nobel directly participated in the infringements, its liability was not personal but derivative and secondary to that of its subsidiaries.

Advocate General Wahl concluded that, because the Commission can use the functional concept of an undertaking and sanction parent companies more readily, it must also accept the implications of this approach when a subsidiary's liability is reduced or extinguished. The expiry of the limitation period which applied to Akzo Nobel's subsidiaries should have extended to Akzo Nobel.

General Court Judgments

Printeos, SA, Tompla Sobre Exprés, SL, Tompla Scandinavia AB, Tompla France SARL, Tompla Druckerzeugnisse Vertriebs GmbH v. Commission (Case T-95/15)

On December 13, 2016, the General Court annulled the Commission's fines against Printeos SA ("Printeos"), Tompla Sobre Exprés SL, Tompla Scandinavia AB, Tompla France SARL, and Tompla Druckerzeugnisse Vertriebs GmbH (together "Tompla") for their participation in the paper envelope cartel.[13]

Between 2003 and 2008, Printeos and Tompla, along with other companies, held a series of multilateral and bilateral meetings to coordinate prices, allocate customers, and exchange commercially sensitive

6 *Heat Stabilisers* (Case COMP/38589), Commission decision of November 11, 2009.

7 *Heat Stabilisers* (Case COMP/38589), amended Commission decision of June 30, 2011.

8 *Akzo Nobel and Akcros Chemicals v. Commission* (Case T-485/11) EU:T:2015:517.

9 *Heat Stabilisers* (Case COMP/38589), Commission decision of June 29, 2016.

10 *Akzo Nobel and others v. Commission* (Case C-97/08 P) EU:C:2009:536, paras. 60–64.

11 *Ibid*.

12 *Commission v. Tomkins* (Case C286/11 P) EU:C:2013:29.

13 *Printeos, SA, Tompla Sobre Exprés, SL, Tompla Scandinavia AB, Tompla France SARL, Tompla Druckerzeugnisse Vertriebs GmbH v. Commission* (Case T-95/15) EU:T:2016:722.

information. In December 2014, the Commission fined the companies €19.4 million in a settlement procedure, applying varying fine reduction percentages.[14]

Tompla claimed that the Commission had infringed its duty to state reasons as it did not justify its departure from the general methodology and its adjustment of the fines pursuant to point 37 of the Commission's Fining Guidelines.[15]

The General Court affirmed that the duty to state reasons under Article 296(2) TFEU is an essential procedural requirement. The statement of reasons must be appropriate to the measure at issue and must disclose, in a clear and unequivocal fashion, the reasoning followed by the institution that adopted the measure to enable the persons concerned to ascertain its justification and the competent court to exercise its power of review. In accordance with Article 47 of the Charter of Fundamental Rights of the European Union, Article 263 TFEU, and Article 296 TFEU, this duty applies to the Commission when imposing fines.

The General Court held that the duty to state reasons is of even greater importance when the Commission departs from the general methodology set out in the Fining Guidelines. It noted that point 37 gives the Commission discretion to account for the particularities of a given case. In light of the principle of equal treatment, the Commission must explain with sufficient clarity and precision its reasoning, including the relevant facts and points of law, for imposing different fine reductions.

The General Court found that the Commission's decision did not provide adequate reasoning either for Tompla to effectively dispute the Commission's approach under the principle of equal treatment, or for the General Court to fully exercise its power of judicial review. The General Court noted that the Commission's decision gave misleading impressions as to the undertakings' respective situations and a vague explanation for adjusting the fines.

Intellectual Property and Licensing

Commission Decisions

Perindopril (Servier) (Case 39.612)

On September 30, 2016, the Commission published a second provisional version of its July 9, 2014 decision[16] fining Servier Group ("Servier") and five generic manufacturers[17] €428 million. The Commission found that Servier had sought to delay generic entry in the perindopril[18] market by: (i) entering into reverse payment patent settlement agreements with five generic manufacturers, breaching Articles 101 and 102 TFEU; and (ii) acquiring a competitor's technology to produce perindopril, breaching Article 102 TFEU.

In anticipation of the expiry of its molecule patents on perindopril, Servier sought to rely on its process patents, covering perindopril manufacturing methods, and also filed new, broader patent applications for perindopril. The generic manufacturers contested Servier's new patent applications. Between 2005 and 2007, Servier entered into patent settlement agreements with five generic manufacturers. Under the terms of these agreements, generic entry was delayed until May 6, 2009.

[14] *Envelopes* (Case AT.39870), Commission decision of December 10, 2014.

[15] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2–5 (the "Fining Guidelines"). Point 37 of the Fining Guidelines states: "[a]lthough these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21."

[16] The Commission first published a provisional version of its decision on July 14, 2015, *see* European Competition Report, July – September 2015, pp. 8–9.

[17] Namely, Niche Generics Limited/Unichem Laboratories Limited, Matrix Laboratories Limited (now part of Mylan Laboratories Limited), Teva UK Limited/Teva Pharmaceutical Industries Ltd/Teva Pharmaceuticals Europe B.V., Krka tovarna zdravil, d.d., and Lupin Limited.

[18] Perindopril is an angiotensin converting enzyme (ACE) inhibitor product, used for the treatment of cardiovascular diseases such as hypertension.

The Commission concluded that an agreement that settles litigation and limits a generic company's commercial freedom in return for payment may, depending on the facts, restrict competition by object.[19] To determine whether the patent settlement agreements constituted by-object restrictions, the Commission analyzed whether: (i) Servier and the generic manufacturers were actual or potential competitors; (ii) the agreements limited the generic undertakings' efforts to enter markets; and (iii) the transfer of value by Servier envisaged in the agreement corresponded to the revenue the generics manufacturers would have expected to generate had they entered the market. The Commission concluded that the patent settlement agreements served the dual purpose of protecting Servier's market position at molecule level, even after the expiration of its molecule patents, in addition to removing the close sources of competition in the market, and, thus, breached Articles 101 and 102 TFEU.[20]

The Commission also analyzed Servier's 2004 acquisition of technology from Azad, a producer of active pharmaceutical ingredients ("APIs"), which reportedly produced perindopril through alternative means that did not infringe Servier's patent. By acquiring this technology, Servier foreclosed a source of potential competition. The fact that the acquired technology was never used by Servier heightened the Commission's concerns that the technology was purchased as part of a "defense mechanism."[21]

Finally, the Commission concluded that Servier's actions constituted a single and continuous infringement of Article 102 TFEU on the market for perindopril formulations in the United Kingdom, France, Poland, and the Netherlands, and on the EU-wide market for perindopril technology. The Commission analyzed Servier's overarching strategy of preventing generic entry and found the patent settlement agreements and the acquisition of perindopril technology to be mutually reinforcing, cumulative actions aimed at delaying generic entry. The Commission concluded that Servier's actions could not be assessed on a standalone basis.[22]

The Commission fined Servier €331 million and imposed an additional fine of €97 million on generic manufacturers for their participation in the patent settlement agreements. Servier's and the generic manufacturers' appeals to the General Court are pending.

Abuse

ECJ Advocate General Opinions

Opinion of Advocate General Wahl in Intel v. Commission (Case C-413/14 P)

On October 20, 2016,[23] Advocate General Wahl advised the Court of Justice to set aside and refer back the General Court's judgment upholding a €1.06 billion fine against Intel for abuse of dominance in the market for x86 central processing units ("CPUs")[24] by unlawfully offering rebates and other payments to computer manufacturers and retailers in exchange for exclusivity.[25] The opinion invites the Court of Justice to "refine" its case law on abuse of dominance.

Advocate General Wahl disagreed with the General Court's conclusion that exclusivity rebates are a "super category"[26] of rebates capable by their very nature of restricting competition. He instead advocated for an effects-based approach in line with the Commission's Guidance Paper.[27] Advocate General Wahl explained

[19] *Perindopril (Servier)* (Case AT. 39.612), Commission decision of June 9, 2014, para. 1201.

[20] *Perindopril (Servier)* (Case AT. 39.612), Commission decision of June 9, 2014, para. 2960.

[21] *Perindopril (Servier)* (Case AT. 39.612), Commission decision of June 9, 2014, para. 2776.

[22] *Perindopril (Servier)* (Case AT. 39.612), Commission decision of June 9, 2014, para. 2997.

[23] *Intel v. Commission* (Case C‑413/14 P), Opinion of Advocate General Wahl, EU:C:2016:788.

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

[25] *Intel* (Case COMP/C-3/37.990), Commission decision of May 13, 2009.

[26] *Intel v. Commission* (Case C‑413/14 P), Opinion of Advocate General Wahl, EU:C:2016:788, para. 84.

[27] Commission communication regarding the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive

that the ultimate aim of competition law is to enhance efficiency, possibly at the expense of less competent firms facing aggressive "yet healthy and permissible"[28] competition by more efficient firms. Anticompetitive effects have a "crucial importance"[29] regardless of a practice's form or whether it qualifies as prohibited coordinated behavior or abuse of dominance.

Referring to *Hoffmann-La Roche*,[30] Advocate General Wahl acknowledged the presumption of unlawfulness against loyalty-inducing rebates as opposed to volume-based rebates. Despite this presumption, to establish a breach of Article 102 TFEU the Court of Justice has consistently engaged in a thorough analysis of the terms and market coverage of loyalty rebates, and the competitive conditions in the relevant markets. In Advocate General Wahl's view, the rebuttable character of the presumption requires a contextual analysis to prove the infringement to the requisite legal standard and to exclude alternative explanations or countervailing efficiencies. If a circumstance casts doubt on the anticompetitive character of the conduct, it is no longer sufficient to state that rebates are theoretically capable of restricting competition. Instead, it must be shown that the rebates at issue "in all likelihood"[31] have an anticompetitive foreclosure effect.

While the Commission and the General Court had also assessed "in the alternative" whether Intel's conduct could foreclose competition, Advocate General Wahl concluded that the circumstances considered were inconclusive and incomplete.[32] In particular, the General Court overlooked the importance of assessing the rebates' market coverage[33] and duration, competitors' market performance, declining prices, and the identity of the targeted customers. Advocate General Wahl emphasized the need to ascertain: (i) whether competitors could compensate customers for losing the rebate (including through the "as-efficient-competitor" test, if available);[34] and (ii) whether there were legitimate explanations for customers' loyalty, such as quality concerns, security of supply, or end-user preferences. The fact that customers are loyal or that the dominant firm is an unavoidable trading partner offering the most attractive prices with the intention of excluding rivals is not sufficient to establish, in all likelihood, an anticompetitive effect.

Advocate General Wahl was not convinced of the exclusive character of the rebates. Although the rebates applied to 80–95% of customers' demand for CPUs in corporate computers, they only covered a minority of their total CPU purchases. Advocate General Wahl found that exclusivity should be assessed by reference to the relevant market as a whole, unless there are sufficient grounds to establish foreclosure effects on specific segments. Because customers could still purchase significant quantities of CPUs from Intel's competitors, the General Court erred in law in classifying Intel's rebates as exclusive.

Advocate General Wahl also addressed the standard of proof required to establish a single infringement over a continuous period of time. The General Court had

exclusionary conduct by dominant undertakings, OJ C 45/7, February 24, 2009 (the "Guidance Paper").

[28] *Intel v. Commission* (Case C‑413/14 P), Opinion of Advocate General Wahl, EU:C:2016:788, para. 41.

[29] *Intel v. Commission* (Case C‑413/14 P), Opinion of Advocate General Wahl, EU:C:2016:788, para. 43.

[30] *Hoffmann-La Roche v. Commission* (Case C-85/76) EU:C:1979:36.

[31] *Intel v, Commission* (Case C‑413/14 P), Opinion of Advocate General Wahl, EU:C:2016:788, para. 117.

[32] The circumstances were that: (i) Intel was an unavoidable trading partner; (ii) original equipment manufacturers' low operating margins made the rebates attractive; (iii) customers took Intel's rebates into account in deciding whether to obtain all or most products from the company; and (iv) the rebates were part of a long-term strategy to exclude competitors.

[33] Advocate General Wahl held that a 14% tied market share was inconclusive.

[34] Advocate General Wahl considered that, while the Commission is not legally obliged to use the "as-efficient-competitor" test (according to which a rebate is not anticompetitive if an equally efficient competitor would have been able to effectively compete for the contestable share of demand without pricing below costs), the test may be particularly useful to capture abusive conduct when the other circumstances examined do not sufficiently establish an anticompetitive foreclosure effect.

concluded that assessment of the *average* share of the tied market was sufficient to establish a restriction of competition over the whole infringement period. Advocate General Wahl acknowledged that it is unnecessary to adduce equal and consistent evidence over the entire infringement period as long as there are objective and consistent indications that the infringement was continuous. However, in this case, the tied market share was considerably smaller at the end of the relevant period. By focusing on the rebates' average market coverage, the General Court had failed to establish a continuous restriction of competition during the entire infringement period. Advocate General Wahl observed that, although the concept of a single and continuous infringement is a procedural rule, the Commission must nevertheless prove the continuous existence of an infringement as part of its effects assessment.

Regarding administrative procedure, Intel criticized the Commission for not recording an interview with a customer, which it used to establish that customer's exclusive supply obligation. The General Court concluded that the Commission was under no duty to record the meeting because it was informal. Advocate General Wahl noted that no distinction between formal and informal meetings exists in law. Instead the Commission must record any interview that is "specifically arranged to collect substantive information"[35] during an investigation. The record must cover the interview's substance in a way that allows an undertaking to exercise its rights of defense.

Finally, Advocate General Wahl concluded that the General Court mistakenly referred to sales by Intel's customer Lenovo in the EEA as a basis for the Commission's jurisdiction over certain aspects of the alleged conduct. Advocate General Wahl noted that, absent structural links between Intel and Lenovo, such sales did not amount to implementation of the infringement in the EEA. Where it is not clear whether the infringement had been implemented in the EEA, Advocate General Wahl supports an approach to jurisdiction based on qualified effects. Referring to *Gencor*,[36] Advocate General Wahl observed that EU law should only apply if a given conduct has foreseeable, immediate, and substantial effects in the internal market. In the context of a single and continuous infringement, each instance of conduct must satisfy this test. The General Court failed to show qualified effects of Intel's conduct towards Lenovo in the EEA.[37]

Commission Decisions

ARA Foreclosure (Case AT.39759)

On September 20, 2016, the Commission fined Altstoff Recycling Austria ("ARA") €6 million for abuse of dominance in the Austrian waste management market between 2008 and 2012 by denying competitors access to indispensable household waste collection infrastructure.[38] This fine reflects a 30% reduction for cooperation. The Commission also made binding the structural commitments offered by ARA.

This is the first abuse of dominance case in which the Commission combined an Article 7-type settlement under Regulation 1/2003[39] with a fine reduction for cooperation.[40] The Commission relied on

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[35] *Intel v. Commission* (Case C‑413/14 P), Opinion of Advocate General Wahl, EU:C:2016:788, para. 232.

[36] *Gencor v. Commission* (Case T-102-96) EU:T:1999:65.

[37] Advocate General Wahl observed that the corresponding exclusive supply obligations had been agreed between a US and a Chinese company and concerned CPUs manufactured and sold in China. Advocate General Wahl considered that Lenovo's sales of notebooks (incorporating CPUs) in the EEA did not sufficiently establish the Commission's jurisdiction on Intel's conduct.

[38] *ARA Foreclosure* (Case AT.39759), Commission decision of September 20, 2016.

[39] Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L001 ("Regulation 1/2003").

[40] The Commission has previously used paragraph 37 to reward cooperation in a number of cases before the entry into force of Regulation 1/2003. *See*, *e.g.*, *Eurofix-Bauco v. Hilti* (Case COMP/IV/30.787 and 31.488), Commission decision of December 22, 1987, OJ 1988 L065; *Tetra Pak II* (Case COMP/IV/31.043), Commission decision of July 24, 1991, OJ 1992 L072; and *Omega Nintendo* (Case COMP/36.321), Commission decision of May 23, 2001, OJ

paragraph 37 of the Fining Guidelines, which allows it to depart from its fining methodology where the "particularities of a given case" justify it.[41] Unlike in cartel cases, where a fine reduction is capped at 10% in the settlement procedure,[42] paragraph 37 of the Fining Guidelines allows the Commission to grant higher reductions.

ARA is a waste management company paid to fulfill packaged goods producers' legal obligation to collect and recycle packaging waste from their products. ARA performed these tasks through its countrywide household collection infrastructure, which includes containers in public locations and household collection bags. ARA owned five percent of its waste collection infrastructure and controlled the rest of the network, which was owned by waste collectors and municipalities. Due to its extensive infrastructure, ARA's share of the Austrian market for the management of household waste reached 95%. During the relevant period, ARA had consistently imposed access conditions to its waste collection infrastructure that effectively prevented competitors from entering the market.

Using the *Oscar Bronner* criteria,[43] the Commission found that for legal, practical, and economic reasons, it was not possible (or at least was unreasonably difficult) for rivals to duplicate ARA's household collection infrastructure.[44] Access to ARA's infrastructure was therefore indispensable for rivals to compete in the household waste collection market. Although ARA theoretically permitted rivals to apply for access to its infrastructure, the conditions of access were challenging. Rivals wishing to obtain governmental approval to collect waste had to demonstrate the ability to offer nationwide coverage. Under ARA's scheme, however, rivals could apply for access only on regional basis. ARA also conditioned access on its rivals' ability to show that they could not duplicate its infrastructure in that particular region. These conditions effectively prevented rivals from entering the market.

Late in the proceedings,[45] ARA submitted a formal offer to cooperate with the Commission and acknowledged its infringement. It indicated the maximum fine it would accept and confirmed that it had been given sufficient access to the file and an appropriate opportunity to make its views known. ARA also offered to divest the waste collection infrastructure that it owned.[46] While the infringement

2003 C241; *see also*, Commission, "Antitrust: reduction of fines for cooperation," available at www.ec.europa.eu/competition/antitrust/ara_factsheet_en.pdf.

41 Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C210 (the "Fining Guidelines").

42 Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C167.

43 *Oscar Bronner v. Mediaprint* (Case C-7/97) EU:C:1998:569, para. 41. A refusal to provide access may infringe Article 102 TFEU if: (i) the refusal of access relates to a product or service that is indispensable to effectively compete in the market; (ii) the refusal is likely to eliminate competition in the affected market; and (iii) the refusal cannot be objectively justified and is not counterbalanced by efficiency gains (*see, ARA Forceclosure* (Case AT.39759), Commission decision of September 20, 2016, para. 76).

44 Legally, it was highly unlikely that a new entrant intending to duplicate the infrastructure would receive the required authorization under Austrian law. The Austrian government explained that duplication was not practical in economic and ecological terms due to the multiplication of costs, an increased number of transport journeys and the higher burden on consumers to allocate waste to different collection systems. Spatial constraints and landscape preservation concerns also made duplication impractical. Economic obstacles included large up-front investments to set up the system and a legal obligation to charge cost-covering licensing fees.

45 ARA had already received and replied to a statement of objections, had an oral hearing, and received two further letters of fact.

46 Regulation 1/2003, article 7(1) provides that the Commission may impose remedies to "bring the infringement effectively to an end". Recital 12 of Regulation 1/2003 further provides that "[c]hanges to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking."

had already ended at the time of the decision, the Commission concluded that the structural remedy was necessary to prevent recidivism.[47] The Commission found that there was a substantial risk of a repeated infringement due to ARA's past behavior. Therefore, a declaration by ARA to grant access in the future was not deemed as effective as a divestiture. Taking the different aspects of ARA's cooperation into account, the Commission rewarded ARA with a 30% fine reduction.

A senior Commission official recently indicated that, because ARA started to cooperate relatively late in the procedure, its ability to provide evidence was limited.[48] The official suggested that, where undertakings cooperate more fully, a fine reduction may exceed the 30% awarded in *ARA*, making it a potentially interesting resolution mechanism. The extent to which ARA represents the first in a number of Article 102 "settlement" cases will depend on dominant companies' willingness to concede the consequences of admitting liability in return for a quick resolution of their investigation and fine reduction.

Mergers And Acquisitions

Commission Decisions

Phase I Decisions Without Undertakings

Sony Corporation of America/Sony-ATV Music Publishing (Case COMP/M.8018)

On August 1, 2016, the Commission unconditionally approved the acquisition by Sony Corporation of America ("Sony") of the Michael Jackson Estate's 50% ownership interest in Sony/ATV Music Publishing LLP ("Sony/ATV"), a music publishing joint venture previously controlled by Sony and the Michael Jackson Estate. As a result of the transaction, Sony acquired sole control of Sony/ATV.

The Commission's investigation focused on the licensing of music publishing rights to online music platforms.[49] In its 2012 *Sony/Mubadala/EMI* decision,[50] the Commission found the markets for licensing of music publishing rights to be national, but indicated that the markets for the licensing of online music publishing rights could be EEA-wide. The Commission confirmed this in its 2015 *PRSfM/STIM/GEMA/JV* decision.[51] In the present case, the Commission reconfirmed that the market for licensing of music publishing rights to online platforms is pan-European, including because wholesale level major licensing terms are sufficiently uniform across the EEA.

The Commission found that collecting societies, not music publishers, control the licensing of music repertoire of continental European artists. The Commission's analysis therefore focused on the exploitation of online music publishing rights for Anglo-American repertoire, which are controlled by major music publishing companies.

The Commission concluded that revenue-based market shares are not a good measure of market power in the licensing of online rights, in particular because a publisher that owns only a fractional right in a song can veto its licensing to an online music platform.

[47] The competition issues identified in the decision already had been partly solved at the time of the decision as the Austrian government had adopted a new waste law that allowed several competitors to enter the market.

[48] *See* Mlex, "Companies may win fine cuts of more than 30 percent fine in antitrust cases, EU official says," January 27, 2017.

[49] The Commission also analyzed and found no concerns arising from horizontal overlaps in the provision of publishing services to authors and the licensing of mechanical, performance, synchronization, and print rights. Similarly, no concerns were found to arise from vertical relationships between the licensing of Sony/ATV's music publishing rights and Sony's interests in downstream businesses, which included recorded music, the publishing of computer and videogames, the production and distribution of motion pictures and TV programs, and online music retail services.

[50] *See Sony/Mubadala Development/EMI Music Publishing* (Case COMP/M. 6459), Commission decision of April 19, 2012.

[51] *See PRSfM/STIM/GEMA/JV* (Case COMP/M.6800), Commission decision of June 16, 2015.

Consistent with its decisional practice,[52] the Commission instead calculated market power by reference to "control shares" that track songs in which music publishing companies have an interest, including fractional interests. The Commission calculated control shares based on songs that featured in major weekly chart hits of EEA Member States.

The Commission examined whether post-transaction Sony's control share would exceed 50%, the threshold at which, according to Commission precedent, competition concerns can arise. Sony/ATV's control share in the EEA market for the exploitation of online music publishing rights was only 10–20%.

The Commission also assessed Sony's control share in three other scenarios, ultimately concluding that none would raise competition concerns:

— **Joint licensing by Sony/ATV and Sony's wholly owned subsidiary Music Entertainment ("SME").** A combination of the repertoires of Sony/ATV and SME, a recorded music company, would have control shares of 30–40% in the EEA.

— **Joint licensing by Sony/ATV and EMI MP.** EMI MP is a music publishing company jointly controlled by Sony and Mubadala, a sovereign wealth fund. In this scenario, the combined control share in the EEA would amount to 30–40%.

— **Joint licensing by Sony/ATV, SME, and EMI MP.** This scenario would lead to control shares of 40–50% (but would not exceed the 50% threshold). Accordingly, the Commission determined that no concerns would arise even in this "worst case" scenario. In addition, the Commission concluded that Mubadala's interests might diverge from Sony's and Mubadala may obstruct coordinated negotiations that favored Sony/ATV and/or SME at the expense of EMI MP's repertoire. The Commission determined that "the different strategic and commercial incentives stemming from the diverse ownership of EMI MP would make it difficult to combine Sony/ATV's and Sony Music's market power with EMI MP's."

Phase I Decisions With Undertakings

Mylan/Meda (Case COMP M.7975)

On July 20, 2016, the Commission conditionally approved the acquisition of Meda AB ("Meda") by Mylan N.V. ("Mylan"). Meda and Mylan manufacture and distribute over-the-counter and prescription generic and specialty finished dose pharmaceuticals ("FDPs"), as well as active pharmaceutical ingredients ("APIs"), and contract manufacture and out-license FDPs.

Market definition. In line with its previous decisions, the Commission confirmed that generic and originator versions of FDPs belong to the same market and used the ATC[53] to define the relevant product markets. As is its custom, the Commission started at the ATC3 level (intended therapeutic use), and proceeded to a narrower ATC4 (mode of action) or molecule level where appropriate. Consistent with its decisional practice related to antiarrhythmic drugs, the Commission departed from the ATC and used the specifically developed Vaughan-Williams classification to define markets related to antiarrhythmic molecules propafenone and flecainide. The Commission further found that these two molecules were in the same market as both were used interchangeably for the treatment of supraventricular arrhythmias, at the very least for new patients. Similar to its previous decisions, the Commission defined the geographic market as national.

[52] *See Sony/Mubadala Development/EMI Music Publishing* (Case COMP/M. 6459), Commission decision of April 19, 2012; *see also Universal/BMG Music Publishing* (Case COMP/M.4404), Commission decision of May 22, 2007.

[53] The Anatomical Therapeutic Classification ("ATC") is a hierarchical and coded four-level system that classifies medicinal products according to their indication, therapeutic use, composition, and mode of action.

Horizontal overlaps. The parties' activities resulted in five overlaps : (i) FDPs; (ii) pipeline products; (iii) APIs; (iv) contract manufacturing; and (v) out-licensing. The Commission's investigation focused on FDPs. Consistent with previous precedents, the Commission focused on Group 1 markets (those in which the parties' combined share exceeded 35% and the increment resulting from the transaction exceeded 1%). On this basis, the Commission identified concerns in several EEA countries related to the manufacturing of FDPs in multiple therapeutic areas, in particular cardio-metabolic; alimentary tract and metabolism; dermatologicals; genito-urinary system and sex hormones; anti-infective agents; antineoplastic and immunomodulating agents; musculoskeletal system; nervous system; and respiratory system.[54] In each of these areas, the parties' combined shares were in the 60–100% range and the increments were in the 5–40% range. The parties were either the only or one another's closest competitors.

Vertical relationships. The Commission's vertical analysis focused on Mylan's 5% share in the upstream aciclovir API market and Meda's 30% share in the vertically related downstream acyclovir FDP market, as well as on the parties' out-licensing of dossiers to third parties. Ultimately, no vertical concerns were identified.

To alleviate the Commission's concerns, Mylan offered to divest its or Meda's businesses in each of the markets at issue, along with the relevant marketing authorizations, customer information, and brands. Market tests confirmed that generic suppliers compete using their entire portfolio to appeal to pharmacies and wholesale customers. The remedy therefore required that the purchaser be established in the marketing of generic pharmaceuticals with an existing distribution and sales footprint in all markets in question.

[54] The Commission had concerns in the following markets: propafenone and flecainide in Belgium, Estonia, Ireland, Italy, Luxembourg, Portugal, Spain, and the United Kingdom; amoxicillin in Norway; diltiazem in Portugal; megestrol in Spain; multivitamins without minerals for paediatric use in Portugal; nabumetone in the United Kingdom; povidone-iodine in France; and progestogens in Austria.

Phase II Decisions Without Undertakings

FedEx/TNT (Case COMP/M.7630)

On December 22, 2016, the Commission unconditionally approved the acquisition of TNT Express N.V. ("TNT"), based in the Netherlands, by FedEx Corporation ("FedEx"), based in the United States. Both companies offer worldwide small package delivery services.

Market definition. Consistent with its decisional practice, the Commission distinguished between domestic markets (packages picked up and delivered within the same country) and international markets (those delivered to a different country). Within the international markets, the Commission further distinguished between intra-EEA small package delivery services and extra-EEA small package delivery services.

Within the intra-EEA delivery markets, the Commission found that next-day (express) delivery and standard (deferred) delivery services constituted separate markets. The Commission concluded that the two services were not demand-side substitutes because only a very small minority of customers would switch to a deferred service should the price of the express services increase by 5–10%. The Commission also found that the two services were not supply-side substitutes because deferred services and express services require different network infrastructures.

Within the extra-EEA delivery market, the Commission concluded that express and deferred services were sub segments of a single market, mainly because: (i) extra-EEA delivery providers mostly use the same infrastructure to deliver express and deferred services; (ii) the same customers purchase express and deferred extra-EEA services; and (iii) unlike in the intra-EEA market, there is no clear difference in transit time between these services.

The geographic markets for extra-EEA and international intra-EEA services were defined as

national, based on the origin of the delivery. The Commission also analyzed extra-EEA deliveries at the EEA-level due to the importance of air networks for international deliveries.

Competitive analysis. The transaction reduced the number of small package delivery service integrators[55] from four to three, with the remaining competitors being UPS and DHL.

When assessing closeness of competition, the Commission relied on customer preferences. Following an analysis of the parties' sales volumes and operational network density, the Commission found that FedEx primarily focuses on customers with extra-EEA delivery preferences, whereas TNT mainly serves customers with standalone intra-EEA delivery needs. The Commission, therefore, concluded that the services provided by the parties were complementary in terms of customer groups. In addition, based on an analysis of bidding data, the Commission identified DHL as FedEx's main competitor for extra-EEA deliveries. In the market for intra-EEA deliveries, the Commission found that FedEx has a relatively weak market position given its limited EEA-wide network, compared to TNT's robust EEA road and air network.

The Commission carried out an exhaustive market reconstruction analysis based on data provided by FedEx, TNT, DHL, and UPS to calculate the integrators' market shares. Its analysis showed that, in national markets for international intra-EEA deliveries, the parties' combined market shares would not exceed 40%. For extra-EEA deliveries, the Commission found that the combined shares would exceed 40% with an increment over 5% only in three national markets (Hungary, Estonia, and Latvia). An analysis of TNT's cost structure and pricing strategy compared to its competitors demonstrated that the transaction would not result in the loss of an important competitive force in the international intra-EEA or extra-EEA markets given that TNT did not have significant cost advantages over its competitors and, thus, could not undercut prices.

The *UPS/TNT* decision. In 2013, the Commission prohibited the *UPS/TNT* proposed transaction, which also represented a four-to-three merger in the small package delivery sector.[56] Based on the Commission's decisions, closeness of competition appears to have been the determining factor for reaching different conclusions. In *UPS/TNT*, the Commission concluded that the merger would have combined the two closest competitors, with post-merger market shares exceeding 50% in some national markets. Due to FedEx's limited intra-EEA delivery network, the Commission was concerned that in such markets, the combined entity would have faced competition only from DHL. By contrast, in *FedEx/TNT*, the Commission concluded that the transaction combined complementary service providers with different network densities targeting different customer groups.

In addition, the Commission found that the transaction would lead to merger-specific efficiencies in the European air network, resulting in lower pickup and delivery and air network costs during the first three years after the completion of the transaction. The 5–10% price increase projected as part of the price/concentration analysis was not considered to be statistically significant and the Commission concluded that it would be outweighed by the verified efficiencies post-transaction. Although similar efficiencies were claimed in *UPS/TNT*, in that case the Commission found that they could not outweigh the price increases expected following the transaction.

Phase II Decisions With Undertakings

Staples/Office Depot (Case COMP/M.7555)

On February 2, 2016 the Commission approved, following a Phase II investigation, the acquisition of Office Depot Inc. ("Office Depot") by Staples Inc. ("Staples"). In the EEA, Office Depot and Staples are

[55] The main characteristics of integrators are ownership of or full control over all transportation assets, sufficient geographic coverage worldwide, a hub-and-spoke operation model, a proprietary IT network, and reputation of reliably delivering parcels on time (*i.e.*, end-to-end credibility) from origin to destination (including air transport).

[56] *UPS/TNT* (Case COMP/M.6570), Commission decision of January 30, 2013.

active in the distribution of office products to businesses.

The Commission's detailed market definition analysis considered segmentation by:

- **Product market**. The Commission found that customers had a strong preference for a one-stop-shop comprising all traditional office supply categories (stationary, paper, and ink & toner), but ultimately left market definition open because competition issues would arise under any product market definition.
- **Customer size**. Consistent with previous precedents, and the market investigation showing that customers' office supply needs varied depending on their size, the Commission defined a separate market for supply to large business customers.
- **Distribution channel**. The Commission defined separate markets according to distribution channel, namely: (i) direct sales at retail level; (ii) wholesale; and (iii) contract sales taking place through participation in tenders organized by large businesses. The contract sales market was further split into international and non-international, because of the significant cost differences between setting up an EEA-wide and international distribution operation, and international customers' preference to source under a single international umbrella.

The Commission found the parties' market share estimates unreliable and was unable to engage in a full market reconstruction given the multitude of products in each product category and the various distribution channel sub-segmentations within the market. Instead, the Commission relied on customer trends and customer/competitor surveys, bidding data analysis, and the parties' internal documents. On that basis, the Commission identified issues in three markets:

- **International contracts in the EEA**. The Commission found that the three-to-two merger would leave only one independent competitor (Lyreco) with a geographic footprint capable of supplying customers in several EEA countries. The significant costs and risks involved in setting up contract distribution operations in new EEA countries constituted high barriers to entry, entrenching the parties' position. These concerns were further corroborated by the parties' bidding data and survey evidence confirming close competition between the parties and high combined shares ranging from 40–50% to 50–60%.
- **Non-international contracts in Sweden and the Netherlands**. The transaction would also leave Lyreco as the only credible competitor in the markets for non-international contracts in Sweden and the Netherlands. Past bidding data showed that Office Depot won 30–40% (20–30% by value) of all business customer tenders lost by Staples in Sweden, while Lyreco won 20–30% (30–40% by value) of those tenders. The Commission found that the remaining local competitors exercised limited competitive constraint, because they rarely participated in the same tenders as the parties and were generally awarded lower-value contracts, if any.
- **Wholesale in Sweden**. The transaction would be a merger to monopoly in the wholesale market in Sweden, whether taken as a whole or segmented into brick-and-mortar resellers with access to their own warehouses and online resellers connecting wholesalers and end-customers for a fee.

To obtain clearance in Phase II, the parties committed to divest to an upfront buyer[57] Office Depot's contract distribution business in the EEA and Switzerland and Office Depot's entire business in Sweden. The transaction was ultimately abandoned as a result of challenges from the U.S. Federal Trade Commission

[57] Upfront buyer clause prohibits the parties from closing the transaction until the Commission has approved a suitable divestiture purchaser.

and the Canadian Competition Bureau. Unlike in the various EEA markets, the transaction would have led to a monopoly in the United States and Canada.

Hutchison 3G Italy/Wind/JV (Case COMP/M.7758)

On September 1, 2016, following a Phase II investigation, the Commission conditionally approved the formation of a joint venture in the telecommunications sector in Italy. The merged entity, which will be jointly controlled by Hutchison Europe Telecommunications S.à.r.l. and VimpelCom Luxembourg Holdings S.à.r.l., will combine their respective telecommunication businesses in Italy—H3G S.p.A. ("H3G") and Wind Telecomunicazioni S.p.A. ("WIND").

Market definition. Consistent with its decisional practice, the Commission identified separate national markets for mobile and fixed telecommunications. The Commission confirmed that wholesale services for access and call origination on mobile networks belong to the same market given that they are part of the mobile virtual network operators' ("MVNOs") essential needs and are generally supplied by the same host mobile network operators ("MNOs").

Competitive assessment. The Commission's investigation focused on unilateral and coordinated effects in the market for retail mobile communication services, and unilateral effects in the market for the wholesale provision of access and call origination on mobile networks. Absent remedies, the transaction would have reduced the number of MNOs from four to three and created the largest MNO in Italy.

Unilateral effects in the retail mobile market. The Commission noted that H3G had significantly increased its market share in recent years, partially due to a commercially aggressive pricing strategy. In the Commission's view, post-transaction the two remaining participants, TIM and Vodafone Italia S.p.A., would have reduced incentives to compete, and MVNOs would not be able to exert sufficient competitive pressure.[58] In addition, customers would not have sufficient countervailing buyer power and the existing barriers to entry would make timely entry unlikely.

The Commission rejected the parties' argument that, absent the merger, they would be unable to finance investments in the quality and coverage of their networks, thereby widening the 4G network gap with their competitors. First, the Commission held that price is, and will remain, the key driver in determining customers' choice of network. Second, having examined internal documents, such as business plans and investment forecasts, the Commission concluded that, absent the transaction, the parties would continue to have the incentive and ability to invest in improving their 4G coverage.

The Commission also rejected the parties' argument that, because H3G had no fixed telecommunications business, it was unable to compete effectively. The market investigation did not support the proposition that, to compete effectively, a mobile company should provide fixed services.

Coordinated effects in the retail mobile market. The Commission found that the Italian retail mobile telecommunications market was prone to coordination because of price transparency, the small degree of product differentiation, and relatively stable supply and demand conditions. H3G's role as a maverick in the telecommunications market was, in the Commission's view, crucial to preserving MNOs' incentives not to align their behavior. The Commission expected the post-transaction entity not to pursue H3G's aggressive pricing strategy any longer, while other MNOs would likely focus on maintaining their current market shares. The Commission therefore concluded that the transaction would likely facilitate collusion among MNOs.

Unilateral effects in the wholesale access and call origination on mobile networks market. The Commission argued that the parties—despite their lower success rate in securing MVNO contracts—are

[58] According to the Commission, MVNOs in Italy would be constrained by the wholesale access conditions imposed by MNOs. In addition, Italian MVNOs are either very small (the biggest player having a 3.7% share of the overall market) or focus on niche markets.

the most aggressive competitors in price. The Commission rejected the parties' argument that they were not close competitors because of the lack of recent switching by MVNOs between H3G and WIND. All four MNOs in Italy are, in the Commission's view, close competitors because they offer the same service, provide MVNOs with the same technologies, and compete for the same customers.

To address the Commission's concerns, the parties proposed a series of measures that would create a new MNO in Italy. The parties also agreed to divest essential inputs for the operation of the new competitor and to provide additional assistance through the network roll-out phase. The parties proposed a fix-it-first remedy with Iliad S.A. as a buyer. The Commission concluded that the remedies offered were sufficient to address their concerns, and approved the transaction. The positive outcome of the case is in contrast with that of two other recent four-to-three proposed transactions in the telecommunications industry, which were abandoned (*Telenor/TeliaSonera*) or prohibited (*Hutchison 3G UK/Telefonica UK*) because the parties' remedy proposals fell short of creating a strong, independent fourth national mobile provider.[59]

State Aid

ECJ Judgments

Dimosia Epicheirisi Ilektrismou AE (DEI) v. Alouminion tis Ellados VEAE (Case C-590/14 P)

On October 26, 2016, the Court of Justice annulled a General Court judgment[60] in a Greek state aid case.[61] The Court of Justice concluded that extending the duration of existing state aid is an alteration of that aid and, therefore, is considered new aid. The Court of Justice also noted that this principle applies even when the alteration stems from a national court's decision.

In 1960, Dimosia Epicheirisi Ilektrismou AE ("DEI"), a public electricity company, and Alouminion tis Ellados VEAE ("Alouminion"), an aluminum producer, entered into a contract under which DEI granted Alouminion a preferential electricity tariff (the "1960 contract"). In 1992, the Commission found that the preferential treatment under the 1960 contract constituted state aid compatible with the internal market.[62] The 1960 contract was due to expire on March 31, 2006, and DEI did not elect to extend it. Alouminion challenged the 1960 contract's termination before the competent national courts.

In January 2007, in interlocutory proceedings, the competent court of first instance suspended the termination. In March 2008, however, the competent court of appeal definitively terminated the 1960 contract. In 2011, the Commission found that the €17.4 million of preferential treatment from January 2007 to March 2008 constituted new aid.[63] Because this new aid had not been notified, the Commission considered it incompatible with the internal market and ordered Greece to recover it. Alouminion appealed to the General Court, which annulled the Commission's decision and classified the aid as existing aid.

On further appeal by DEI, and supported by the Commission, the Court of Justice annulled the General Court's judgment. The Court of Justice held that the decision of the Greek court of first instance suspending the termination of the contract in 2007 constituted an "<u>extension</u> of the duration of existing aid [which] must be considered to be an <u>alteration</u> of existing aid and therefore, […] constitutes <u>new</u> aid" (emphasis added).[64] Moreover, the Court of Justice noted that the duty of sincere cooperation obliges the national courts to comply with EU state aid rules. Consequently,

59 *See*, *e.g.*, *Hutchison 3G UK/Telefonica UK* (Case COMP/M.7612), Commission decision of May 11, 2016 and *Telenor/TeliaSonera* (Case COMP/M.7419), notification withdrawn by the parties on February 27, 2015.

60 *Alouminion v. Commission* (Case T-542/11) EU:T:2014:859.

61 *DEI and Commission v. Alouminion tis Ellados* (Case C-590/14 P) EU:C:2016:797.

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

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

64 *Alouminion v. Commission* (Case T-542/11) EU:T:2014:859, para. 50.

national courts cannot take decisions that conflict with a Commission decision.

DTS Distribuidora de Televisión Digital SA v. Commission (Case C-449/14 P)

On November 10, 2016, the Court of Justice dismissed an appeal by Distribuidora de Televisión Digital SA ("DTS") against the General Court ruling[65] that the financing of the Spanish public television system ("RTVE") did not violate EU state aid rules.[66]

Spanish Law 8/2009 came into force in September of 2009. According to this law, advertising, teleshopping, sponsorship, and pay-per-view services would no longer be sources of funding for RTVE. Consequently, RTVE would lose a substantial part of its commercial revenue. To offset this loss, Law 8/2009 provided for fiscal measures including a tax on the revenues of pay television operators based in Spain. The tax would be used to cover up to 20% of the total annual support for RTVE while any remaining funds from the tax would be paid back into the general state budget.

On July 20, 2010, the Commission decided that the funding scheme for RTVE was compatible with the internal market under Article 106(2) TFEU because it did not constitute an integral part of the aid and did not overcompensate RTVE.[67] DTS appealed this decision. On July 11, 2014, the General Court dismissed DTS's action. DTS, supported by Telefónica de España SA and Telefónica Móviles España SA, appealed the General Court judgment.

In dismissing the appeal, the Court of Justice held that the General Court had not erred in law in finding that the fiscal measures were not part of the aid scheme. The Court of Justice emphasized that a tax would be subjected to state aid provisions only if it formed an integral part of the aid measure. To fulfill this condition, the tax must be hypothecated to the aid (*i.e.*, the revenue from the tax must be allocated to the financing of the aid, and directly impact the amount of the aid). The General Court correctly concluded that the tax was not part of the aid because RTVE would have been entitled to a specific amount based on the net costs of the fulfillment of its public service mandate, and not based on the revenues collected by the tax. Further, any surplus from the tax revenues would have been returned to the state budget.

The Court of Justice also noted that the issue of whether a tax is an integral part of an aid financed by a tax does not depend on the existence of a competitive relationship with the person liable to pay the tax (*e.g.*, pay-television operators). The only relevant consideration is whether the tax is hypothecated to the aid in question.

Commission v. World Duty Free Group SA and Others (Joined Cases C-20/15 P and C-21/15 P)

On December 21, 2016, the Court of Justice held that the General Court had erred in annulling two Commission decisions[68] on a Spanish tax advantage to companies taxable in Spain ("resident companies") that own shareholdings in foreign companies.[69] The Court of Justice thus further clarified the case law on the determination of whether a national measure is selective under Article 107(1) TFEU.[70]

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[65] *DTS Distribuidora de Televisión Digital v. Commission* (Case T-449/14 P) EU:T:2014:629.

[66] *DTS Distribuidora de Televisión Digital v. Commission* (Case C-449/14 P) EU:C:2016:848.

[67] Commission Decision 2011/1/EU of July 20, 2010 (State Aid C 38/09 (ex NN 58/09)) OJ 2011 L 1/9.

[68] Commission Decision 2011/5/EC of October 28, 2009 (State Aid C 45/07 (ex NN 51/07, ex CP 9/07)), OJ 2011 L 7/48, annulled by the General Court in *Autogrill España v. Commission* (Case T-219/10) EU:T:2014:939, and Commission Decision 2011/282/EU of January 12, 2011 (State Aid C 45/07 (ex NN 51/07, ex CP 9/07)), OJ 2011 L 135/1, annulled by the General Court in *Banco Santander and Santusa v. Commission* (Case T-399/11) EU:T:2014:938.

[69] *Commission v. World Duty Free Group* (Joined Cases C-20/15 P and C-21/15 P) EU:C:2016:981.

[70] A national measure must meet four criteria to be classified as state aid under Article 107(1) TFEU. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (*see, e.g.*, *BVVG* (Case C-39/14) EU:C:2015:470, para. 24).

Spanish Law 24/2001 of December 27, 2001 enabled resident companies owning a shareholding of at least five percent and for at least one year in a foreign company (established either within or outside of the EU) to deduct the resulting goodwill for tax purposes. The Commission found this measure to be selective because it benefited exclusively resident companies owning shareholdings in foreign companies. The Commission declared it incompatible with the common market and ordered Spain to recover the aid.

Following appeals by three companies,[71] the General Court concluded that the Commission had misapplied Article 107(1) TFEU's selectivity condition and annulled the contested decisions. It held that the measure was not selective because the Commission had not identified a particular category of undertakings exclusively favored by the measure. The Commission appealed to the Court of Justice, arguing that the General Court imposed an additional obligation to establish selectivity that is more restrictive than as defined by case law.

The Court of Justice agreed with the Commission that the additional obligation imposed by the General Court is a misinterpretation of the selectivity condition. It recalled that, to establish whether a national tax measure is selective, the Commission must demonstrate that its differentiation between operators that are in a comparable factual and legal situation is a derogation from the Member State's ordinary tax system.[72] Only resident companies owning at least five percent shareholdings in <u>foreign</u> companies for at least one year could qualify for the tax advantage. Resident companies owning the same shareholdings in other resident companies for the same period could not qualify. The fact that a large number of companies could benefit from the measure was not sufficient to question its selective nature.

The Court of Justice referred the cases back to the General Court for an examination of whether companies that did not meet the conditions for obtaining the tax advantage were in a factual and legal situation comparable to that of the companies that did.

Policy and Procedure

ECJ Advocate General Opinions

FSL Holdings and Others v. Commission (Case C-469/15P), Opinion of Advocate General Kokott

On November 17, 2016, Advocate General Kokott advised the Court of Justice to dismiss the appeal against the General Court's judgment in the Southern European bananas cartel. In October 2011, the Commission fined FSL Holdings NV, Firma Leon Van Parys NV, and Pacific Fruit Company Italy SpA €8.9 million for participating in a price-fixing cartel in the Southern European bananas market.[73] The Commission relied *inter alia* on evidence from the Italian tax authority to establish the infringement. The evidence was obtained in a criminal investigation related to tax offences.

In June 2015, the General Court concluded that an interruption of the infringement resulted in a shorter duration of the cartel and reduced the fines to €6.7 million.[74]

On appeal, all three companies contested the admissibility of evidence obtained by the Commission from the Italian tax authorities (in particular, notes of an employee of Pacific Fruit). Advocate General Kokott rejected this argument. She noted that the General Court was entitled to infer that the evidence had been exchanged lawfully because no Italian court had forbidden the transfer of such evidence to the Commission and the transfer was authorized by the Italian public prosecutor's office. The Advocate General, accordingly, found that the General Court had not based its findings on unlawfully obtained evidence.

The companies also claimed that the evidence from the Italian tax authority should not have been used to

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[71] Autogrill Espana SA (now World Duty Free Group SA), Banco Santander SA, and Santusa Holding SL.

[72] *See, e.g.*, *Paint Graphos and Others* (Joined Cases C‑78/08 to C‑80/08) EU:C:2011:550, para. 49.

[73] *Exotic fruit* (Case COMP/39482), Commission decision of October 12, 2011.

[74] *FSL Holdings and others v. Commission* (Case T-655/11) EU:T:2015:383.

establish the existence of the cartel because it was gathered for a different purpose. Advocate General Kokott, however, pointed out that evidence collected for other purposes may be used in antitrust proceedings. The Advocate General explained that competition law[75] protects undertakings from the use of evidence collected by a competition agency in subsequent proceedings in which stricter procedural law standards may apply. In this case, however, these concerns did not arise because the procedural standards applicable in the national tax proceedings and the EU antitrust proceedings were equally strict.

Finally, the appellants argued that the General Court violated their rights of defense by failing to adequately assess the economic and legal context when establishing a single and continuous infringement. Advocate General Kokott stressed the importance of examining competition law infringements in their economic and legal context, but noted that the depth of such an examination may vary. In particular, the anticompetitive object of hardcore cartels is obvious, so an in-depth assessment of the economic and legal context is not required. The imposition of such a burden on the Commission would effectively blur the distinction between restrictions by object and restrictions by effect.

Feralpi v. Commission (Case C-85/15P), Opinion of Advocate General Wahl

On December 8, 2016, Advocate General Wahl delivered his opinion on five appeals concerning the General Court's judgments that upheld the Commission's decision in the Italian concrete reinforcing bar cartel.

In December 2002, the Commission found that 11 Italian steel companies infringed Article 65(1) of the European Coal and Steel Community Treaty ("ECSC Treaty")[76] and fined the companies €85 million.[77] The companies appealed, arguing that the decision was improperly based on the ECSC Treaty, which had expired before the decision was adopted.

In September 2009, the Commission readopted the decision based on Regulation 1/2003[78] (and, by extension, Article 101 TFEU).[79]

The companies appealed. In 2014, the General Court dismissed most of the appeals and confirmed that the Commission had neither committed any procedural errors nor breached the applicants' rights of defense.[80] Five of the companies appealed to the Court of Justice, alleging that the Commission had erred in not issuing a supplementary statement of objections.[81]

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75 Article 12(2) and Article 28(1) of Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now 101 and 102 TFEU), OJ 2003 L 1/1.

76 This article prohibited all agreements and concerted practices between undertakings leading to a restriction of competition within the common market (similarly to Article 101 TFEU).

77 *Reinforcing bars* (Case COMP/37956), Commission decision of December 17, 2002 (the "2002 decision").

78 Council Regulation No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, January 4, 2003. More specifically, the basis of the Commission's decision was Article 7(1) with respect to the infringement and Article 23(2) with respect to the fines.

79 *Reinforcing bars* (Case COMP/37956), Commission decision of September 30, 2009 (the "2009 decision").

80 *Ferriera Valsabbia and Valsabbia Investimenti v. Commission* (Case T-92/10) EU:T:2014:1032; *Alfa Acciai v. Commission* (Case T-85/10) EU:T:2014:1037; *Riva Fire v. Commission* (Case T-83/10) EU:T:2014:1034; *Feralpi v. Commission* (Case T-70/10) EU:T:2014:1031; and *Ferriere Nord v. Commission* (Case T-90/10) EU:T:2014:1035. The General Court annulled the decision insofar as it jointly and severally fined two companies because it concluded that the Commission did not establish that the two companies formed a single undertaking when the decision was adopted. The General Court reduced the fines on two of the appellants, so as to reflect the periods of their limited participation in the infringement.

81 Namely, the provisions set out in Regulation No 1/2003 and in the Commission Regulation No 773/2004 of

Advocate General Wahl found that the Commission had breached the appellants' rights of defense and requested that the Court of Justice overturn the General Court's judgments and annul the 2009 decision. Advocate General Wahl recognized that Articles 7(1) and 23(2) of Regulation 1/2003 enable the Commission to penalize undertakings in sectors that fall under the expired ECSC Treaty. He noted that the Commission should also have complied with the procedural rules set out in Regulation 1/2003. If the procedural requirements set out in Regulation 1/2003 had not been complied with, a decision adopted on its basis would remain valid only under exceptional circumstances, such as if: (i) the procedure set out in Regulation 1/2003 had been correctly followed when adopting the 2002 decision; or (ii) the procedural steps undertaken based on the rules applicable at that time could be considered equivalent to those required by Regulation 1/2003.

Advocate General Wahl determined that the first condition was not met because different procedural rules applied in 2002, when the Commission originally issued its decision.[82] Advocate General Wahl concluded that the second condition was also not met because the parties could not request an oral hearing under the procedure leading to the adoption of the 2002 decision. The Advocate General emphasized the importance of an oral hearing by pointing out that the outcome of the proceedings could have been different had an oral hearing taken place. National competition authorities ("NCAs") participate in such oral hearings and must be consulted by the Commission prior to adoption of any decision under Regulation 1/2003. Accordingly, the relevant NCAs' opinions could have influenced the Commission's 2009 decision.

In considering the appellants' other pleas, the Advocate General criticized the Commission's fine increase for recidivism on Ferriere Nord. The Advocate General noted that the Commission is not necessarily required to specify in its statement of objections the aggravating circumstances it intends to apply toward a particular undertaking. However, the Commission is required to explain its reasons when the undertaking is not otherwise able to anticipate the likely application of the aggravating circumstances. In light of the lack of case law providing guidance on the interpretation of repeated infringements, he concluded that the Commission should have at least indicated the reasons for treating Ferriere Nord's conduct as a repeat infringement.

CLEARY GOTTLIEB

April 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (now Article 101 and 102 TFEU), OJ L 123. See *Feralpi v. Commission* (Case C-85/15 P) EU:C:2016:940; *Ferriera Valsabbia and Valsabbia Investimenti v. Commission* (Case C-86/15 P) EU:C:2016:940; *Alfa Acciai v. Commission* (Case C-87/15 P) EU:C:2016:940; *Ferriere Nord v. Commission* (Case C-88/15 P) EU:C:2016:940; and *Riva Fire v. Commission* (Case C-89/15 P) EU:C:2016:940.

[82] The Advocate General observed that the Commission had admitted that it had not taken all the steps required by Regulation No 17/62 and Regulation No 2842/98 when adopting the 2002 decision, and in any event the procedural steps taken by the Commission did not correspond to the requirements set out in Regulation No 1/2003 and Regulation No 773/2004.

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