Fining Policy

ECJ Judgments

Timab Industries and CFPR v. Commission (Case C-411/15 P)

On January 12, 2017, the Court of Justice dismissed the appeal brought by Timab Industries and Cie financière et de participations Roullier (together, "Timab") against the General Court's judgment[1] that upheld the fine imposed by the Commission[2] for their involvement in the animal feed phosphates cartel between 1993 and 2004.[3]

During settlement discussions, the Commission estimated that Timab's fine for a single and continuous infringement for the entire duration of the cartel (1978–2004) would be in the €41–44 million range. To calculate the fine range, the Commission applied: (i) a 10% settlement discount; (ii) a 17% leniency discount; and (iii) a 35% discount for cooperation outside the leniency program because Timab provided information showing its involvement in the cartel between 1978 and1993.

Timab subsequently withdrew from the settlement procedure. During the standard procedure, in response to the Commission's statement of objections, Timab disputed its participation in the infringement before 1993. Accordingly, the Commission disregarded Timab's declarations in the leniency application pertaining to the pre-1993 period and concluded that it could not prove Timab's involvement in the cartel between 1978 and 1993.

The Commission ultimately fined Timab €60 million, higher than estimated in the settlement process, for its participation in the cartel limited to the years 1993–2004. The higher fine was attributable primarily to the fact that Timab's relevant sales increased significantly between 1993 and 2004. The annual average sales figure for this shorter period was therefore higher than that for the longer period (1978–2004), on which the Commission based its initial calculations.

In addition, as a result of Timab's withdrawal from the settlement proceedings, the Commission did not apply a settlement discount when calculating the fine. It also did not take into account Timab's cooperation outside the leniency program, and it reduced the leniency discount from 17% to 5% to reflect the fact that Timab's cooperation concerned a much shorter infringement period. The table below provides a comparison of the fine calculations before and after Timab's withdrawal from the settlement procedure.

[1] *Timab Industries and CFPR v. Commission* (Case T- 456/10) EU:T:2015:296.
[2] *Animal feed phosphates* (Case COMP/38.866), Commission decision of July 20, 2010.
[3] *Timab Industries and CFPR v. Commission* (C-411/15 P) EU:C:2017:11.

Fine Calculation		
Factor	**Settlement Procedure (1978-2004)**	**Standard Procedure (1993-2004)**
Duration	26 Years	10+ Years
Real Value of Sales	€529 M	€341 M
Average Real Value of Sales:	€21 M / Year	€32.8 M / Year
Real Value of Sales X 17% Gravity	€90 M	€58 M
Average Real Value of Sales X 17% Deterrence	+ €3 M	+ €5 M
Basic amount	**€93 M**	**€63 M**
Cooperation Outside the Leniency Program	- €33 M (35%)	- €0 M (0%)
Adjusted circumstances	**€60 M**	**€63 M**
Leniency discount	- €10 M (17%)	- €3 M (5%)
Settlement discount	- €6 M (10%)	- €0 (0%)
Fine	**€41–44 M**	**€60 M**

Timab appealed the Commission's decision. Following the General Court's dismissal of the appeal, Timab appealed to the Court of Justice.

First, Timab argued that the Commission had failed to examine the file with care and impartiality, and that it had incorrectly inferred from Timab's leniency application that it had participated in the cartel since 1978. The Court of Justice rejected Timab's argument and noted that the claim was ineffective because it related to a period (1978–1993) for which the Commission had not penalized Timab.

Second, Timab disputed the General Court's treatment of Timab's leniency application and participation in the settlement procedure as admissions of guilt. It argued that, by treating its statements as admissions of guilt, the General Court violated Timab's right of defense and, in particular, the right not to incriminate itself. The Commission contended that a leniency application by definition entails acknowledgement of the undertaking's participation in a cartel. Consequently, the Commission did not infringe the right not to incriminate oneself, since the self-incriminatory statements were voluntary. The Court of Justice confirmed the General Court's findings that the Commission did not infringe Timab's right of defense. It noted that, to establish an infringement of the right not to give self-incriminating evidence, the undertaking concerned must have been effectively compelled to provide information or evidence capable of proving the infringement. The Court of Justice determined that Timab's statements both in the leniency application and in the context of the settlement procedure were entirely voluntary.

Third, Timab asserted that the General Court had failed to exercise its unlimited jurisdiction, *inter alia*, by "failing to carry out a sufficient investigation of all the elements of the fine imposed."[4] In particular, Timab contended that the General Court did not verify the materiality of the new elements that led the Commission to impose a higher fine for a significantly reduced duration of the infringement. The Court of Justice disagreed. It found that the General Court had fully exercised its unlimited jurisdiction, because it verified the merits of the Commission decision and the elements used by the Commission to calculate the fine.

Fourth, the General Court concluded that Timab's withdrawal from the settlement procedure led to a situation of "*tabula rasa*" (blank slate) – which meant that, due to the total separation between settlement and standard procedures, the Commission was entitled to calculate the fines without any reference to the estimates produced during settlement discussions. The Court of Justice agreed with the General Court's assessment.

[4] *Timab Industries and CFPR v. Commission* (C-411/15 P) EU:C:2017:11, para. 97.

Finally, Timab claimed that the General Court had breached the principle of legitimate expectations, because Timab could not have reasonably anticipated that once it withdrew from the settlement procedure, the fine reduction for cooperation would decrease from 52% to 5%. Timab contended that, accordingly, it could not make an informed decision on whether to settle. The Court of Justice held that the Commission's fining estimates during the procedural stage, including during settlement, cannot give rise to any legitimate expectation. This is because, at that stage, the Commission cannot give a precise assurance as to the amount of the fine.

Toshiba Corp. v. Commission (Case C-623/15 P)

On January 18, 2017, the Court of Justice dismissed[5] the appeal brought by Toshiba Corp. ("Toshiba") against the General Court's judgment[6] that partially upheld Toshiba's action for annulment of the Commission *TV and Computer Monitor Tubes* [7] decision.

In December 2012, the Commission fined seven undertakings €1.47 billion for participating in one or two separate cartels in the market for color cathode ray tubes ("CRTs") between 1996/1997 and 2006.[8] The Commission found two separate infringements: one related to color CRTs for computer monitors and one related to CRTs for television sets (or color picture tubes, "CPTs"). It concluded that the participants colluded to share competitively sensitive information on pricing, markets, customers, and to limit output.

The Commission found that Toshiba participated in the CPT cartel by maintaining bilateral contacts with a majority of the undertakings in the cartel and attending a number of multilateral meetings. It determined that, as of April 2003, a joint venture controlled by Toshiba and Panasonic, Matsushita Toshiba Picture Display Co. Ltd ("MTPD"), had also continuously participated in the CPT cartel. The Commission fined Toshiba approximately €28 million for the direct infringement it committed, and fined Toshiba, Panasonic, and MTPD approximately €87 million for the infringement committed by the joint venture. Toshiba and other addressees of the Commission's decision appealed to the General Court. In five separate judgments,[9] the General Court largely upheld the Commission's decision.

In September 2015, ruling on the action for annulment brought by Toshiba, the General Court found that the Commission had not established to the requisite legal standard that Toshiba knew of the CPT cartel or intended to actively contribute to the common objectives of the cartel. The General Court annulled Toshiba's fine for the direct infringement and reduced Toshiba's fine for the joint venture's infringement.[10]

On appeal, Toshiba requested the annulment of the fine imposed jointly and severally with Panasonic and MTPD. Toshiba alleged that the General Court had erred in concluding that Toshiba was in a position to exercise decisive influence over MTPD, and consequently holding Toshiba liable for MTPD's infringement.

[5] *Toshiba v. Commission* (Case C-623/15 P) EU:C:2017:21.
[6] *Toshiba v. Commission* (Case T-104/13) EU:T:2015:610.
[7] *TV and Computer Monitor Tubes* (Case COMP/39.437), Commission decision of December 5, 2012.
[8] A CRT is an evacuated glass envelope containing an electron gun and a fluorescent screen, usually with internal or external means to accelerate and deflect the electrons. When electrons from the electron gun strike the fluorescent screen, light is emitted, creating an image on the screen.

[9] *See also Panasonic Corp. and MT Picture Display Co. Ltd v. Commission* (Case T-82/13) EU:T:2015:612; *Samsung SDI and Others v. Commission* (Case T-84/13) EU:T:2015:611, *infra*, p. 6; *LG Electronics v. Commission* (Case T-91/13) EU:T:2015:609; and *Philips v. Commission* (Case T-92/13) EU:T:2015:605.
[10] *Panasonic Corp. and MT Picture Display co. Ltd v. Commission* (Case T-82/13) EU:T:2015:612.

The Court of Justice concluded that it may reasonably be established that a subsidiary's conduct is jointly determined by the parent companies when this is implied in the statutory provisions or contractual stipulations governing the joint venture. The fact that Toshiba had a veto right over MTPD's business plan for the entire duration of its existence was enough to conclude that Toshiba, together with Panasonic, exercised decisive influence over MTPD. The Court of Justice also clarified that, contrary to Toshiba's arguments, it is not necessary to demonstrate that a veto right has been effectively exercised to determine the existence of decisive influence over a joint venture's conduct; the mere holding of a veto right is sufficient.

The Court of Justice dismissed Toshiba's appeal in its entirety and confirmed the approximately €82 million fine imposed jointly and severally on the three companies.

Commission v. Total and Elf Aquitaine (Case C-351/15 P)

On January 19, 2017, the Court of Justice dismissed the Commission's appeal against the General Court's judgment of April 29, 2015 finding that the Commission could not require interest to be paid on the fines imposed on Total SA ("Total") and Elf Aquitaine SA ("Elf Aquitaine") for their involvement in the acrylic glass cartel.[11]

In May 2006, the Commission fined Arkema France SA ("Arkema") €219.1 million. Its parent companies Total and Elf Aquitaine were jointly and severally liable for the fine up to €140.4 million and €181.3 million, respectively.[12] In 2006, Arkema paid the full fine for itself and its parent companies, pending appeals to the General Court. In 2011, the General Court reduced Arkema's fine to €113.3 million. The General Court reduced the deterrence increase applied to Arkema to account for the fact that it was no longer controlled by Total when the fine was imposed and the larger fine could have been justified only based on Total's turnover on that date.[13] The General Court, however, in a separate proceeding dismissed the action brought by Total and Elf Aquitaine, leaving unchanged the fine imposed.[14] On this basis, the Commission, in two subsequent letters to Total and Elf Aquitaine, demanded payment for their part of the fine in addition to the interest accrued on the fine since Arkema's initial payment. In particular, the Commission noted that Total and Elf Aquitaine's liability "was not extinguished by the retention/reduction of the sums mentioned by the judgment" regarding Arkema.

In 2011, Total and Elf Aquitaine paid €137.1 million, which included the difference between the original fine paid by Arkema and the reduction set by the General Court as well as interest amounting to €31.3 million. Total and Elf Aquitaine then in an action before the General Court sought annulment of the Commission's letters. The General Court held that the Commission's letters were actionable under Article 263 TFEU in so far as they related to the imposition of interest for defaulting on payment. It also annulled the Commission's decision to impose interest because Total and Elf Aquitaine had met their payment obligations on time.[15]

On appeal, the Commission claimed that the contested letters were not intended to produce binding legal effects separate from its original decision, and were merely in preparation to the Commission's possible enforcement proceedings. As a result, they could not have been considered challengeable acts for the purposes of Article 263 TFEU. The Court of Justice pointed out that the

[11] *Commission v. Total and Elf Aquitaine* (Case C-351/15 P) EU:C:2017:27.
[12] *Methacrylates* (Case COMP/F/38.645), Commission decision of May 31, 2006.
[13] *Total and Elf Aquitaine v. Commission* (Case T-206/06) EU:T:2011:250 and *Arkema France and Others v. Commission* (Case T-217/06) EU:T:2011:251.
[14] This was later also confirmed by the Court of Justice in *Total and Elf Aquitane v. Commission* (C-421/11P) EU:C:2012:60.
[15] *Total and Elf Aquitaine v. Commission* (Case T-470/11) EU:T:2015:241.

Commission's letters seeking payment of a fine (or the interest that may arise from it) may only constitute an enforcement notice and are not legally binding. In the present case, however, the contested letters demanded the payment of default interest in spite of the payment of the full original fine, constituting a modification of the pecuniary obligation for which Total and Elf Aquitaine were liable.

The Court of Justice rejected the Commission's argument, and held that the joint and several liability of Total and Elf Aquitaine was purely derivative of Arkema's. Therefore, after the full payment of the original fine by Arkema, the Commission was no longer entitled to seek payment from Total and Elf Aquitaine. The Court of Justice further noted that the liability of a parent company, when purely derivative of that of its subsidiary, cannot exceed that of its subsidiary.

Laufen Austria AG v Commission (C-637/13 P)

In November 2013, Laufen Austria AG ("Laufen Austria") asked the Court of Justice to set aside a judgment of the General Court[16] that had dismissed an action for annulment brought against a Commission decision fining 17 bathroom equipment manufacturers €622 million for participation in a price-fixing cartel.[17] On January 26, 2017, the Court of Justice set aside the judgment of the General Court and referred the case back to the General Court for a new ruling.[18]

The cartel came to the attention of the Commission through an immunity application by one of the cartel participants. In 2010, the Commission issued a decision against a number of participants in the bathroom fittings and fixtures cartel, including Laufen Austria. The Commission concluded that the cartelists had infringed Article 101(1) TFEU by fixing prices for baths, sinks, taps, and other bathroom fittings in Germany, Austria, Italy, Belgium, France, and the Netherlands between 1992 and 2004. At the time of the infringement, Laufen Austria operated as an independent company and marketed products under its own brand. In 1999, Laufen Austria's parent company (Keramik Holding AG), was acquired by Roca Sanitario. In its decision, the Commission fined Laufen Austria €32 million. Of this total, Laufen Austria was jointly and severally liable for €17.7 million with Roca Sanitario.

On appeal, Laufen Austria first claimed that the General Court had infringed the principle that penalties must be specific to the offender and it had not taken into account that Laufen Austria was an independent undertaking during the period of the infringement, prior to the acquisition by Roca Sanitario. Therefore, by taking into account the total turnover of Roca Sanitario when calculating the 10% ceiling, it had infringed the principles of proportionality, equal treatment, and personal liability.

The Court of Justice concluded that the parent company cannot be held responsible for the conduct of a subsidiary before the date of the acquisition, and that the Commission must use the subsidiary's own turnover in the business year preceding the decision for the purpose of calculating the 10% ceiling.

The Court of Justice agreed with Laufen Austria and held that the General Court erred in law by upholding the Commission's incorrect calculation of the 10% ceiling based on the parent company's turnover (for a period when the parent company was not held to be jointly and severely liable), instead of the subsidiary's turnover.

Second, the General Court determined that the mere fact that the geographic scope of an infringement is wider necessarily means that the infringement is more serious. Laufen argued that the General Court should have consequently reduced Laufen's fine because Laufen's infraction was limited to Austria

[16] *Laufen Austria v. Commission* (Case T-411/10) EU:T:2013:443.

[17] *Bathroom Fittings & Fixtures* (Case COMP/39.092), Commission decision of June 23, 2010.

[18] *Laufen Austria v. Commission* (Case C-637/13 P) EU:C:2017:51.

(by contrast, other cartel participants' infractions affected multiple jurisdictions).

The Court of Justice held that, in determining the multipliers, the geographic extent of an infringement is just one factor in the assessment and must be considered together with the other factors set out in the Fining Guidelines.[19] The Court of Justice held that the mere fact that the geographic scope of one infringement is wider does not necessarily mean that the infringement is more serious or that the multipliers should be higher. It also pointed out that the differences between cartel participants are reflected in the basic amount of the fine which is based on the participant's turnover. The Court of Justice concluded that the basic amount of the fine imposed on Laufen was correctly determined by reference to the value of its sales in Austria. Therefore, the principles of proportionality and equal treatment were not breached.

Samsung SDI and Others v. Commission (Case C-615/15 P)

On March 9, 2017, the Court of Justice dismissed an appeal by Samsung SDI Co. Ltd. and Samsung SDI (Malaysia) Bhd. (together, "Samsung SDI"),[20] and upheld the €150 million fine imposed by the Commission on Samsung SDI for its participation in the *TV and Computer Monitor Tubes* cartel.[21] The Court of Justice confirmed that the Commission did not discriminate against Samsung SDI by selecting an end date for its participation in the CPT cartel which was later than that chosen for the other undertakings in the proceedings.

Notably, the Commission found that Samsung SDI Co. Ltd. had participated in the CPT cartel directly and through its subsidiaries Samsung SDI Germany and Samsung SDI (Malaysia) Bhd. between 1997 and 2006. Along with other addressees of the Commission's decision, Samsung SDI appealed to the General Court, which upheld the Commission's decision.

On appeal, Samsung SDI claimed that the General Court had breached the principle of equal treatment by rejecting its argument that the Commission could not set an end date for its participation in the CPT cartel subsequent to the dates set for all other cartel participants included in the proceedings. Samsung SDI argued that this ran contrary to the principle that collusion requires the involvement of at least two undertakings.

The Court of Justice, however, noted that at least one other undertaking had participated in the CPT cartel until the same end date set for Samsung SDI. The fact that the Commission chose not to include that undertaking in the proceedings, on the ground that it had been declared bankrupt and subsequently placed under the control of a court-appointed administrator, did not entail that the undertaking stopped its participation in the cartel. Also the Commission's decision not to include that particular undertaking in the procedure was not in breach of the principle of equal treatment because, consistent with well-established case law, an undertaking that acted in breach of Article 101 TFEU cannot escape being penalized on the sole ground that another undertaking has not been fined for the same conduct.

Commission Decisions

Commission Publishes Summary of Smart Card Chips Decision (Case AT.39574)

On January 27, 2017, the Commission published the summary of its 2014 decision in the smart card chips

[20] *Samsung SDI and Others v. Commission* (Case C-615/15 P) EU:C:2017:190.

[21] *See TV and computer monitor tubes* (Case COMP/AT.39437), Commission decision of December 5, 2012 already described in *Toshiba Corp. v. Commission* (Case C-623/15 P), *supra*, p. 3–4. As mentioned above, Samsung SDI participated in the cartel together with Toshiba and five other competitors. The Commission found two separate infringements: one related to CRTs for computer monitors and one related to CPTs for television sets.

cartel.[22] In its decision, the Commission found that Infineon Technologies AG ("Infineon"), Koninklijke Philips NV and Philips France (together, "Philips"), Samsung Electronics Co. Ltd and Samsung Semiconductor Europe GmbH (together, "Samsung"), and Renesas Electronics Corp. and Renesas Electronics Europe Ltd (together, "Renesas") had infringed Article 101 TFEU by coordinating their pricing and conduct in the sale and production of smart card chips. The Commission determined that the undertakings—the four main suppliers of smart card chips in the EEA—engaged in a single and continuous infringement consisting of a network of bilateral contacts during which they discussed pricing, negotiations with common customers, and future market conduct, as well as exchanged competitively sensitive information.

The Commission based its finding of a single and continuous infringement on the two objectives pursued by the undertakings, which was to limit and control both: (i) the impact of Samsung's and Atmel's aggressive entry into the smart card chips market; and (ii) the pricing pressure exerted by the participants' two main customers. To attain these objectives, the undertakings adopted a common pattern of behavior, which involved the same type of exchanges as well as the same individuals, and timing of contacts. Accordingly, although the infringement consisted of bilateral exchanges of information, the Commission concluded that the four undertakings took part in a single and continuous infringement.

The Commission fined the undertakings a total of €138 million. In determining the fines, the Commission took into account the undertakings' degrees of involvement in the infringement, and also granted all undertakings a fine reduction because of the length of the procedure (over six years). The Commission granted Renesas full immunity from fines, as it was the first undertaking to apply for leniency, and also granted Samsung a 30% reduction under the Leniency Notice.

Infineon and Philips appealed the Commission's decision to the General Court. Both disputed the findings that: (i) the exchanges of information constituted a restriction of competition by object; and (ii) their conduct formed part of a single and continuous infringement. In addition, the appellants argued that the way in which the Commission handled the evidence breached their rights of defense.

In December 2016, the General Court dismissed both actions and upheld the Commission's decision,[23] confirming that the undertakings' information exchange constituted a restriction of competition by object because the exchanged information, even if it was at times inaccurate or misleading, could benefit the undertakings in light of the specific market conditions.[24]

The General Court also upheld the Commission's finding of a single overall infringement. It confirmed that, while Philips did not participate in the entire infringement, it knew of the collusive practices at issue, while Infineon did not. Accordingly, it found Infineon liable for the overall infringement only to the extent it engaged in contacts with the other undertakings.

Finally, the General Court observed that whether evidence was provided before or after settlement negotiations with the Commission has no bearing on its reliability, and that information provided in response to a Commission request does not diminish

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

[23] *Infineon Technologies v. Commission* (Case T-758/14) EU:T:2016:737 and *Philips and Philips France v. Commission* (Case T-762/14) EU:T:2016:738. *See* European Competition Report, October–December 2016, p. 1.

[24] The market was characterized by constant decline in prices, downstream pricing pressure from the few, large customers, rapid technological development, and the parallel negotiation of supply contracts.

its probative value, as compared to information voluntarily submitted by a leniency applicant.

Infineon and Philips's appeals against the General Court's judgment are pending before the Court of Justice.

Abuse

Commission Decisions

E.ON Gas Foreclosure (CASE COMP/39.317)

On May 4, 2010, the Commission accepted a series of commitments from E.ON SE ("E.ON") to address its preliminary finding that E.ON may have abused a dominant position in the German regional (grid-wide) gas transport markets, downstream wholesale markets for the supply of gas to local and regional distributors, and retail markets for the supply of gas to industrial customers.[25]

The Commission observed that E.ON had a natural monopoly on its transmission grid via its subsidiary E.ON Gastransport GmbH ("EGT"), and a supply share of 90–100% of the total allocable capacity into its transmission grid. E.ON was also the lead supplier of gas to regional and local distributors, with market shares of around 55–65% for high-calorific gas ("H-gas") and 75–85% for low-calorific gas ("L-gas"). E.ON was even stronger in the market for retail supplies to industrial customers through its gas transmission grid, with a market share of around 75–85% for H-gas and 80-90% for L-gas. The Commission was therefore concerned about E.ON entering into long-term bookings for most of the capacity available on its gas transportation grid, which potentially amounted to a refusal to give competitors access to its infrastructure in breach of Article 102 TFEU.

To address these concerns, E.ON committed to release transport capacity at a number of entry points and limit long-term capacity bookings below 54% of the total capacity available in its gas transmission grid by October 1, 2015. It also committed not to exceed this 54% ceiling for 10 years.

In a letter dated June 24, 2016, E.ON requested that the Commission terminate these commitments on the basis of a material change in facts. The Commission recognized that the market had changed in several important ways since 2010.

First, E.ON's corporate structure changed substantially. In 2012, E.ON divested EGT[26] and was therefore no longer active in the gas transport market. This decreased E.ON's overall market position in the gas supply markets.

Second, structural changes also affected the German gas markets, including the creation of large market areas through the combination of several gas transmission grids. This broadened opportunities for gas supply at least on a national basis.[27] The Commission also observed that conversion between H-gas and L-gas was now possible without raising extra costs and the two types of gas could now form part of the same market.[28] These developments reduced E.ON's share in the German downstream wholesale and retail markets to around 25–35% and 15–25%, respectively. Following the commitment decision, E.ON-booked capacity was significantly below the 54% ceiling, and competitors had been able to enter the market and gain significant shares.

[25] *E.ON GAS* (Case COMP/39.317), Commission decision of May 4, 2010. Article 9(2)(a) of Council Regulation (EC) 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") provides that the "Commission may, upon request or on its own initiative, reopen the proceedings: a) where there has been a material change in any of the facts on which the decision was based."

[26] At that time, EGT had been renamed "Open Grid Europe."

[27] *See Gazprom/Wintershall/Target Companies* (COMP/M. 6910), Commission decision of December 3, 2013 and *EWE/VNG* (B 8 69/14), German competition authority decision of October 23, 2014.

[28] *Ibid*. In the past, the Commission defined L-gas and H-gas as two separate markets based on their different energy content and the fact that they are usually transported in separate gas networks.

The Commission therefore considered that E.ON may no longer be dominant.

Third, significant regulatory changes were implemented in 2010. These changes notably subjected the acquisition of long-term bookings to a competitive process based on an auction procedure. They also reserved 20% of total capacity for short-term bookings and limited long-term bookings to 65% of total grid capacity. Finally, market participants including E.ON generally preferred short-term capacity bookings, which reflect changing market demands better. The Commission observed that booking significant amounts of capacity on a long-term basis had become too costly in a more competitive and integrated market. Based on these changes, on July 26, 2016, the Commission terminated E.ON's commitments.[29]

Gazprom (CASE AT.39816)

On April 22, 2015, the Commission adopted a Statement of Objections ("SO") concerning an alleged infringement of Article 102 TFEU by OAO Gazprom and OOO Gazprom Export (together, "Gazprom") in the markets for the wholesale import supply of natural gas in Bulgaria, Estonia, the Czech Republic, Hungary, Latvia, Lithuania, Poland, and Slovakia (the Central and Eastern European or "CEE" countries).[30] 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. On March 13, 2017, the Commission invited third parties to comment on the commitments offered by Gazprom.[31]

[29] *E.ON GAS* (Case COMP/39.317), Commission decision of July 26, 2016.

[30] Commission Press Release IP/15/4828, "Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets," April 22, 2015.

[31] Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No. 1/2003 in Case AT.39816 — Upstream gas supplies in central and Eastern Europe, OJ 2017 C 81/9.

In its preliminary assessment, the Commission observed that Gazprom may be dominant in all CEE markets for the upstream wholesale supply of natural gas. It found that Gazprom may have implemented an overall abusive strategy based, in particular, on territorial restrictions (*e.g.,* export bans and destination clauses) in supply agreements with customers. These territorial restrictions may have allowed Gazprom to pursue an unfair pricing policy in Bulgaria, Estonia, Latvia, Lithuania, and Poland by charging significantly higher prices than in Western Europe.

Gazprom may also have abused its dominant position by making the supply of gas to Bulgarian customers dependent on customers' investments in the "South Stream" pipeline project. Finally, the Commission found that Gazprom may have implemented various contractual provisions with the objective of isolating the Baltic States' and Bulgarian gas supply markets from neighboring countries.

To remedy territorial restrictions, Gazprom notably offered to remove all contractual barriers to the free flow of gas through exports and cross-border re-selling by CEE customers and to conclude interconnection agreements between Bulgaria and other EU Member States. It also proposed to give CEE customers that are unable to arrange for the transport of gas to the Baltic States or Bulgaria the possibility to ask for gas delivery directly at entry points into these countries.

Further, to ensure competitive prices in the CEE countries, Gazprom proposed to introduce price review clauses based on European competitive benchmarks.[32] Customers would have a contractual right to trigger a price review clause when prices diverge from such benchmarks. Gazprom also proposed to increase the frequency and speed of price revisions.

[32] Such competitive benchmarks refer to border prices in Germany, France, and Italy and to gas prices at the liquid gas hubs in continental Europe.

Finally, Gazprom proposed not to seek any damages from its Bulgarian partners following the termination of the South Stream project and ensure that the supply of gas would no longer depend on customers' investment in Bulgarian gas infrastructure. The Commission noted that, subject to market testing, these commitments should meet its concerns by ensuring the free flow of gas at competitive prices in the CEE countries.

Intellectual Property

General Court Judgments

Topps Europe v. Commission (Case T-699/14)

On January 11, 2017, the General Court dismissed an appeal brought by Topps Europe Ltd ("Topps") against the Commission's July 15, 2014 decision rejecting Topps's complaint that competitor Panini SpA ("Panini"), the Fédération internationale de football association ("FIFA"), the Union of European Football Associations ("UEFA"), and several national football associations[33] (together with FIFA and UEFA, the "Football Associations") had infringed Articles 101 and 102 TFEU through the licensing and acquisition of intellectual property rights ("IPR").[34] Topps and Panini are competing manufacturers of football stickers and cards ("collectibles").

Football Associations grant football collectibles' producers the necessary IPR for their production of collectibles for specific football tournaments. Topps's complaint alleged that Panini and the Football Associations had entered into long-term exclusivity arrangements for collectibles for the FIFA World Cup and UEFA Champions League tournament, bundling licenses for stickers and cards. Topps claimed the exclusivity arrangement was conducted through a non-transparent and discriminatory tendering process in violation of Article 101 TFEU, and that the Football Associations had refused to accept its tenders and licensing proposal for those tournaments in violation of Article 102 TFEU. Topps also alleged that various exclusivity clauses imposed by Panini and the Football Associations on downstream distributors and points of sale were in violation of both Articles 101 and 102 TFEU. The Commission rejected these allegations, finding that the agreements and practices were unlikely to infringe Article 101 and 102 if investigated, and that there was insufficient EU interest in doing so.

Topps appealed the Commission's rejection on two grounds. First, it argued that the Commission had infringed Topps's procedural rights to access the documents used to reject the complaint. Second, it argued that the Commission had made a manifest error in its assessment of the complaint, and had provided insufficient reasoning in rejecting the complaint.

The General Court rejected both grounds of appeal. With respect to Topps's procedural rights, the General Court found that the documents provided to Topps by the Commission were sufficient to enable Topps to understand the reasoning behind the Commission's decision, in particular dismissing Topps's claim that the Commission had restricted access to file by failing to disclose all the documents submitted by the Football Associations. With respect to the second ground of appeal, the General Court dismissed all five parts of Topps's allegation that the Commission had made a manifest error of assessment and infringed its obligation to state reasons.

The General Court upheld the Commission's decision to reject the narrow market definition proposed by Topps, which confined the downstream market to World Cup and Champions League collectibles sold to children aged 6–14, and the upstream market to IPR that are indispensable for their production. The General Court found that the Commission's decision not to use a SSNIP test did

[33] The national football associations identified in the rejected complaint were the French Football Association, Italian Footballers' Association, Royal Spanish Football Federation, and German Football Association.

[34] *Topps Europe v. Commission* (Case T-699/14) EU:T:2017:2.

not constitute a manifest error of assessment, as the Commission had discretion in choosing the most appropriate methodology to define the relevant market. The Commission had instead taken into account, *inter alia*, the degree of supply and demand substitutability between football collectibles, as reflected in previous decisions concerning Topps, along with price data provided by Topps and Panini.

The General Court also assessed Topps's claim that the Commission had improperly assessed Panini's exclusive licensing agreements with the Football Associations and found that the Commission had correctly evaluated the duration, scope, and context of the agreements. In particular, given the limited scope for harm due to the short four-year duration between tournaments, the General Court found that the Commission only needed to determine that the agreements could be potentially justified, without carrying out a complete investigation of the practice.

As to Article 101 TFEU, the General Court also found that the documents submitted to the Commission were not sufficient to establish that Panini had imposed exclusive purchasing obligations as part of its agreements with distributors and retailers. The General Court noted that, even if such exclusivity arrangements had been established, the arrangements would have been confined to only the Euro and World Cup collectibles, a small part of the overall market.

As to Article 102 TFEU, the General Court upheld the Commission's finding that Topps's claims of Panini's dominance in the downstream market for football collectibles relied on the premise of a narrowly defined market and disregarded the intense competition taking place in the market. The General Court upheld the Commission's finding that the licensing of IPR for other tournaments, including several managed by the Football Associations, were evidence that the FIFA and UEFA IPR were evidently not indispensable for the production of related collectibles.

Finally, with respect to the remedy requested by Topps, the General Court also upheld the Commission's rejection of the imposition of a single point of sale for football collectible IPR, similar to the centralized model for the sale of football broadcasting rights.[35] The General Court found that the Commission's previous decisions in the commercial broadcasting context were based on that market's specific characteristics, and that the collectibles market structure was too different to justify applying such a remedy.

Topps's appeal concerned a Commission decision to reject a complaint, and as a result the General Court's analysis is somewhat limited. Nevertheless, the judgment clarifies that the Commission has wide discretion in deciding how to prioritize enforcement in IPR-related cases, and that the General Court will uphold the Commission's findings provided it has taken sufficient account of the market-specific features of the IPR licensing conduct under review.

Mergers And Acquisitions

General Court Judgments

United Parcel Service v. Commission (Case T-194/13)

On March 7, 2017, the General Court annulled[36] the Commission's decision [37] of January 30, 2013 prohibiting the acquisition of TNT Express NV ("TNT") by United Parcel Service, Inc. ("UPS"). UPS and TNT are global operators in the specialist

[35] The centralized model of sale of IPR consists of the joint selling of rights by all clubs in a league through a single point of sale, with the proceeds shared between all clubs. Although such arrangements usually contain some elements of price-fixing, given the efficiencies they bring in terms of intra-club distribution of revenues, the Commission has previously found them to fulfill the exemption in Article 101(3) TFEU. *See Joint selling of the commercial rights of the UEFA Champions League* (COMP/C.2-37.398), Commission decision of July 23, 2003.

[36] *United Parcel Service v. Commission* (Case T-194/13) EU:T:2017:144.

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

transportation and logistics sector that offer small package delivery services.

In the annulled decision, the Commission held that the proposed merger would significantly impede competition in the market for intra-EEA international express small package delivery services in 15 EEA Member States. The Commission distinguished integrators (*i.e.*, UPS, TNT, DHL, and FedEx) from other service providers and found that the two remaining integrators in the market, FedEx and DHL, would be unable to exert sufficient competitive pressure on the merged entity post-transaction. Additionally, the Commission projected that the merger would result in price increases ranging from 5% to 10–20% in various national markets for international intra-EEA express package delivery services.

In its assessment of the potential impact on prices for international intra-EEA express small package delivery services, the Commission relied on econometric analysis to identify Member States in which the transaction would raise competition concerns. Although, during the merger proceedings, the Commission had several exchanges with UPS on the econometric model, it did not communicate the final version to UPS. Following the Commission's prohibition decision, UPS appealed, alleging that its rights of defense, in particular the right to be heard, had been infringed.[38]

[38] UPS submitted three pleas in total, namely: (i) errors of law and manifest errors of assessment; (ii) infringement of its rights of defense; and (iii) infringement of the obligation to state reasons. In the context of its second plea, UPS alleged infringements of its rights of defense regarding the likely effects of the merger on prices, expected efficiency gains as a result of the merger, future competitive position of FedEx, and the number of Member States where competition would have been significantly impeded. The General Court ruled only on the first part of the second plea (*i.e.*, infringement of UPS's rights of defense regarding the likely effects of the merger on prices) and did not examine other pleas as it annulled the decision in its entirety.

In response to UPS's claims, the Commission argued first that its final analysis of the potential effects of the merger on prices was not materially different from what UPS submitted, and related only to: (i) the possible effects that increased concentration would have on initial prices; and (ii) the definition of the concentration variable. Second, the Commission argued that all of UPS's studies had been discussed at various state-of-play meetings and it had shared with UPS its preliminary view on UPS's last study prior to its decision. The Commission took the view that, given when UPS submitted its last study, the Commission did not have time to further engage with UPS before issuing its decision. The Commission further argued that it was within its rights to revise or supplement the elements of law or fact in the statement of objections throughout the process, provided that these changes were reflected in the final decision. Finally, the Commission claimed that UPS's rights of defense would have been breached only if UPS could have shown that the Commission's findings would have been different if the analysis had been disregarded as evidence. The Commission argued that this was not the case here as SIEC would have been found in certain markets even if the analysis was not taken into account.

The General Court held that the final version of the econometric model included non-negligible changes to the versions discussed with UPS as the Commission had used two different variables when examining the effects on prices in: (i) the statistical estimation of the effects on prices; and (ii) the prediction of the effects on prices. The Commission shared with UPS its analysis based on one of these two variables, but did not mention that it was using different variables for different stages.

The General Court concluded that the Commission had relied on the new results to revise the number of Member States where competition would have been significantly impeded. According to the General Court, UPS should therefore have had the opportunity to review the amended analysis and challenge its results, which might have reduced the number of EEA Member States at issue. Despite the Commission's assertion that its decision was based on a range of factors, both quantitative and qualitative, the General Court found that UPS might have been in a better position to defend itself had it been privy to the final econometric model used by the Commission.

The General Court further held that the necessity for speed in merger control proceedings should be taken into account when assessing whether the rights of defense were infringed. However, the Commission adopted the final econometric model two months before its decision on the transaction, and thus had the opportunity to communicate to UPS at the very least the essential elements of the model.

In light of the above, the General Court annulled the Commission's decision in its entirety. This is the first judgment in over a decade to reverse a Commission merger prohibition decision. Following the prohibition of *UPS/TNT*, the Commission unconditionally approved FedEx's acquisition of TNT in January 2016.[39] Therefore, despite its significance for merger proceedings, the ruling is not expected to have any real impact on the relevant market.

Commission Decisions

Phase I Decisions With Undertakings

Vodafone/Liberty Global/Dutch JV (Case COMP/M.7978)

On August 3, 2016, the Commission conditionally approved the formation of a joint venture combining Vodafone Group's and Liberty Global's telecommunication businesses in the Netherlands—Vodafone Libertel, B.V. ("Vodafone") and Ziggo Group Holding B.V. ("Ziggo").[40] In the Netherlands, Vodafone is an established mobile network operator. Since 2014, it also has provided retail fixed telephony, broadband internet, and TV services. Vodafone does not operate its own fixed line network in the Netherlands and instead uses the networks of KPN, a Dutch incumbent operator. Ziggo operates a nationwide cable network through which it provides fixed services. Ziggo also has minimal presence in mobile services.

Market definition. Consistent with its decisional practice, the Commission identified separate national markets for mobile and fixed telecommunications. It analyzed the transaction's effect on: retail markets for fixed telephony, fixed internet access, TV services, mobile services, business connectivity, and wholesale market for supply and acquisition of TV channels.

The Commission considered the existence of separate markets for multiple-play services comprising fixed telephony, fixed internet access, TV services, and mobile services. However, due to the inconclusive results of the market investigation, it ultimately left the market definition open. The Commission noted that although both parties provide all three types of fixed services, they do not overlap in their standalone provision and instead compete in the form of dual, triple, and quadruple play bundles. Vodafone ties TV services to fixed internet service. Conversely, Ziggo ties internet access and telephony to TV services. The Commission, therefore, assessed the impact of the transaction on the markets for multiple play bundles instead of conducting separate analyses for each of the services.

Horizontal effects. The Commission raised concerns with respect to the markets for fixed services multiple play bundles and bundles of fixed and mobile services ("fixed-mobile multiple play bundles"). In both cases, the Commission concluded that the transaction would remove an important competitive constraint.

Unilateral effects in possible market for retail supply of fixed multiple play bundles. The Commission's investigation showed that the main

[39] *FedEx/TNT Express* (Case COMP/M.7630), Commission decision of January 8, 2016.
[40] *Vodafone/Liberty Global/Dutch JV* (Case COMP/M.7978), Commission decision of August 3, 2016.

competitors in this market were Ziggo and KPN with market shares of 40–50% each in dual play bundles, and 60–70% and 20–30%, respectively, in triple play bundles. Despite Vodafone's low market share (less than 5%) the Commission considered it to be an important potential competitor. First, Vodafone had invested heavily in its fixed services infrastructure, had achieved significant growth in a short period of time, and, according to the Commission's projections, was well-positioned to compete with Ziggo and KPN. Second, Vodafone was an aggressive competitor. Although Vodafone was not the lowest-price service provider in the market, its prices were lower than those of KPN and Ziggo for comparable offers. Third, the Commission found entry in the market by other providers to be very unlikely.

The Commission refused to take into account the possibility that the transaction would lead to a change in the regulatory landscape in the Netherlands to the detriment of other fixed services providers. In the Netherlands, providers of fixed line services render their services by means of access to one or both of KPN's networks, which are subject to access regulation. The Dutch competition agency, supported by Tele2, argued that should the transaction go forward, KPN will likely request a new market review. Such a review could result in the finding that the market for the wholesale local access—in which KPN was previously found to be dominant—needs to be expanded to include cable networks. In that case, KPN's access obligations would be lifted. The Commission acknowledged that it should take into account national regulatory requirements, but concluded that its merger analysis must be based on the current regulatory conditions and it could not be reasonably predicted that the transaction would change the regulatory regime in the Netherlands.

Unilateral effects in possible market for retail supply of fixed-mobile multiple play bundles. The Commission conducted a similar analysis with respect to the market for fixed-mobile multiple play bundles. The Commission's investigation found that, besides KPN, whose market share was 80–90%, Ziggo and Vodafone were the only other competitors. The transaction would therefore reduce the number of market participants from three to two. The Commission again found Vodafone to be a potentially important competitive force. First, although Vodafone's combined market share for quadruple play bundles was below 5%, the Commission estimated that, given the high number of Vodafone customers in dual and triple play whose package included mobile services, its market share for the overall fixed-mobile multiple play bundles market was probably higher. Second, the Commission found that Vodafone was uniquely positioned to cross-sell its fixed-mobile bundles to its sizeable mobile customer base. Third, some market participants estimated the churn rate in fixed-mobile bundles to be four times lower for fixed-only services and two times lower for mobile-only services as compared to stand-alone fixed and mobile services. This reduced churn rate created an important customer lock-in effect in favor of Vodafone, a market participant already growing fast in multiple play bundles. Finally, the Commission deemed a hypothetical entry of Tele2 in fixed and fixed-mobile multiple unlikely given Tele2's focus on mobile and "data hungry" customers, and also dismissed a possible entry by T-Mobile, citing the time lag that this entry would entail.

To address the Commission's concerns, the parties agreed to divest Vodafone's retail consumer fixed-line business, including its entire customer base, thereby completely removing the overlap in the possible markets for retail supply of fixed and fixed-mobile multiple play bundles, and ensuring that a new entrant could replicate Vodafone's role in these markets. These arrangements also allowed for the splitting of shared-supply contracts.

Abbott Laboratories/St Jude Medical (Case COMP/M.8060)

On November 23, 2016, the Commission conditionally approved the acquisition of St Jude

Medical Inc. ("SJM") by Abbott Laboratories ("Abbott").[41] Although the two companies' portfolios were largely complementary, their activities overlapped in the development, production, and sale of certain cardiovascular medical devices.

Market definition. The Commission assessed the product markets for vessel closure devices, transseptal sheaths, and structural heart devices for the first time in this decision.[42]

Horizontal effects. The Commission raised concerns with respect to vessel closure devices ("VCDs") and transseptal sheaths ("TSs").

VCDs. Certain minimally invasive cardiovascular diagnostic and interventional procedures result in a hole in the blood vessel access site that must be closed to prevent uncontrolled bleeding. VCDs can be used to close such holes. The Commission distinguished VCDs from other vessel closure techniques, such as surgical suturing, manual compression (pressing down on the vessel until the edges of the hole close as blood coagulates), and closure assist devices (devices that apply mechanical pressure and/or blood-clotting medication to stop bleeding). The Commission considered, but ultimately left open, a possible sub-segmentation of VCDs based on the size of the vessel hole to be sealed.

The parties argued that they were not close competitors for a number of reasons, including because Abbott focused on large hole closure, in which SJM did not have and was not developing an offering, the parties devices used different closure mechanisms (Abbott's devices were clip and suture-based, and SJM's devices were plug-based), and each party's small hole closure device competed more closely with manual compression than with the other party's device.

The Commission rejected these arguments, concluding that the transaction raised serious concerns in relation to VCDs, due to the parties' considerable combined market shares (up to 90% in some Member States), absence of strong competitors, and significant degree of substitutability between the parties' products, as shown by the market investigation. Although some customers believed that the acquisition would lead to increased investment in R&D, this was outweighed by others' concerns that the transaction would lead to an increase in prices, and a reduction in competition and choice.

To address the Commission's concerns, the parties agreed to divest SJM's global small-hole VCD business.

TSs. TSs are hollow tubes used in electrophysiology procedures to insert catheters from the right to the left upper heart chamber to treat abnormalities in the timing and pattern of the heartbeat. The Commission did not reach a definitive conclusion as to a possible sub-segmentation of this market between fixed and steerable TSs or based on the size of the device. While SJM was a pioneer in TS with its *Agilis* product in Europe, Abbott was expected to launch a competing product (*Vado*) soon, becoming the first new entrant in this market in many years.

The Commission noted that SJM was the leading supplier in the market, with shares exceeding 50% in many Member States. The Commission was also concerned that the merged entity would abandon its plans to launch Abbott's TS post-acquisition. Finally, the Commission rejected the parties' argument that other companies were likely developing competing pipeline TSs because market participants did not confirm this view and viewed Abbott's TS as the most likely and imminent entrant.

To address the Commission's concerns, the parties agreed to divest Abbott's TS business.

[41] *Abbott Laboratories/St Jude Medical* (Case COMP/M.8060), Commission decision November 23, 2016.

[42] In accordance with its decisional practice for medical devices, the Commission defined relevant geographic markets for existing products as national and those for pipeline products as at least EEA-wide.

Structural heart devices. The Commission also analyzed transcatheter mitral valve replacement (“TMVR”) and transcatheter mitral valve repair (“TMVr”) devices used in minimally invasive surgeries treating mitral regurgitation (a structural heart disease affecting the mitral valve). Only Abbott offered a TMVr device in the EEA; both parties (along with over 20 other companies) were developing TMVR devices.

The Commission defined separate markets for TMVr and TMVR devices. The Commission raised no concerns in TMVr because only Abbott was active in this market. As to TMVR, the Commission concluded that the parties were not close competitors. Their respective TMVR pipeline devices were at different stages of development and around 30 research programs for the development of competing TMVR devices were ongoing, many of which would likely be launched before SJM’s.

Conglomerate effects. The Commission examined a range of hypothetical bundling scenarios, but ultimately concluded that anticompetitive conglomerate effects were unlikely, including due to the relevant procurement and reimbursement practices. The market investigation confirmed that a tying strategy would not be successful because in these markets price is not a driver of choice for coronary imaging and interventional devices. This outcome is consistent with the Commission’s findings in prior medical device and pharmaceutical cases, in which it has considered possible conglomerate effects but has not found a cause of concern.[43]

Microsoft/LinkedIn (Case COMP/M.8124)

On December 6, 2016, following a Phase I investigation, the Commission conditionally approved the acquisition of LinkedIn Corporation (“LinkedIn”) by Microsoft Corporation (“Microsoft”).[44] LinkedIn operates a professional social network (“PSN”) that also includes various product lines such as recruiting tools and online education courses, sales intelligence, premium member subscriptions, and an advertisement platform. Microsoft is a technology company offering operating systems (“OSs”) for personal computers, servers, and mobile devices, other software and cloud-based solutions, hardware devices, and online advertising.

Market definition. The Commission distinguished PSNs from non-specialist social networks (*e.g.*, Facebook and Twitter) because PSNs have specific functionalities (providing a detailed CV and applying for positions) and a narrower use (professional networking). PSNs, which provide a general platform for users from all professions and affiliations, were also distinguished from specialized services that only connect the members of a particular profession (such as Academia for academics).[45] The Commission defined the geographic market for PSNs as national.

Conglomerate effects. Reminiscent of competition issues that arose a decade ago in connection with Microsoft’s Internet Explorer[46] and Windows Media Player,[47] the Commission identified conglomerate

[43] *E.g., Medtronic/Covidien* (Case COMP/M.7326), Commission decision of November 28, 2014, para. 372 (the Commission found, *inter alia*, that “[e]ven if a competitor cannot provide the same type of bundle, it may always create a combination of products from its own portfolio that would be meaningful to customers thus remaining competitive and not compromising its market share in the market of the tying product… Also in this case, companies active in selling packages of medical devices to hospitals could exert a degree of competitive pressure on the merged entity to enable smaller competitors to remain in the market”).

[44] *Microsoft/LinkedIn* (Case COMP/M.8124), Commission decision of December 6, 2016.

[45] The Commission did not further segment PSNs according to the device or OS because they are generally available on both mobile and desktop devices, and on most OSs.

[46] *See Microsoft (Tying)* (Case COMP/C-3/39.530), Commission decision of December 16, 2009.

[47] *See Microsoft (Windows Media Player)* (Case COMP/AT.37.792), Commission decision of March 24, 2004.

concerns arising from the combination of Microsoft's strong positions in operating systems for PCs (in which its Windows OS holds a 80–90% share of the worldwide and EEA markets) and office productivity software (in which its Microsoft Office product holds a 90–100% share of the worldwide and EEA markets) and LinkedIn's leading PSN (which holds a 80–90% share of the EEA market). The Commission was concerned that Microsoft would have the ability and incentive to pre-install LinkedIn on all Windows PCs,[48] and integrate LinkedIn into Microsoft Office,[49] enhancing LinkedIn's visibility to the detriment of competing PSNs. In response, Microsoft argued that, post-acquisition of Skype, its pre-installation of Skype did not drive new registrations. The Commission rejected this argument because: (i) Skype had already been pre-installed on half of Windows PCs pre-acquisition, rendering the counterfactual flawed; and (ii) factual findings with respect to internet-based communications services did not necessarily transpose to PSNs.

The Commission was also concerned that the transaction would enable Microsoft to foreclose LinkedIn's PSN competitors by preventing them from accessing Microsoft's application programming interfaces ("APIs") needed to interoperate with Microsoft's Office products and to access data in the Microsoft cloud, reinforcing the foreclosure effect.

The increase in LinkedIn's user base would raise entry barriers for PSNs, including as a result of network effects: as the value of a network depends on the number of active users, any expansion in LinkedIn's network resulting from pre-installation would trigger a positive feedback loop bringing more value and users to the platform. This would "tip" the market in favor of LinkedIn's PSN, leading to the marginalization of rivals offering a greater degree of privacy protection to users and thereby hindering consumer choice. The network effects were not likely to be mitigated by multi-homing (*i.e.*, customers using more than one social network on a regular basis) because, due to the time and effort required to build and update a profile on a PSN, users typically do not subscribe to several competing PSNs.

As a result, existing and new competitors would be foreclosed from providing PSN services in the EEA.

To address the Commission's concerns, Microsoft offered five-year commitments relating to both the integration of LinkedIn into Microsoft's Office software and the pre-installation of LinkedIn on Windows PCs. Regarding integration, Microsoft agreed to make the relevant APIs and related tools available to competing PSN providers and to maintain existing levels of interoperability with Office, so that rivals can continue to develop PSNs offering similar Office-integrated functionality to what Microsoft envisaged to introduce in relation to LinkedIn. Regarding pre-installation, Microsoft agreed that PC manufacturers and distributors would be free not to pre-install LinkedIn on Windows, and that users would be free to remove LinkedIn should the OEMs/distributors decide to pre-install it.[50]

[48] The Commission held that the pre-installation of a LinkedIn application on Windows OS would amount to a technical tying, capable of enhancing the visibility of LinkedIn, reaffirming its position in previous cases that software pre-installation can make switching more difficult in view of users' inertia to use pre-installed software.

[49] The Commission found that the integration of LinkedIn into Microsoft Office, and in particular Outlook, would allow LinkedIn to access Microsoft's data (such as Outlook's address books) and suggest new LinkedIn connections, ultimately leading the market to "tip" in favor of LinkedIn.

[50] The Commission specifically did not require that Microsoft be prevented from integrating LinkedIn with its existing products (even in ways that competing PSNs might not entirely be able to replicate via the integration commitments) or from pre-installing LinkedIn on Windows PCs, concluding that such requirements would unduly impinge on Microsoft's ability to market its products going forward.

State Aid

ECJ Judgments

Viasat Broadcasting UK v. Commission (Case C-660/15 P)

On March 8, 2017, the Court of Justice assessed, for the first time, whether the *Altmark* conditions should be applied in determining whether aid is compatible with the internal market under Article 106(2) TFEU. It dismissed in its entirety an appeal from Viasat Broadcasting UK Ltd. ("Viasat") against a 2015 General Court judgment[51] in a Danish state aid case,[52] which had dismissed Viasat's action for annulment of a 2011 Commission decision that declared measures in favor of TV2/Danmark ("TV2"), a public television station in Denmark, compatible state aid on the basis of Article 106(2) TFEU, *i.e.*, on the basis of TV2's public service obligation.[53]

Viasat claimed that the aid granted to TV2 was incompatible with the internal market. It alleged that, in assessing the compatibility of the aid under Article 106(2) TFEU, the Commission did not take into account the second and fourth *Altmark* conditions, and failed to explain why Article 106(2) TFEU applied in this case even though those two *Altmark* conditions were not met.

In its 2003 *Altmark* judgment,[54] the Court of Justice ruled that a state measure that merely compensates an undertaking for discharging a public service obligation without conferring a real advantage on the recipient does not fall under Article 107(1) TFEU and therefore does not constitute state aid. The Court of Justice set out four cumulative conditions that must be met for a measure not to be considered as state aid. These conditions, listed below, are generally referred to as "the *Altmark* conditions." First, the recipient undertaking must have clearly defined public service obligations. Second, the parameters for the calculation of the compensation must be established in advance in an objective and transparent manner. Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations. Fourth, the compensation must be determined on the basis of an analysis of the costs that a typical undertaking, well run and adequately equipped to meet the necessary public service requirements, would have incurred in discharging those obligations.

In assessing Viasat's appeal, the Court of Justice agreed with the General Court that the verification of the *Altmark* conditions "occurs upstream"—meaning that the *Altmark* conditions must be examined during the initial stage, when determining whether a measure constitutes state aid within the meaning of Article 107(1) TFEU, and not during a later (downstream) stage when determining, where appropriate, whether the aid is nonetheless necessary for discharging a public service obligation under Article 106(2) TFEU.

The Court of Justice concluded that the General Court correctly held that the Commission did not need to consider the second and fourth *Altmark* conditions to decide whether the state aid is compatible under Article 106(2) TFEU. It follows that the Commission did not violate its duty to state reasons. The Court of Justice therefore dismissed Viasat's claim in its entirety.

General Court Judgments

France v. Commission and SNCM v. Commission (Cases T-366/13 and T-454/13)

On March 1, 2017, the General Court dismissed appeals by France and Société Nationale Maritime Corse-Méditerranée ("SNCM") and ordered France to recover unlawful state aid awarded between 2007 and 2013 to ferry companies SNCM and Compagnie méridionale de navigation ("CMN") for additional

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[51] *Viasat Broadcasting UK v. Commission* (Case T-125/12) EU:T:2015:687.
[52] *Viasat Broadcasting UK v. Commission* (C-660/15 P) EU:C:2017:178.
[53] Commission Decision C (2011) 2612 of April 20, 2011 (State Aid C 2/03(ex NN 22/02)), OJ 2011 L 340/1.
[54] *Altmark Trans and Regierungspräsidium Magdeburg* (Case C-280/00) EU:C:2003:415.

passenger transportation services between Marseille and Corsica during peak periods ("the additional services").[55]

Between July 1, 2007 and December 31, 2013, SNCM and CMN provided permanent/regular passenger and freight services (the "basic services"), as well as the additional services during peak periods, under their public service delegation contract with the Corsican authorities. In its May 2, 2013 decision, the Commission found that SNCM's and CMN's compensation for the additional services constituted unlawful state aid and ordered its recovery.[56] France and SNCM appealed, arguing, among other things, that the Commission had misapplied the concept of state aid by distinguishing between basic and additional services, even though both constituted services of general economic interest ("SGEIs") and fulfilled the *Altmark* conditions.

The General Court reiterated that Member States' discretion in defining SGEIs is not unlimited.[57] It held that, for the additional maritime transport services to constitute SGEI, Member States should provide evidence of a real public need arising from the inadequacy of regular transport services. The General Court found that the additional services did not respond to such a need, given their substitutability with private offerings of passenger services departing from Toulon. Therefore, it concluded that the additional services did not constitute SGEI under the first *Altmark* condition.

With respect to the fourth *Altmark* condition, the General Court agreed with the Commission that France's public procurement procedure did not ensure effective and open competition.[58] It deemed the period between awarding the public delegation contract and the starting date of the services (around three weeks) to be too short and to constitute a significant barrier for new entrants. Moreover, France's refusal to extend this period departed from previous practice and even led to the exclusion of a competitor's bid. The General Court noted that, although multiple companies operated regular ferry services in the area, only two were able to enter into the procurement process (due to technical requirements).

For those reasons, the General Court upheld the Commission's decision and ordered France to recover the aid compensating SNCM and CMN for rendering the additional service.

Policy and Procedure

ECJ Judgments

Evonik Degussa GmbH v. Commission (Case C-162/15 P)

On March 14, 2017, the Court of Justice annulled[59] a General Court judgment[60] dismissing an action for annulment of a Commission decision[61] concerning a request for confidential treatment submitted by Evonik Degussa GmbH ("Evonik") under Article 8 of Decision 2011/695/EU.[62] The Court of Justice

[55] *SNCM v. Commission* (Case T‑454/13) EU:T:2017:134 and *France v. Commission* (T-366/13) EU:T:2017:135.
[56] Commission Decision C (2013) 1926 of May 2, 2013 (State Aid SA.22843 (2012/C) (ex 2012/NN)), OJ 2013 L 220/20.
[57] In this case, it had to be assessed based on the Maritime Cabotage Regulation. Council Regulation No. 35277/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ 1992 L 364 ("Maritime Cabotage Regulation").
[58] According to the fourth Altmark criterion, the compensation awarded to the recipient undertaking in return for assuming a public service obligation must be determined on the basis of an analysis of the costs of a typical well run undertaking, adequately equipped to meet the necessary public service requirements.
[59] *Evonik Degussa v. Commission* (Case C-162/15 P) EU:C:2017:205.
[60] *Evonik Degussa v. Commission* (Case T-341/12) EU:T:2015:51.
[61] Commission Decision C (2012) 3534 final of May 24, 2012 rejecting a request for confidential treatment submitted by Evonik Degussa GmbH in *Hydrogen Peroxide and Perborate* (Case COMP/F/38.620), Commission decision of May 3, 2006.
[62] Decision 2011/695/EU of the President of the European Commission on the function and terms of reference of the

affirmed the broad competence of the Hearing Officer in reviewing requests for confidentiality, and clarified the protection afforded to documents submitted in leniency applications.

In 2006, Evonik received full immunity from fines as the first undertaking to submit information to the Commission regarding the hydrogen peroxide and perborate cartel.[63] In 2007, the Commission published an initial non-confidential version of the decision (the "PHP decision") and subsequently notified participants that it intended to publish an extended non-confidential version. Evonik requested confidentiality for information submitted under the 2002 Leniency Notice.[64] The Commission accepted this request as to the sources of information and names of Evonik's collaborators, but rejected it as to all other information ("the contested information").

On Evonik's referral, the Hearing Officer concluded that Evonik had failed to show that the publication of the contested information was likely to cause serious harm. The Hearing Officer found that Evonik could not claim protection on the basis of potentially being subject to damages actions because such actions form an integral part of EU competition policy. Evonik brought an action for annulment before the General Court, which was dismissed. Evonik appealed the dismissal to the Court of Justice.

Article 8 enables undertakings to refer their objections to the disclosure of information in competition proceedings to the Hearing Officer who has the competence to decide whether the information should remain confidential or whether there is an overriding interest in its disclosure. This procedure mirrors the "*Akzo* procedure"[65] approved by the EU courts prior to the introduction of the formal role of Hearing Officer.

First, the Court of Justice held that the General Court had erred in declining the Hearing Officer's competence under Article 8 to examine the request for confidentiality based on the principles of legitimate expectation and equal treatment. The Court of Justice confirmed that the aim of Article 8 is to protect information submitted to the Commission in competition proceedings. Its scope would be reduced considerably if it only enabled the Hearing Officer to examine rules affording specific protection against disclosure of information, as in Regulation 1049/2001.[66] The Court of Justice accordingly annulled the decision at issue insofar as the Hearing Officer had declined competence to address the request for confidentiality based on any ground arising from rules or principles of EU law.

Second, the Court of Justice scrutinized whether the contested information was confidential or should not be published for other reasons. It held that confidential information that is over five years old must be considered historical and has lost its confidential nature unless the undertaking claiming confidentiality shows that the information constitutes essential elements of its commercial position (which Evonik failed to demonstrate). The Court of Justice also held that the presumption under Regulation 1049/2001 against disclosure of documents on file in an administrative proceeding did not apply to the publication of Commission infringement decisions.

Finally, the Court of Justice clarified that publishing verbatim quotations from documents provided to the Commission in support of a leniency statement is permitted subject to compliance with confidentiality

Hearing Officer in certain competition proceedings, OJ 2011 L 275/29 ("Article 8, Decision 2011/695").

[63] *Hydrogen Peroxide and Perborate* (Case COMP/F/38.620), Commission decision of May 3, 2006.

[64] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 45/03.

[65] *Akzo Chemie v. Commission* (Case C-53/85) EU:C:1986:256 ("*Akzo*").

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

obligations. It distinguished such quotations from verbatim quotations of the leniency statement itself, which may not be published.

General Court Judgments

Gascogne Sack Deutschland and Gascogne v. Union (Case T-577/14)

On January 10, 2017, the General Court partially upheld an action brought by Gascogne Sack Deutschland GmbH and Groupe Gascogne SA (together, "Gascogne") for compensation for damage suffered due to the excessive length of the General Court proceedings dismissing their appeal against the Commission's 2005 decision regarding the industrial bags cartel.[67] Gascogne claimed that the length of the General Court proceedings infringed its fundamental right to a hearing within a reasonable time, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. Gascogne prevailed on the substance, but was largely unsuccessful in its claim for compensation.

In 2005, the Commission fined 16 companies including Gascogne approximately €292 million for their participation in a cartel in the plastic industrial bags market.[68] Gascogne appealed to the General Court.[69] On November 16, 2011, the General Court dismissed these actions.

Gascogne appealed to the Court of Justice, which dismissed the appeal and further held that any claim for compensation for delay by the General Court should be brought before the General Court itself, rather than on appeal to the Court of Justice.[70] Gascogne then brought a separate action against the EU before the General Court.[71]

Gascogne claimed that the General Court's failure to adjudicate its case without undue delay infringed its right to a fair hearing within a reasonable time. In particular, Gascogne alleged that the period of nearly four years (46 months) between the closing of the written proceedings and opening of the oral proceedings before the General Court constituted an unreasonable delay. The General Court found that, given the general complexity of competition law cases, a period of 15 months between the written and oral procedures is appropriate. In addition, given that multiple additional actions brought in connection with the industrial bags decision had to be considered in parallel, each action justified an additional month in the proceedings. The total appropriate period therefore would have been 26 months, meaning that the additional 20 months amounted to an excessive delay and infringed Gascogne's right to be heard within a reasonable time.

As to the damage alleged, Gascogne had the burden of conclusively proving both the existence and extent of the damage, as well as establishing a causal link between the delay and such damage. The General Court dismissed Gascogne's claims of material damage for losing the opportunity to find an investor sooner and interest paid on the fine. Gascogne's claim for losses sustained as a result of paying bank guarantee charges was partially upheld for the period sufficiently linked to the breach of Article 47.

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67 *Gascogne Sack Deutschland and Gascogne v. Union* (Case T-577/14) EU:T:2017:1.

68 *Industrial Bags* (Case COMP/F/38.354), Commission decision of November 30, 2005 ("industrial bags decision").

69 *Groupe Gascogne v. Commission* (Case T-72/06) EU:T:2011:671 and *Sachsa Verpackung v. Commission* (Case T-79/06) EU:T:2011:674.

70 *Gascogne Sack Deutschland v. Commission* (Case C-40/12 P) EU:C:2013:768; *Kendrion v. Commission* (Case C-50/12 P) EU:C:2013:771; and *Groupe Gascogne v. Commission* (Case C-58/12 P) EU:C:2013:770.

71 *See Gascogne Sack Deutschland and Gascogne v. Union* (Case T-577/14), European Competition Report, January–March 2015, pp. 22–23. (The plea of inadmissibility was based on the lack of designation of the party against whom the application was made. The General Court, however, held that according to settled case law, an action for damages based on Article 340(2) TFEU can be brought against the EU because it has legal personality.)

Gascogne further claimed compensation for non-material damage suffered as a result of the breach, consisting of: (i) harm to its reputation; (ii) uncertainty in decision-making; (iii) difficulties in managing its business; and (iv) anxiety and inconvenience experienced by its executives and employees. The General Court dismissed claim (iv) as inadmissible, and dismissed claim (i), holding that the finding of a breach of Gascogne's rights under Article 47 would sufficiently remedy any reputational harm. The General Court allowed Gascogne's claim that the breach had caused uncertainty and difficulties in managing the business because, although court proceedings are inherently uncertain, Gascogne could not have anticipated the extent of the delay. The prolonged uncertainty affected Gascogne's decision-making and constituted non-material damage that was not fully compensated by the finding of a breach.

In line with precedent holding that a judgment may not be annulled solely on the grounds of a delay in adjudication, [72] the General Court did not award Gascogne the full damages requested because to do so would have had the effect of reopening the amount of the fine originally imposed by the Commission in its industrial bags decision.

Aalberts Industries v. European Union (Case T-725/14)

On February 1, 2017, the General Court upheld a claim for damages by Aalberts Industries NV ("Aalberts") against the EU for a failure to adjudicate its case within a reasonable time.[73] On October 14, 2014, Aalberts had brought an action before the General Court against the EU, represented by the Court of Justice (supported by the Commission) for unreasonable delay in adjudicating its appeal against the Commission's 2006 copper fittings cartel decision.[74]

In December 2006, Aalberts appealed the Commission's decision. In March 2011, the General Court allowed Aalberts's appeal holding that the Commission had erred in finding that Aalberts had participated in an infringement.[75]

Article 340 TFEU provides that the EU must compensate for any damage caused by its institutions in the performance of its duties, while Article 47 of the Charter of Fundamental Rights of the European Union provides that everyone is entitled to a fair hearing within a reasonable time. The EU courts have previously analyzed breaches of the right to be heard within a reasonable time on a case-specific basis, considering in particular: (i) the importance of the case to the applicant; (ii) the complexity of the case; and (iii) the conduct of the parties.[76]

The General Court assessed each factor in turn. First, it found that the appeal was of real importance to Aalberts because it was against the Commission's finding of a single, complex, and continuous infringement of Article 101 TFEU and imposition of a fine. Second, the General Court found that the appeal was highly complex, given the numerous facts and legal issues involved. In particular, the Commission's 2006 decision totaled 220 pages, and the facts and analysis were complex (the Commission found that around 30 companies had entered into a complex series of agreements and concerted practices). Further, the General Court had to deal in parallel with nine other linked appeals brought in several languages. Third, the General Court found that the conduct of the parties had

[72] *See Groupe Gascogne v. Commission* (Case C-58/12 P) EU:C:2013:770, para. 78; *Der Grüne Punkt — Duales System Deutschland v. Commission* (Case C-385/07 P) EU:C:2009:456, para. 194; and *Bolloré v. Commission* (Case C-414/12 P) EU:C:2014:301, para. 105.

[73] *Aalberts Industries v. European Union* (Case T-725/14) EU:T:2017:47.

[74] *Fittings* (Case COMP/F-1/38.121), Commission decision of September 20, 2006.

[75] *Aalberts Industries and Others v. Commission* (Case T-385/06) EU:T:2011:114.

[76] *See, e.g., Der Grüne Punkt – Duales System Deutschland v. Commission* (C-385/07 P) EU:C:2009:456 and *Baustahlgewebe v. Commission* (C-185/95 P) EU:C:1998:608.

contributed to the total duration of the proceedings. In particular, both parties had lodged lengthy pleadings that exceeded the page limits set in the practice direction (and were accompanied by voluminous annexes), and the General Court had granted extensions during the process. Further, the General Court did not find that there was any period of unjustified inactivity in the handling of the appeal.

The General Court found that the period of 24 months between the end of the written procedure and beginning of the oral procedure was justified considering the circumstances of the case, and accordingly dismissed Aalberts's action for damages.

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