HORIZONTAL AGREEMENTS

ECJ Judgments

Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba **(Case C-74/14)**

On January 21, 2016, the Court of Justice issued a preliminary ruling on questions from a Lithuanian court on whether restricting discounts through travel agents' common online booking system constituted a concerted practice for the purposes of Article 101 TFEU.[1]

In 2012, the Lithuanian Competition Authority found that 30 travel agencies and Eturas (as facilitator) had breached Article 101 TFEU by participating in an anticompetitive concerted practice in relation to discounts applicable to bookings via the E-TURAS, a common booking system visible to all agencies. The parties challenged the decision in the Vilnius District Court, which partially granted the appeals and reduced the fines imposed. The parties further appealed the decision to the Lithuanian Supreme Administrative Court, which subsequently referred the case to the Court of Justice.

The travel agencies participated in E-TURAS, a common booking system, in which the system's administrator posted a notice inviting them to cap the discount rates for travel bookings and informing them that the platform would undergo a technical modification, whereby any discounts in excess of the cap would be automatically reduced.

The referring court asked whether it could be presumed that (i) the travel agencies were aware of the notice and (ii) by not opposing it, they tacitly approved the price discount restriction, thereby engaging in a concerted practice under Article 101 TFEU.

The Court of Justice pointed out that an economic actor must independently determine its conduct on the market. Accordingly, contacts between economic operators with the purpose to influence or reveal such conduct are precluded. This also applies to passive modes of participation, such as presence in meetings without clearly opposing to the conclusion of anticompetitive agreements. Under Article 101 TFEU, there is a general presumption that competing companies participating in anticompetitive meetings will consider the information exchanged when determining their own market conduct.

However, in this case, the Court of Justice found that the receipt of an email was not enough to infer actual or constructive knowledge of its unlawful content. To establish a concerted practice, additional evidence, even if indirect, would be needed to justify the rebuttable presumption that the travel agents were aware of the contents of the email. The Court of Justice determined that the agencies should have an opportunity to rebut a presumption of awareness without having to "take excessive or unrealistic steps."

It further noted that a finding of concerted practice requires not only evidence of collusion, but also subsequent market conduct, and a causal relationship between the two. Provided that these two additional elements are fulfilled, the circumstances of the present case would justify a presumption of a concerted practice between the travel agencies that were aware of the content of the message. However, these agencies could rebut this presumption by showing that they had systematically applied discounts that exceeded the cap imposed through the E-TURAS system, and thus there was no causation between the alleged collusion and their market conduct.

This case is of particular interest because the Court of Justice applied for the first time the concept of concerted practices to online platforms and in a context where no direct horizontal meetings or communications took place. The judgment provides useful guidance regarding the defenses companies may use to rebut the presumption that they participated in an unlawful practice.

[1] *Eturas UAB and others v. Lietuvos Respublikos konkurencijos taryba* (Case C-74/14) EU:C:2015:493.

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Buzzi Unicem v. Commission **(Case C-267/14 P)**

On March 10, 2016, the Court of Justice upheld Buzzi Unicem's appeal against the General Court's judgment of March 14, 2014.[2] The appealed judgment rejected Buzzi Unicem's action for annulment against a Commission decision requiring the company to provide information related to an alleged infringement of competition law.[3]

The contested decision required Buzzi Unicem to provide detailed and exhaustive information in response to a long questionnaire, covering several commercial transactions executed over a period of ten years in twelve Member States. The decision described the alleged infringement in the following generic terms: "restrictions on trade flows in the European Economic Area (EEA), including restrictions on imports in the EEA coming from countries outside the EEA, market-sharing, price coordination and related anti-competitive practices in the cement market and related product markets."[4]

Buzzi Unicem challenged the validity of this decision before the General Court, but its claim was dismissed. The company therefore appealed to the Court of Justice. The Court of Justice invalidated the contested decision, concluding that the Commission had failed to adequately state its reasons.

The Court of Justice noted that Article 18 of Regulation No. 1/2003[5] empowers the Commission to adopt decisions requiring any undertaking to provide "all necessary information" in relation to an alleged infringement of competition rules. According to the same provision, when adopting a similar request for information the Commission must "state . . . the purpose of the request." These two limbs of Article 18 are closely interconnected: if a decision does not clearly state the scope of the request for information—and, in particular, the specific infringement being investigated—it is impossible to assess the necessity of the information required and, therefore, to review the validity of the request itself.

The Court of Justice held that the Commission did not adequately state the purpose of the request for information addressed to Buzzi Unicem, describing the contested decision as excessively laconic, generic, and in some respects ambiguous. First, the description of the alleged infringement did not clarify which precise conduct was suspected to be in violation of competition rules, nor the specific product supposedly affected by that conduct. Second, the Commission's decision opening the investigation did not provide any additional detail, and therefore could not compensate for the inadequate statement of reasons. The comparison of the decision opening the investigation, the contested decision, and the questionnaire addressed to Buzzi Unicem was all the more misleading because each document referred to a different geographic scope of the alleged infringement. Finally, the Court of Justice noted that the contested decision was adopted more than two years after the first dawn raids, by which time the Commission should have had a much clearer and more detailed picture of the suspicions that it was investigating.

The present judgment is the last of a stream of recent cases closely scrutinizing the Commission's exercise of its powers of investigation in antitrust enforcement proceedings.[6]

General Court Judgments

EGL and its subsidiary CEVA Freight and Others v. Commission **(Case T-251/12)**

On February 29, 2016, the General Court ruled on the appeals submitted by 6 members of the freight forwarding

2 *Buzzi Unicem v. Commission* (Case T-297/11) EU:T:2014:122.

3 Commission decision relating to a proceeding under Article 18(3) of Council Regulation (EC) No 1/2003, C(2011) 2356 final of March 30, 2011.

4 *Buzzi Unicem v. Commission* (Case C-267/14 P) EU:C:2016:151, para. 30.

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

6 *See, e.g.*, *Prysmian v. Commission* (Case T-140/09) EU:T:2012:597 and *Deutsche Bahn v. Commission* (Case C-583/13 P) EU:C:2015:404.

cartels.[7] In 2012, the Commission found that fourteen separate groups of freight forwarding companies had participated in four cartels.[8] The four cartels in question were related to a new export system ("NES" cartel), advanced manifest system ("AMS" cartel), currency adjustment factor ("CAF" cartel), and peak season surcharges ("PSS" cartel). The Commission imposed fines totalling €169 million.

Eagle Global Logistics Inc. ("EGL") claimed that the Commission had erred in law and/or fact by failing to define the relevant markets or establish that the NES agreement had had an appreciable effect on trade between Member States. EGL also claimed the Commission had no authority to impose a fine in connection with the NES agreement because the relevant conduct was exempt under Council Regulation 141/62.[9] Additionally, it claimed that the Commission had failed to recognise the intrinsic value of the evidence provided by EGL in its leniency application regarding the CAF agreement.

The General Court dismissed the appeal, holding that the Commission had correctly defined the relevant markets and found that the collusion had an effect on the final price paid for freight forwarding services and restricted competition. The General Court found that Council Regulation 141/62 did not apply, because the NES cartel did not directly affect the air transport services market, but rather the freight forwarding market which contained many more services. Finally, the General Court found that the Commission had correctly applied the 2006 Leniency Notice[10].

In a separate appeal, Deutsche Bahn and Schenker, along with Kühne + Nagel International and Panalpina Welttransport argued that the Commission had erred by not terminating the investigation due to tainted evidence. The companies also asserted that the Commission should have applied Council Regulation 141/62 in assessing the amount of the fine, and in refusing to initiate settlement talks. The General Court rejected the appeal for the reasons set out above in relation to EGL's appeal. According to the General Court, the Commission had not erred in refusing to enter settlement talks because a significant number of the parties involved were not seeking to cooperate with the Commission and no efficiency gains would have been gained from the procedure.

Finally, UTi Worldwide, Inc. ("UTi") put forward similar claims against the Commission, including the scope of the infringement, the lack of AMS agreements' effect on competition, and errors in the fine calculation. The General Court agreed that the infringement periods attributed to UTi's subsidiaries were subject to rounding down. As a result, UTi, whose liability was derived entirely from that of its subsidiaries, should enjoy the same reduction in the infringement period and benefit from a corresponding reduction in fines.

The General Court confirmed the well-established case law related to the allocation of fines between a parent company that did not participate directly in the infringement and the subsidiaries that did: namely, that a parent company's liability cannot exceed the overall amount of the fines imposed on its subsidiaries.

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[7] *EGL and its subsidiary CEVA Freight and Others v. Commission* (Case T-251/12) EU:T:2016:114; *Kühne + Nagel International AG and Others v. Commission* (Case T-254/12) EU:T:2016:113; *UTi Worldwide and Others v. Commission* (Case T-264/12) EU:T:2016:112; *Schenker v. Commission* (Case T-265/12) EU:T:2016:111; *Deutsche Bahn and Others v. Commission* (Case T-267/12) EU:T:2016:110; and *Panalpina Welttransport and Others v. Commission* (Case T-270/12) EU:T:2016:109.

[8] *Freight Forwarding* (Case COMP/39462) Commission Decision of March 28, 2012.

[9] EEC Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17, OJ 124, 28.11.1962, p. 2751-2751. *See also*, Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 374, 31.12.1987, p. 1-8.

[10] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17-22.

MERGERS AND ACQUISITIONS

ECJ Judgments

Éditions Odile Jacob SAS v. Commission (Case C-514/14 P)

On January 28, 2016, the Court of Justice rejected an appeal by Éditions Odile Jacob SAS ("EOJ") of the General Court's[11] 2014 dismissal of EOJ's application to annul the Commission's 2011 decision to re-approve Wendel Investissement SA ("Wendel") as a purchaser of Vivendi Universal Publishing's ("VUP") assets divested as a condition of the Commission's approval of the *Lagardère/Natexis/VUP*[12] merger.

The Commission's decision to re-approve Wendel followed the annulment in 2010 by the General Court[13] of the Commission's first approval decision of July 30, 2004, which approved Wendel as the purchaser of VUP. The Court of Justice annulled the Commission's 2004 decision because the trustee reporting on Wendel's suitability was not sufficiently independent from the divested business.

EOJ was one of the companies that had expressed an interest in acquiring VUP's assets and challenged the Commission's re-approval decision. The General Court confirmed the re-approval of Wendel, rejecting all of EOJ's pleas, and EOJ appealed.

EOJ argued that the re-approval decision did not remedy the lack of Wendel's independence from the seller, Lagardère. The Court of Justice upheld the General Court's conclusion that, to give full effect to the 2010 judgment, the Commission was only required to approve a new trustee responsible for writing a report on Wendel's candidature, and then to authorise or reject Wendel on the basis of the new trustee's report.

EOJ also claimed that the Commission's re-approval of Wendel could not be based on the decision authorizing the *Lagardère/Natexis/VUP* merger because this decision was temporarily inapplicable as a result of the annulment of the first approval of the trustee. The Court of Justice rejected this claim, noting that EOJ misconstrued the effect of 2010 judgment, which explicitly upheld the validity of the merger clearance decision and required the Commission to take a new decision on the approval of the trustee. The Court of Justice also agreed with the Commission's retroactive re-approval of Wendel after the sale of the relevant assets. The Court of Justice explained that such retroactive decisions are permitted where they attain several general interest objectives, including respect by the administration for legality and the force of *res judicata*.

Finally, EOJ argued that the General Court's finding that Wendel was independent from Lagardère (the seller of VUP's assets) was inconsistent with the fact that the same individual sat on the governing bodies of both companies. The Court of Justice rejected this plea and upheld the General Court's conclusion that the Commission had taken sufficient steps to ensure that the involvement of this person in Wendel would not compromise its independence from Lagardère. In particular, Wendel honored its commitment to ensure that the relevant person would resign within a year of approval and would not be involved in discussions relating to Wendel's publishing activities.

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[11] *Éditions Odile Jacob v. Commission* (Case T-471/11) EU:T:2014:739.

[12] *Lagardère/Natexis/VUP* (Case COMP/M.2978), Commission decision of January 7, 2004.

[13] *Éditions Odile Jacob v. Commission* (Case T-279/04) EU:T:2010:384. The General Court's judgment was upheld by the Court of Justice in *Lagardère v. Éditions Odile Jacob SAS* (Case C-554/10 P) EU:C:2011:879.

COMMISSION DECISIONS

Phase II Decisions With Undertakings

Zimmer/Biomet (Case COMP/M.7265)

On March 30, 2015, the Commission approved the acquisition of sole control of Biomet, Inc. ("Biomet") by Zimmer Holding, Inc. ("Zimmer").[14] Zimmer is a U.S. publicly-traded company active in the design, development, manufacture, and marketing of orthopedic devices, including reconstructive (to replace damaged joints with prosthetic components), spinal (to correct conditions of the spine), and trauma devices (to treat bone fractures), biologics (non-surgical techniques), dental implants (form of dental prosthetics), and surgical products (such as bone cement and accessories). Biomet is a wholly owned subsidiary of LVB, a privately-held holding company active in orthopedic and other medical devices.

The Commission assessed the transaction's effect on the markets for: (i) primary knee implants,[15] revision knee implants,[16] total knee implants,[17] extreme orthopedics,[18] hinged knee implants,[19] limb salvage,[20] unicondylar knee implants,[21] and patella-femoral implants;[22] (ii) elbow implants; (iii) hip implants; (iv) overall shoulder implants, including a degenerative shoulder replacement, fracture shoulder replacement, and reverse shoulder replacement; (v) bone cement;[23] (vi) bone cement accessories;[24] (vii) surgical tools (pulsed lavage); [25] (viii) spine devices; and (ix) trauma devices.

In line with its decisional practice,[26] the Commission analyzed each product market on a national level, notably due to different market structures (*e.g.*, public reimbursement systems and hospitals' purchasing behavior) from country to country and to the importance of a local/national sales force.

The Commission concluded that the transaction would give rise to concerns in the following areas: (i) unicondylar knee implants in 16 countries[27] where the parties' combined market share is higher than 35%; (ii) elbow implants in 12 countries[28] where the merged entity would be the leading supplier, with a significantly larger market share than competitors; and (iii) total knee implants in Denmark and Sweden, where the parties' combined market share amounts to approximately 50–60%.

Unicondylar knee implants. The Commission's investigation showed that Zimmer and Biomet are the two leading players, and that they are close competitors and

[14] *Zimmer/Biomet* (Case COMP/M.7265), Commission decision of March 30, 2015.

[15] Implant to replace the entirety of knee joints. They generally have four components (i) a femoral component to replace femoral condyles; (ii) a tibial component; (iii) a polyethylene insert that replaces the meniscus and acts as the articulating and bearing surface between the femoral and tibial components; and (iv) a patella-femoral component.

[16] Implants composed of the same basic components as primary knee implants. However, they display a much greater degree of modularity, allowing for additional accessories to be placed in order to suit the specific needs of a patient.

[17] Implant "crowning" the entire surface of the knee joint with a surface replacement, and additional elements used to reproduce the natural biomechanics of the joint.

[18] Distinguished from revision knee implants, these encompass hinged knee and limb salvage implants.

[19] These implants replace the whole surface of knee joints but are fixed with an extended shaft and display additional elements such as supplementary metal plates.

[20] Highly intrusive procedure consisting of the replacement of a patient's limb in order to avoid dramatic outcomes such as amputation.

[21] Implant to replace only one side of the knee joint, namely a femoral condyle.

[22] Moderately intrusive implant to replace the back of the patella, consisting of a metal groove fitted on the end of the femur and a plastic disc attached to the underside of the kneecap.

[23] Used to aid the fixation of reconstructive implants on the bone structure.

[24] Aid in the application of bone cement.

[25] High-pressure irrigation system used in orthopedic surgery.

[26] *See, e.g.*, *Johnson&Johnson/Synthes* (Case COMP/M.6266), Commission decision of April 18, 2012, para. 118.

[27] Austria, Belgium (including Luxembourg), the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, The Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, and the UK.

[28] Austria, Belgium (including Luxembourg), the Czech Republic, Denmark, France, Germany, Italy, Norway, Portugal, Spain, Sweden, and the UK.

perceive themselves as such. Customers in this market were found not to have sufficient ability to switch to other suppliers to constrain the merged entity's potential anticompetitive behavior. The Commission also concluded that entry into the market is difficult because it requires considerable resources and a long R&D period that can last several years, and there are no competitors of the magnitude of Biomet and Zimmer.

Elbow implants. The Commission found that in this niche market, Zimmer and Biomet are close competitors, and there are only one or two alternative suppliers. According to the Commission, the merger would eliminate one of the major competitors in the context of difficult customer switching due to the limited number of credible alternative suppliers.

Knee implants. The Commission found that the merger would effectively constitute a *quasi* 3-to-2 merger in Denmark and 4-to-3 merger in Sweden. Moreover, the role of evidence-based medicine, the importance of long standing clinical data, and the presence of a national registry greatly increase the barriers to entry.

To address the Commission's concerns, the parties offered commitments to divest Zimmer's unicondylar knee implant business and Biomet's elbow implants business across the EEA, and to divest Biomet's Vanguard Total Knee Systems in Denmark and Sweden. On the basis of the commitments, the Commission concluded that the transaction was compatible with the internal market.

Ball/Rexam (Case COMP/M.7567)

On January 15, 2016, the Commission conditionally cleared the acquisition of sole control by the American company Ball of UK-based Rexam, respectively the first and second largest manufacturers of beverage cans worldwide.

Beverage cans—made either from steel or aluminum—account for around 9% of beverage packaging in Europe, with the remainder being attributed to polyethylene terephthalate ("PET") bottles (50%), glass bottles (15%), and other containers (26%). Four suppliers—Ball, Rexam, Crown, and Can-Pack—account for almost all sales of beverage cans in Europe, most of which are purchased by large and sophisticated customers, such as Carlsberg, Coca-Cola, Heineken, Nestlé, and PepsiCo.

In line with its decisional practice,[29] the Commission found that beverage cans, due to their particular characteristics (shape, environmental performance, shelf life, customization), constitute a separate market from other forms of beverage packaging solutions. The Commission did not take a final position as to whether the market should be divided further based on can materials (steel or aluminum), components (can body or end), or size, although it noted that size is an important differentiating feature, particularly when distinguishing traditional from slim or sleek cans. The relevant geographic market was defined according to a "customer-centric approach," whereby catchment areas with a radius of 700 km were drawn around each customer's filling location and then grouped in nine clusters (each including one or more countries) where competitive conditions were deemed to be sufficiently homogeneous.

The Commission concluded that Ball and Rexam are the two largest suppliers at the EEA level and together account for around two thirds of revenues in the market. In some geographic areas, the transaction would lead to an increment in market share of more than 30%. The Commission noted that competition in the sector is not intense because the "big 3" (Ball, Rexam, and Crown) avoid competing against each other on the same tenders and focus on customers that each supplier is better located to serve. According to the Commission Ball and Rexam are close competitors that have comparable networks of production plants and product ranges. In particular, only Ball and Rexam, through their extensive plant network, are able to guarantee security of supply in case of can shortages, which could hold up the manufacturing processes of beverage producers, especially during seasonal peaks. The wide geographic footprint of the

[29] *Rexam/American National Can* (Case COMP/M.1939), Commission decision of July 19, 2000.

parties' production network enables the merging parties to leverage their strong position toward customers in certain areas and specialize in a specific range of can sizes and formats, reducing unit costs and production downtimes.

The Commission took the view that the main remaining players—Crown and Can-Pack—could not exercise sufficient competitive pressure due to the lack of sufficient geographic coverage, the limited width of their portfolios, chronic capacity constraints, and inability to meet large customers' requirements in terms of innovation, technical services, just-in-time delivery, and flexibility. At the same time, new entry or in-house production by customers would require significant investments, technologies and know-how, and a sufficient volume commitment for at least five years.

The Commission also observed that the parties are able to impose commercial terms that undermine the smaller suppliers' ability to compete and thereby limiting countervailing buyer power. For instance, even large customers did not succeed in compelling Ball and Rexam to unbundle the sale of can bodies and can ends, although the two products are usually sold separately in non-EEA markets. The parties were also able to impose the purchase of minimum volumes of certain types of cans as a condition to obtaining different types that are in tight supply capacity.

The Commission identified competitive concerns on the markets for beverage cans in Benelux, Central Europe, France, the Iberian Peninsula, Italy, Nordic countries, North-East Europe, South-East Europe, the U.K. and Ireland. The Commission cleared the transaction after Ball committed to divest ten can body plants and two can end plants in the EEA, and reduce a sufficient number of key personnel, including management, R&D and sales staff. The commitments included an upfront buyer clause making the closing of the transaction subject to a binding agreement to divest the relevant business to a purchaser approved by the Commission (which is expected to be the Luxembourg-based company Ardagh).

Phase I Decisions With Undertakings

***SNCF MOBILITES/Eurostar International Limited* (Case COMP/M.7449)**

On May 13, 2015, the Commission conditionally approved the acquisition of sole control of Eurostar International Limited ("Eurostar")—the high-speed railways service connecting the UK, France, and Belgium—by the French national rail company ("SNCF").[30] Since 2010, Eurostar has been a full-function joint venture, controlled jointly by SNCF and the UK Government, with the Belgian national operator SNCB holding a non-controlling minority share. SNCF obtained sole control by purchasing the UK Government's interest in Eurostar.

The Commission defined the relevant market by reference to the point-to-point (the origin and destination ("O&D")) approach, which posits that passengers do not readily substitute destinations but can substitute transport modes on the same itinerary. On this basis, the Commission identified two relevant point-to-point markets: London-Paris and London-Brussels.

Horizontal effects. The Commission did not find any concerns because the transaction, which involves a change from joint to sole control, does not combine competing activities given that SNCF is not active in services on the London-Paris and London-Brussels routes. In fact, Eurostar is the only rail operator on the London-Brussels and London-Paris itineraries on which it accounts for a share of 70–80% in competition with airlines and other means of transportation.

Vertical effects. The Commission concluded that following the acquisition of sole control SNCF could hinder the entry of Eurostar's competitors on the rail routes, thereby further strengthening Eurostar's dominant position. More specifically, it would become more difficult for potential competitors to access stations and auxiliary services (*e.g.*, ticket offices, passenger information

[30] *SNCF MOBILITES/Eurostar International Limited* (Case COMP/M.7449), Commission decision of May 13, 2015.

services, and cross-channel areas) in France and Belgium and maintenance centers and related services (overnight storage, servicing, and cleaning of trains and light maintenance) in France, Belgium, and the U.K. The Commission found that this infrastructure has limited capacity and is controlled and managed by Eurostar and its shareholders, SNCF and SNCB. In particular, the Commission was concerned that potential entrants would not have the 'priority access' to train paths at peak times.

The concerns identified by the Commission pre-dated the transaction, *i.e.*, since the creation of the Eurostar JV in 2010, which was notified to, and approved by, the Commission subject to commitments aimed at reducing barriers to competing against Eurostar. The Commission concluded that these concerns would continue to exist following the transaction and therefore SNCF and Eurostar committed to provide any new entrant with fair and non-discriminatory access to: (i) standard and cross-channel areas and services in stations in France and Belgium; (ii) maintenance centers and related services in France, Belgium, and the U.K.; and (iii) train paths currently used by Eurostar at peak times, should a new entrant not be able to obtain such access through the usual procedure for path allocation by the infrastructure managers. The commitments were also voluntarily subscribed to by SNCB, which was not formally a party to the transaction. It is also noteworthy that the commitments did not include divestments and were limited to behavioral remedies, which are rare in EU merger control.

The Commission approved the transaction subject to the above commitments.

INTELLECTUAL PROPERTY

Advocate General Opinion

***Genentech Inc. v. Hoechst GmbH, Formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH* (Case C-567/14), Opinion of Advocate General Wathelet**

On March 17, 2016, Advocate General Wathelet delivered his opinion on a request for a preliminary ruling from the Paris Court of Appeal on the issue of whether Article 101 TFEU precludes an obligation on a patent licensee to pay royalties for the entire duration of the license agreement, notwithstanding the absence of infringement or the revocation of the licensed patent.

In 1992, Hoechst GmbH ("Hoechst," at the time Behringwerke AG) and Genentech Inc. ("Genentech") concluded a license agreement under German law for the use by Genentech of a human cytomegalovirus enhancer, a technology protected by a European patent—which was subsequently revoked in 1999 by the European Patent Office for lack of novelty—and two patents issued in the United States.

In consideration for the right to use the licensed technology, Genentech agreed to pay a one-time license fee, a fixed annual research fee, and a running royalty based on the sales of finished products using the patented materials and processes (which the licensor could have reasonably expected to be the highest of the three amounts). Genentech never paid the running royalty and, in 2008, terminated the license agreement.

Hoechst and its parent company Sanofi-Aventis Deutschland GmbH ("Sanofi-Aventis"), believing that Genentech had sold products (Rituxan in particular) manufactured using the licensed enhancer, filed an application for arbitration with the International Court of Arbitration of the International Chamber of Commerce ("ICC") to claim the running royalty.

In September 2012, the ICC arbitrator held that Genentech had manufactured Rituxan using the patented enhancer and therefore had to pay the running royalty on the sales of that product between 1998 (when the first U.S. patent was issued) and the termination of the agreement in 2008. The arbitrator took the view that the license was entered into for a commercial purpose, to avoid litigation on the validity of the patents. Therefore, by purchasing this license, the licensee could use the enhancer without being accused of having infringed IP laws.

Genentech argued that interpreting the (now invalid) license agreement so as to enable it to recover running royalties without taking account of whether the supposedly licensed products were covered by the licensed patents was contrary to EU competition law. Genentech thus brought an action before the Paris Court of Appeal seeking the annulment of the arbitral award.

In December 2014, the Paris Court of Appeal referred the question of whether, in circumstances where patents are revoked, a license agreement requiring the licensee to pay royalties for the exclusive use of the rights attached to the licensed patent would be compatible with Article 101 TFEU to the Court of Justice for a preliminary ruling.

Hoechst and Sanofi-Aventis argued that the request for a preliminary ruling was improper. They claimed that it was impossible to address the question without infringing French law because the scope of review of international arbitral awards was limited to cases of flagrant infringements of international public policy. Hoechst and Sanofi-Aventis further claimed that, because French law prevented any substantive review of international arbitral awards, the national court would not be able to annul the award.

Advocate General Wathelet opined that the limitations on the scope of the review of international arbitral awards imposed by French law contradicted the principle of effectiveness of EU law. He noted that it is undesirable to have parties to potentially anticompetitive agreements resort to arbitration to bypass review under Articles 101 and 102 TFEU.

Advocate General Wathelet noted that, as interpreted by the arbitrator, the license agreement gave rise to

Genentech's obligation to pay royalties and this obligation did not depend on whether the licensed technology was protected by valid patents. The application of the provisions in Article 101 does not preclude such obligation. The payments for using the licensed technology were due even if the patents at issue had been revoked or had not been infringed.

Advocate General Wathelet also suggested that the holding in the factually similar *Ottung*[31] case could apply. In *Ottung*, the Court of Justice held that an obligation to pay a royalty which is unconnected to a patent may infringe Article 101 TFEU if the license agreement does not grant the licensee the right to terminate the agreement by giving reasonable notice, or seeks to restrict the licensee's freedom of action after termination.

The purpose of Genentech's agreement was to enable the licensee to use the technology and avoid patent litigation, therefore its obligation to pay royalties only lasted for the duration of the validity of the license agreement. Moreover, Genentech was able to terminate the agreement by giving two months' notice and its freedom of action after termination was in no way restricted.

Advocate General Wathelet concluded that a license agreement that requires the licensee to pay royalties for the exclusive rights to use the licensed patented technology does not violate Article 101 TFEU, where (1) the commercial purpose of the agreement is to enable the licensee to use the technology at issue while averting patent litigation; and (2) the licensee can terminate the license agreement if the patents at issue are revoked or if it does not use the licensed technology.

He added that the Court of Justice could answer the question referred for a preliminary ruling by establishing that Article 101 TFEU does not require the annulment of the contested international arbitral award in such a case. It remains to be seen whether the Court of Justice agrees with the Advocate General's position, as this Opinion is not binding on the Court.

[31] *Kai Ottung v. Klee & Weilbach A/S and Thomas Schmidt A/S* (Case 320/87) EU:C:1989:195.

STATE AID

ECJ Judgments

***Federal Republic of Germany v. Commission* (Case C-446/14 P)**

On February 18, 2016, the Court of Justice dismissed an appeal by the Federal Republic of Germany ("Germany") against the General Court judgment confirming the Commission's decision that ordered Germany to recover incompatible state aid granted to Zweckverband Tierkörperbeseitigung in Rheinland-Pfalz (association for the disposal of animal carcasses in Rhineland-Palatinate, "ZT").[32] The Court of Justice found that the General Court had made no error and dismissed the appeal.

ZT's members, districts in Saarland, Hesse, and Rhineland-Palatinate, entrust ZT with their obligations under the January 25, 2004 German law on the disposal of animal by-products. In addition to category 1 and 2 materials, as defined by Regulation n°1069/2009 of October 21, 2009,[33] which entail significant risks, ZT also disposed of category 3 materials (*i.e.* animal carcasses and body parts which, although not fit for human consumption, do not show any sign of transmissible disease, or could be used as livestock food). A 2010 change in ZT's articles of association established that, in addition to disposal of category 1 and 2 materials, the contribution paid to ZT by its members would also be used to compensate for the costs of maintaining reserve capacity in case of epizootic disease. Between 1979 and 2011, ZT received contributions amounting to €66 million, of which €30 million were received between 1998 and 2011.

In 2012, the Commission found that Germany's contributions to ZT since January 1, 1979 constituted incompatible state aid, and ordered it recovered for the amounts granted since May 26, 1998.[34] In 2014, the General Court rejected ZT's appeal, and ZT appealed to the Court of Justice, requesting the annulment of the General Court's ruling.

The Court of Justice rejected Germany's argument that, contrary to the General Court's finding, the four cumulative *Altmark* conditions for public service compensation not to constitute state aid, were met.[35] In particular, Germany argued that the fourth *Altmark* condition was met (*i.e.* the requirement that, where an undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation must be determined based on an analysis of the costs of a typical, well-run undertaking). The Court of Justice disagreed. It upheld the General Court's finding that the Commission had correctly concluded that the fourth condition was not met. The General Court had taken into account the situation in other German States to determine the necessary level of compensation on the basis of an analysis of the costs of a typical, well-run undertaking to satisfy its public service requirements. The Court of Justice noted that the General Court also found that the Commission had to ensure that the contributions granted to ZT did not cover costs that could result from a lack of efficiency. Additionally, the Court of Justice held that the General Court had rightly noted that Germany's argument that no operator would exercise ZT's activity without being authorized to realize a profit did not establish that ZT constitutes a typical, well-run undertaking within the meaning of the fourth *Altmark* condition.

Second, the Court of Justice rejected Germany's arguments that the General Court (i) had wrongly confirmed the Commission's conclusion that the German authorities had committed a manifest error of assessment by finding the maintenance of reserve capacity in case of

[32] Commission decision C(2012) 2557 of April 25, 2012 (State Aid SA.25051 (C 19/10) (ex NN 23/2010)), OJ 2012 L 236/1 and *Federal Republic of Germany v. Commission* (Case T-295/12) EU:T:2014:675.

[33] Regulation n°1069/2009 of the Parliament and the Council of October 21, 2009.

[34] Commission decision C(2012) 2557 of April 25, 2012 (State Aid SA.25051 (C 19/10) (ex NN 23/2010)), OJ 2012 L 236/1 and *Federal Republic of Germany v. Commission* (Case T-295/12) EU:T:2014:675.

[35] *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsreright*, (Case C-280/00) EU:C:2003:415.

epizootic disease to be a service of general economic interest ("SGEI"); and (ii) did not give sufficient grounds for its finding. The Court of Justice emphasized that these arguments were of a subsidiary nature, as even if the German authorities had not committed a manifest error of assessment in this respect, this fact alone would not result in the contested decision's annulment. For the contested decision to be annulled, the contributions granted to ZT for maintaining its reserve capacity in case of epizootic disease would have had not to confer an economic advantage to ZT pursuant to the *Altmark* conditions. Consequently, the Court of Justice held that the General Court had not erred in finding that the maintenance of such a reserve did not meet all of the *Altmark* conditions and that this finding alone was sufficient to confirm the contested Commission decision.

It is also noteworthy that the Court of Justice dismissed Germany's argument that the General Court had wrongly confirmed the Commission's finding of a manifest error of assessment. Germany had argued before the General Court that the Commission had breached its obligation to provide reasons to support its finding that Germany had committed a manifest error in its assessment of the SGEI. The General Court held that even if the Commission had not expressly indicated whether Germany's error was "simple" or "manifest," it was obvious from the decision that the Commission had considered the error to be "manifest," based on the requisite legal principles.[36]

***Hellenic Republic v. European Commission* (Case C-431/14 P)**

On September 19, 2014, March 8, 2016, the Court of Justice affirmed the ruling of the General Court that compensation aid provided to Greek farmers constituted unlawful state aid.[37] First, the General Court correctly construed the facts which supported the finding that the compensation represented state aid. Second, the General Court sufficiently examined the contention that the Commission decision lacked adequate support. Lastly, the Commission had properly followed the relevant guidelines because Greece did not allege a specific and exceptional circumstances in the Greek agricultural sector.

Due to adverse weather conditions, Greek farmers sustained losses in 2008. In response, the Greek Agricultural Insurance Organization ("ELGA")—a public entity that insures farmers against natural disasters—paid out compensation to over 800,000 farmers between 2008 and 2009, with most farmers receiving on average €500. Under the insurance scheme, agricultural producers paid an annual three percent special insurance levy which the state recorded as revenue. The compensation payments were partly funded by this special tax.

These aid measures came at a time of economic crisis. In response to this crisis, on December 17, 2008, the Commission enacted the Temporary Community Framework for State aid measures to support access to finance during the financial and economic crisis ("TCF"). The TCF exempted various measures from the state aid rules, except for undertakings aimed at producing agricultural products. Yet, on October 28, 2009, a Communication amended the TCF so that agricultural products were exempt from the state aid rules for €15,000 per undertaking.

In its December 2011 decision, the Commission determined that the compensation constituted state aid because the compensation was not funded solely through the special insurance contributions.

The Commission then considered whether the state aid comported with the internal market. Of the 2008 compensation, about €350 million complied with the internal market since the aid went to producers who lost more than 30% of their normal production. However, the Commission found that about €33 million in aid was incompatible with the internal market. Of the 2009 aid, roughly €390 million granted before October 28, 2009—when the TCF Communication entered into force—was incompatible with the internal market. In contrast, the aid

[36] *Federal Republic of Germany v. Commission* (Case T-295/12) EU:T:2014:675, paras. 55 and 183–185.

[37] *Hellenic Republic v. Commission* (Case C-431/14 P) EU:C:2016:145.

granted after October 28, roughly €28,000, was compatible with the internal market under the amended TFC. The Commission ordered Greek authorities to recover all incompatible aid.

Greece responded by seeking an annulment in the General Court. On September 20, 2012, the General Court suspended the recovery of the state aid for two reasons. First, Greece established a prima face case that the exceptional economic circumstances might warrant reducing the €425 million recovery order. Second, if Greek authorities recovered the compensation under these economic conditions it would likely result in sociopolitical backlash.

However, in 2014, the General Court dismissed Greece's action. The General Court determined that the Commission correctly characterized the compensation as state aid, even though the compensation was funded partly through the special contribution tax. Furthermore, the General Court rejected claims that Commission misapplied the TCF given the serious economic conditions facing Greece. Greece appealed.

First, Greece argued that the General Court had misconstrued the special tax contributions as state resources. More specifically, Greece argued that the General Court: (1) distorted the facts when ruling that the 2008 and 2009 insurance contributions counted as state resources, (2) described the facts in an incorrect manner, and (3) relied upon an inapposite case called *Freskot*. The Commission disputed the admissibility of these arguments, as well as the merits of both arguments.

The Court of Justice noted that the General Court enjoys exclusive jurisdiction over fact-finding, unless the factual findings are obviously inaccurate based upon documents in the file. Here, the Court of Justice examined the General Court decision—the only relevant document in the file—and did not find an obvious factual distortion. Thus, this argument lacked merit.

The Court of Justice then determined that the General Court accurately described the facts, namely, (i) the compensation payments came from the ELGA rather than the special contribution fund directly, (ii) the 2008 payments were independent of the special contributions, and (iii) Greece funded the 2009 payments through debt guaranteed by the state. Based on these findings, the Court of Justice held that the General Court could conclude that the compensation constituted state aid.

Third, Court of Justice found that the General Court did not err by relying on *Freskot* because it concerned a previous version of the Greek law at issue, and contained language identical to the present version.

Given these findings, the Court of Justice concluded that the General Court adequately supported its decision that the compensation constituted state aid, despite the special tax contributions.

Greece also argued that, given exceptional market conditions, the General Court should have assessed whether the advantage conferred upon the agricultural producers *in fact* provided them an advantage. The Commission disputed the merits as well as the admissibility of this argument. The Court of Justice deemed Greece's argument inadmissible because it was not raised in General Court. As a result, the Court of Justice could only examine whether the General Court sufficiently considered the reasoning in the Commission decision. It concluded that the General Court adequately addressed the Commission reasoning by (i) reaffirming that the farmers received an benefit not available under ordinary market conditions, (ii) determining that the economic crisis did not call into question the strong competition concerns in the agricultural sector, and (iii) finding that the Commission followed the TCF framework which was specifically enacted to deal with state aid during the economic crisis.

Greece also asserted that the General Court had misapplied the TCF by exempting Greek agricultural producers from the state aid exception, despite the economic crisis. Greece further contended that the General Court did not consider whether the exceptional circumstances faced by the Greek economy in 2009

differed from the circumstances contemplated in the TCF. In response, the Commission pointed out that Greece had not raised this issue before the General Court.

On those arguments, the Court of Justice first affirmed that the Commission cannot depart from the guidelines contained in the TCF because, by adopting the TCF, the Commission limited its discretion when determining whether state aid comports with the internal market. However, an exception to this rule exists. A departure from the guidelines may be necessary if (i) a Member State alleges exceptional circumstances in a specific sector of the economy, and (ii) these circumstances differ from those envisaged in the guidelines.

In this case, however, Greece failed to identify specific or exceptional circumstances in the Greek agricultural sector that differed from those envisaged by the TCF, making departure from the TCF guidelines improper. Void of the necessary exceptional circumstances, the Commission correctly adhered to the TCF guidelines.

Greece also claimed that the order to recover the €425 million in incompatible aid violated the principle of proportionality. Yet the Court of Justice noted that the General Court conducted a detailed examination of proportionality. All things considered, the Court of Justice concluded that the Commission order was appropriate and dismissed the appeal.

General Court Judgments

***Frucona Košice v.Commission* (Case T-103/14)**

On March 16, 2016, the General Court upheld an appeal by Frucona Košice a.s. ("Frucona")[38] against the Commission's 2013 decision[39] that found that a Slovak write-off of tax debt in favour of Frucona was incompatible with state aid rules.

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

In June 2006,[40] the Commission found that the tax office would have obtained a higher repayment of its claims through a bankruptcy procedure or the tax execution procedure. It concluded that the write-off gave an advantage to Frucona as compared to its competitors and thus constituted state aid. Frucona appealed this decision to the General Court which dismissed the appeal.[41] It then appealed to the Court of Justice, which annulled the General Court's judgment.[42] The Court of Justice held that, (1) by failing to take into account the duration of the bankruptcy procedure in the assessment of the private creditor test, the Commission had committed a manifest error of assessment; or, (2) in so far as it had taken that factor into consideration, had failed to state to the requisite legal standard the reasons for the initial decision. The Court of Justice referred the case back to the General Court.

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

In its March 16, 2016 judgment, the General Court upheld Frucona's new appeal and annulled the Commission's contested decision. Notably, the General Court held that

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

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

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

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

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

the burden of proof that the conditions for applying the private creditor test have been fulfilled is borne by the Commission. It agreed with Frucona that the Commission had failed to demonstrate that the bankruptcy procedure was more advantageous than the 65% write-off arrangement, *i.e.*, (1) that the likely proceeds from a sale of its assets in the context of bankruptcy would have been higher, and (2) that the duration of the bankruptcy procedure was of no significant influence, so that a private creditor would have opted for the bankruptcy procedure. The General Court also analyzed whether the Commission had made a manifest error of assessment in concluding that the tax execution procedure would have been more advantageous for private creditors (had it been available to them) than the 65% write-off arrangement. The General Court concluded that it did. The General Court noted that, with regard to the tax execution procedure, the Commission merely "assumed that it would be conducted in a speedy manner," thereby not taking into account the duration of such a procedure. It concluded that the Commission did not have in its possession material evidence enabling it to claim that a private creditor would manifestly have opted for the tax execution procedure instead of the 65% write-off arrangement.

For those reasons, the General Court annulled the contested decision. The Commission appealed the General Court's judgment to the Court of Justice; the case is pending.[43]

Commission Decisions

Commission Concludes that Belgian "Excess Profit" Tax Scheme is Illegal

On January 11, 2016, the Commission decided that the Belgian "excess profit" tax scheme constituted unlawful state aid.

The Commission has been investigating national tax ruling practices in general since June 2013. On October 21, 2015, two decisions found certain tax rulings in the Netherlands (Starbucks) and Luxembourg (Fiat Finance and Trade) to be unlawful. Three other investigations in relation to Ireland (Apple) and Luxembourg (Amazon and McDonald's) are still ongoing. The Commission's investigation into the Belgian "excess profit" tax scheme was opened in February 2015.

Under national fiscal rules, companies are taxed based on the total profit generated from their activities in Belgium. However, since 2005, and according to Article 185§2 (b) of the Belgium tax Code, multinational companies could reduce their tax base for alleged "excess profit" if they had obtained prior confirmation of such a deduction through a tax ruling.[44] In applying the "excess profit" scheme, the tax base of the multinationals benefiting from a tax ruling was not their actual recorded profit but a hypothetical and much lower average that a similarly situated stand-alone company would be expected to obtain.

The Commission found that the scheme was giving a preferential and selective subsidy to the 35 multinationals that obtained the tax ruling because it deviated from "normal practice under Belgian company tax rules." These multinationals had obtained tax discounts ranging from 50% to 90% of their actual recorded profits, while their stand-alone competitors paid taxes on their total actual profits in accordance with Belgian tax rules.

Moreover, the Commission found that, regardless of the circumstances above, the "excess profit" exemption gives a preferential and selective subsidy as it constitutes a derogation from the Belgium's reference system because the scheme's rationale and methodology contravene the arm's length principle. The Commission argued that this principle requires that any excess profits reflect economic reality and be taxed where they arise. However, according to the Commission, since the scheme does not require any proof of past or present double taxation, it cannot be said to be seeking to avoid double taxation, but is rather unilaterally creating a double non-taxation situation in favor of the companies that benefited from its application.

[43] *Commission v. Frucona Košice* (Case C-300/16 P), pending.

[44] *Code des Impôts sur les Revenus / Wetboek Inkomstenbelastingen.*

Consequently, the Commission found that the scheme breached Article 107(1) of the Treaty on the Functioning of the European Union and ordered Belgium to cease applying the "excess profit" scheme. Interestingly, unlike other recent decisions which focused on individual tax rulings, this annuls an entire scheme. Although this is not the first time that the Commission has torn down sections of a tax regime, taking a broad approach in examining schemes rather than individual tax rulings represents a scaling up of the Commission's attempts to tackle tax avoidance through the enforcement of state-aid rules.

To restore fair competition and to remove the unfair advantage the beneficiaries of the scheme have enjoyed, the Commission ordered Belgium to recover the full unpaid tax, which the Commission estimated to amount to around €700 million.

Belgium appealed the decision and the issue will be reviewed by the General Court.

FINING POLICY

ECJ Judgments

Toshiba Corporation v. Commission **(Case C-373/14 P)**

On January 20, 2016, the Court of Justice dismissed an appeal by Toshiba Corporation ("Toshiba") challenging the General Court's dismissal of its action against the Commission's decision in the power transformers cartel.[45] In 2009, the Commission found that Toshiba, together with six other companies, took part in a power transformers cartel in violation of Article 101(1) TFEU. The Commission's decision was based on inspections in the power transformers sector in February 2007, and took into account Siemens's application for leniency. Toshiba was fined € 13.2 million.

In proceedings before the General Court, Toshiba appealed to the General Court, seeking to annul the decision, or, in the alternative, to reduce the fine imposed. The General Court dismissed the action and Toshiba appealed to the Court of Justice.

Toshiba argued that the General Court had erred in law in when considering an oral market sharing agreement ("*gentlemen's agreement*") reached between the cartel participants as a 'restriction by object.' According to Toshiba, the Japanese and European producers that were party to the alleged gentlemen's agreement were not potential competitors. The Court of Justice disagreed, pointing out that cartel participant Hitachi accepted projects coming from customers in Europe, thereby demonstrating that barriers to entry in the European market were not insurmountable. Moreover, the very existence of the gentlemen's agreement indicated that the Japanese and European producers were potential competitors.

Toshiba claimed that it had distanced itself from the cartel during a meeting in Vienna, and was absent from a subsequent meeting in Zurich. The Court of Justice explained that the concept of 'publicly distancing' oneself from a cartel—which is a way in which a cartel participant can avoid liability—is fact-specific. It is critical that the other cartel participants are aware of the undertaking's intention to end its participation in the cartel. According to the General Court, this requires an overall assessment of "*a number of coincidences and indicia.*" The Court of Justice recalled that it only reviews points of law. Unless there is a clear distortion in the evidence used by the General Court to assess whether a company has distanced itself from a cartel, the Court of Justice is not in a position to replace the General Court's assessment.

Relying on the principle of personal responsibility, Toshiba claimed that it was unlawfully held responsible for participating during the last period of the cartel. Toshiba claimed that the General Court had failed to address whether it participated in the last meeting in Zurich. However, the Court of Justice pointed out that Toshiba had not publicly distanced itself from the cartel during the meeting in Vienna, nor did it provide evidence that it did not take part in the meeting in Zurich. Thus, the General Court did not err in law when it concluded that Toshiba's participation in the cartel continued until the Zurich meeting.

In determining Toshiba's fine, the Commission took into account Toshiba's worldwide market shares, despite the fact that the cartel related only to the EEA and Japan. According to Toshiba, this approach contradicted the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (the "Fining Guidelines"),[46] that specify that the relevant geographic market—in this case, the EEA and Japan—has to be taken into account. The Court of Justice pointed out that the Fining Guidelines pursue the objective of "*reflecting in the most appropriate way possible the weight and economic power of the undertaking at issue in the infringement, in order to ensure that the fine has sufficient deterrent*

[45] *Toshiba Corporation v. Commission*, Case C-373/14 P ECLI:EU:C:2016:26.

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

effect."[47] Taking only turnover generated in the EEA and Japan into account would run counter to that objective because (i) in line with the gentlemen's agreement, Toshiba had no sales in the EEA; and (ii) all cartel participants were active worldwide. Limiting the relevant geographic area to the EEA and Japan would therefore not have appropriately reflected the weight of the undertaking in the cartel and would not have ensured the deterrent effect of the fine.

Consequently, the Court of Justice rejected all grounds of Toshiba's appeal.

***Galp Energía España SA, Petróleos de Portugal (Petrogal) SA and Galp Energía SGPS SA* (Case C-603/13 P)**

On January 21, 2016, the Court of Justice upheld an appeal against a General Court judgment[48] on the Commission's decision finding a cartel in the Spanish bitumen market.[49]

In 2007, the Commission found that 13 companies had participated in a series of agreements and concerted practices[50] in the form of market sharing and price coordination in the Spanish market for penetration bitumen. The Commission established that Galp Energía España SA, a subsidiary of Petróleos de Portugal,[51] was one of the members of the cartel. There is a presumption that a parent company actually exercises decisive influence over its wholly-owned subsidiary. Given the shareholding relationship between Galp Energía España SA, Petróleos de Portugal, and Galp Energía SGPS (together, "Galp"), the Commission took the view that the three companies constituted a single undertaking for the purposes of the application of Article 101 TFEU.[52] As a result, Galp was fined approximately €8.6 million.

On appeal, the General Court found that the Commission had failed to establish Galp's participation in the cartel monitoring system and compensation mechanism. Nevertheless, it found that Galp was liable for these two aspects of the cartel, based on a statement of a former bitumen sales director of Galp. The General Court held that there was no need to vary the starting amount of the fine, but reduced the fine to approximately €8.2 million based on certain attenuating circumstances and dismissed Galp's appeal in all other respects.

Galp appealed to the Court of Justice. Among others, Galp alleged that the General Court had failed to adjudicate within a reasonable time, because the proceedings lasted for almost five years and nine months, including a period of four years and one month between the end of the written procedure and the hearing, which elapsed without any procedural act. The Court of Justice determined that a claim for compensation for damages caused by the General Court's failure to adjudicate within a reasonable time should not be made to the Court of Justice in the context of an appeal, but rather must be brought directly before the General Court.

Finally, Galp alleged that the General Court had exceeded its jurisdiction to review decisions imposing fines, as it found that the appellants were liable with respect to two elements of the infringement of Article 101 TFEU, namely the knowledge of the compensation mechanism and the foreseeability of the monitoring system. The Court of Justice reiterated that, when exercising their unlimited jurisdiction,[53] the EU Courts are empowered to substitute

[47] *Toshiba Corporation v. Commission*, Case C-373/14 P ECLI:EU:C:2016:26, para. 86.

[48] *Galp Energía España, SA, Petróleos de Portugal (Petrogal) et Galp Energia, SGPS, SA v. Commission* (T-462/07) EU:T:2013:459.

[49] *Galp Energía España SA, Petróleos de Portugal (Petrogal) SA and Galp Energía SGPS SA v. Commission* (Case C-603/13 P) EU:C:2016:38.

[50] *Bitumen Spain* (COMP/38710), Commission Decision of October 10, 2007.

[51] Penetration bitumen is a type of bitumen which has not been processed and is used for the construction and maintenance of roads.

[52] From 1990 to 2003, 89% of the shares of Galp Energía España were held by Petróleos de Portugal while 10% by an insurance company which was controlled by Petróleos de Portugal. Since 2003, Galp Energía España has been a wholly-owned subsidiary of Petróleos de Portugal, which has been a wholly-owned subsidiary of Galp Energía SGPS since 1999.

[53] Pursuant Article 261 TFEU and Article 31 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the

their own assessment in relation to the determination of the amount of that penalty for that of the Commission, which adopted the measure in which that amount was initially fixed. The unlimited jurisdiction enjoyed by the Courts concerns only the assessment of the fine imposed by the Commission, and does not allow them to alter the constituent elements of the infringement determined by the Commission.

The Court of Justice concluded that the General Court had erred in law by establishing the appellants' liability for the compensation mechanism and for the foreseeability of the monitoring system. As a result, the Court of Justice set aside the General Court's judgment insofar as it fixed a new amount of the fine imposed on Galp. In addition, in the exercise of its unlimited jurisdiction, it further reduced the basic amount of the fine due to the lack of evidence of Galp's participation in the compensation mechanism and the monitoring system. Ultimately, the total fine imposed to Galp amounted to approximately €7.7 million.

rules on competition laid down in Articles [101 TFEU] and [102 TFEU], OJ 2003 L1, p.1.

POLICY AND PROCEDURE

ECJ Judgments

DHL Express (Italy) and DHL Global Forwarding (Italy) **(Case C-428/14)**

On January 20, 2016, the Court of Justice ruled on a preliminary reference from an Italian court regarding the relationship between leniency applications made under the Commission's leniency notice and summary applications made to National Competition Authorities ("NCAs") in relation to the same cartel.[54]

On June 5, 2007, DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA (together, "DHL") submitted an immunity application regarding their participation in an international freight forwarding cartel in the sea, air, and road transport sectors. The Commission granted DHL full immunity for the entire freight forwarding sector, but decided to prosecute only the infringement concerning freight forwarding by air – thereby leaving open the possibility for the ICA to prosecute the cartel in relation to road transport. On July 12, 2007, DHL submitted a summary application for immunity to the Italian Competition Authority (the "ICA") in relation to the same cartel. In November 2007, Deutsche Bahn AG (acting for itself and on behalf of its subsidiary, Schenker) submitted a leniency application to the Commission, with Schenker filing a summary application to the ICA in December 2007. The ICA determined the existence of a cartel concerning international freight forwarding on the road to and from Italy. However, it held that DHL's initial summary application did not include information concerning freight forwarding on the road; such information having only been provided in DHL's additional summary application dated June 23, 2008. Therefore, the ICA only awarded DHL a fine reduction, granting Schenker immunity because it was deemed the first to admit the existence of a freight forwarding cartel on the road.

To assess the ICA's approach, on September 18, 2014 the Italian Consiglio di Stato (the "Council of State") referred the following questions to the Court of Justice: (1) whether the European Competition Network model leniency program (the "ECN program") is binding on NCAs; (2) whether a legal link exists between a leniency application filed with the Commission and a summary application submitted to an NCA concerning the same cartel; and (3) whether an undertaking that received a reduction (but no immunity) in fines from the Commission can submit a summary application to an NCA. Advocate General Wathelet delivered his opinion on these issues on September 10, 2015.[55]

The Court of Justice found that there is no centralized system for the receipt and assessment of leniency applications at EU level. As a consequence, the treatment of such applications received by an NCA is determined by that authority under the national law of the Member State in question. The Court of Justice also pointed out that the ECN has no power to adopt legally binding rules, demonstrated by the fact that the ECN program was published in the C series of the Official Journal, dedicated to information and notices, and not in the L series, which covers legislation. The Court of Justice had previously ruled that the ECN was not binding on member states' courts and tribunals however in this judgment it went one step further and addressed its effect as regards to NCAs.[56] The Court of Justice pointed out that, because Member States may designate courts as NCAs, the uniform application of EU law would be undermined if the binding effect of the ECN program were dependent on the judicial or administrative nature of the NCAs of the various Member States.[57]

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[54] *DHL Express (Italy) and DHL Global Forwarding (Italy)* (Case C-428/14) EU:C:2016:27.

[55] *DHL Express (Italy) and DHL Global Forwarding (Italy)* (Case C-428/14), opinion of Advocate General Wathelet, EU:C:2015:587. *See also* CGSH, EU Competition Quarterly Report, July – September 2015.

[56] *Pfleiderer* (Case C-360/09) EU:C:2011:389; and Kone and Others (Case C-557/12) EU:C:2014:1317.

[57] *DHL Express (Italy) and DHL Global Forwarding (Italy)* (Case C-428/14) EU:C:2016:27, para. 41.

Likewise, the Court of Justice denied the existence of a legal link between a leniency application submitted to the Commission and a summary application submitted to an NCA for the same cartel. The Court of Justice noted the first paragraph of the ECN program, which acknowledges that an application for leniency to one authority is not to be considered an application for leniency to another. The Commission's Notice on cooperation within the Network of Competition law[58] contains similar language. The Court of Justice emphasized the autonomous nature of leniency programs. Accordingly, a legal link between a leniency application before the Commission and a summary application before NCAs would call into question the autonomy of the various leniency applications and, consequently, the rationale behind the system of summary applications.

The Court of Justice concluded that the possibility of submitting a summary application to an NCA after filing a leniency application with the Commission is not only open to those undertakings that are granted immunity, but also to undertakings that receive a reduction in fines from the Commission. The Court of Justice determined that allowing undertakings who receive reduced fines from the Commission to submit a summary application to NCAs supports the objective of the program—to increase the effective application of Article 101 TFEU—and does not limit the number of leniency applications.

***HeildelbergCement v. Commission* (Case C-247/14 P), *Schwenk Zement v. Commission* (Case C-248/14 P), *Buzzi Unicem v. Commission* (Case C-267/14 P), and *Italmobiliare v. Commission* (Case C-268/14 P)**

On March 10, 2016, the Court of Justice ruled on four appeals by cement manufacturers HeidelbergCement AG, Buzzi Unicem SpA, Schwenk Zement KG and Italmobiliare SpA against General Court judgments that dismissed their challenges to a Commission decision to request information as part of an Article 101 TFEU investigation. The Court of Justice held that an excessively succinct, vague, and generic statement of reasons does not comply with the obligation to state reasons laid down in Article 18(3) of Regulation 1/2003 such as to justify a request for information ("RFI").[59] It found that the General Court had erred in law in finding that the decision at issue contained an adequate statement of reasons. Here, the RFI occurred more than two years after the Commission's initial inspections and several RFIs to the companies, and several months after its decision to initiate proceedings. The Court of Justice thus found that the Commission adopted the contested decision when it already had information that would have allowed it to state the reasons for its RFI more precisely than it did.

In November 2008 and September 2009, the Commission conducted inspections at the companies' premises and then sent RFIs under Article 18(2) of Regulation 1/2003.[60] On December 6, 2010, the Commission initiated a procedure for alleged infringements of Article 101 TFEU including market-sharing, price coordination and related anticompetitive practices. On March 30, 2011, the Commission adopted the decision at issue, requiring the appellants to answer a 94-page questionnaire within 12 weeks. The four cement manufacturers brought actions for annulment before the General Court, arguing that the Commission had not adequately explained the alleged infringements and imposed on them a disproportionate

[58] See Commission Notice on cooperation within the Network of Competition law, (2004/C 101/03) of April 27, 2004 ("Cooperation Notice"), point 38.

[59] 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 L 1/1, Article 18(3) ("Where the Commission requires undertakings and associations of undertakings to supply information by decision, it shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided. It shall also indicate the penalties provided for in Article 23 and indicate or impose the penalties provided for in Article 24. It shall further indicate the right to have the decision reviewed by the Court of Justice.")

[60] 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 L 1/1, Article 18(2) ("When sending a simple request for information to an undertaking or association of undertakings, the Commission shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which the information is to be provided, and the penalties provided for in Article 23 for supplying incorrect or misleading information.")

burden, given the time frame and the volume of information requested. By judgments of March 14, 2014, the General Court confirmed the lawfulness of the Commission's RFI. The companies then appealed to the Court of Justice to set aside the General Court judgments and Commission decisions.

Under Article 18(3) of Regulation 1/2003, the Commission's statement of reasons for an RFI must "state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided."[61] The Commission may only request information (1) likely to enable it to investigate the presumed infringements justifying its investigation, and (2) set out in the RFI. It must precisely indicate the purpose for the RFI, because this is how the Court will assess the necessity of the information requested. Additionally, the adequacy of the statement of reasons depends on how clearly the Commission defines the alleged infringements.

The Court of Justice assessed whether the statement of reasons relating to the decision at issue complies with Article 296 TFEU in light not only of its wording, but also of the decision's context, including the Commission's decision to initiate proceedings.[62]

First, with regard to the wording of the RFI, the questionnaire referred to numerous matters, covering very different types of extremely sensitive and detailed information on a considerable number of domestic and international transactions concerning 12 Member States over a period of 10 years. Given the RFI's considerable length, the Court of Justice found the statement of reasons to be excessively brief, vague, and generic.[63] The statement of reasons referred to the Commission's investigation in presumed anticompetitive conduct in the cement and cement-related products in the EU, including market sharing, price coordination practices as well as other anticompetitive practices. It also stated that the Commission needed the information in order "to assess the compatibility of the practices under investigation with EU competition rules by having full knowledge of the facts and their exact economic context."[64]

Second, the Court of Justice concluded that the statement of reasons for the decision to initiate proceedings did not offset the brevity or the vague and generic nature of the statement of reasons of the RFI. It considered the description of both the presumed infringement and the relevant products to be particularly s and unclear, and that the statement of reasons for the RFI, when read in conjunction with the decision to initiate proceedings, was ambiguous as to the alleged infringement's geographical scope.[65] The Court of Justice's ruling therefore sends a signal to the Commission that its RFIs should rely on detailed justifications, and not merely on a vague and generic description of the suspected infringement.

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61 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 L 1/1, Article 18(3) aforementioned.

62 Article 296 TFEU ("Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality. Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties. When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.")

63 The first two recitals of the decision at issue read as follows: "1. The Commission is currently investigating alleged anti-competitive conduct in the cement, cement products and other materials used in the production of cement and of cement-based products industries ... in the EU/EEA. 2… The alleged infringements relate to restrictions on trade in the EEA, in particular restrictions on imports into the EEA from countries outside of the EEA, market-sharing and price-coordination practices as well as other anti-competitive practices relating thereto in the cement and related products markets. If their existence were to be confirmed, those acts could constitute an infringement of Article 101 TFEU and/or Article 53 of the EEA Agreement."

64 Recital 6 of the decision at issue states that "additional information also required in order to assess the compatibility of the practices under investigation with EU competition rules by having full knowledge of the facts and their exact economic context is sought" in the questionnaire.

65 According to the decision at issue, the alleged infringement extends to the territory of the EU or of the EEA. The decision to initiate proceedings, adopted three month earlier, refers "in particular" to 10 EU Member States.

Commission Opinion

Sainsbury's Supermarkets Ltd v. MasterCard Incorporated **(Claim No HC 20122-000063) October 29, 2015**

On October 29, 2015, the Commission published an opinion to the English High Court, requesting that the latter reconsider its order to disclose documents obtained through access to file, in the context of a damages action brought against MasterCard Incorporated ("MasterCard") by Sainsbury's Supermarkets ("Sainsbury").

On October 7, 2015, MasterCard informed the English High Court that, as a result of the access to the Commission's investigative file in an antitrust case,[66] it had been provided access to surveys carried out by Deloitte, EIM, and Moore Stephens. MasterCard considered that some of these documents were relevant to the issues in the damages litigation between them and Sainsbury, and asked the English High Court whether they should be disclosed. The English High Court requested the Commission's non-binding views,[67] and ordered the disclosure of these documents, subject to appropriate protection of confidential information and to receiving the Commission's opinion.

The Commission held that a number of EU law rules protect against disclosure and use of evidence specifically prepared for the Commission's proceedings, as long as those proceedings are ongoing.[68] On the specific question raised by the English High Court, the Commission found that (1) the documents at issue were prepared for the Commission's investigation in cases still pending before the Commission, and that (2) in principle, concern for the harm that disclosure may cause to the effective enforcement of the EU competition rules should prevail over the interests that the claimants have in disclosure of the documents. For that reason, it requested the English High Court to reconsider its order.

The Commission noted that, according to case law,[69] where, pursuant to national disclosure rules, parties to proceedings before a national court are ordered to disclose documents that originate from the Commission or were obtained through access to file, the national court must provide appropriate protection of business secrets or other confidential information that belong to legal or natural persons. The Commission noted further that non-confidential versions created for disclosure to MasterCard during the Commission's investigation were non-confidential only vis-à-vis MasterCard, and that third parties who provided the information might object to sharing that information with Sainsbury.

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[66] *Mastercard II* (Case AT.40049).

[67] Article 15 of 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 L 1, 4.1.2003.

[68] According to Articles 16a(1) and 16a(3) of Regulation (EC) No 773/2004 of April 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, information that was specifically prepared for proceedings of the Commission shall not be used by parties in proceedings before national courts until the Commission has closed the proceedings. See also Article 6(5) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, which provides that disclosure of certain evidence, including information specifically for the proceedings of a competition authority or sent to the parties in the course of the proceedings, can only be ordered after a competition authority has closed its proceedings.

[69] *Postbank v. Commission* (Case T-353/94) EU:T:1996:119, paras. 86-87.

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