Horizontal Agreements

ECJ Judgments

Evonik Degussa GmbH and AlzChem AG v. Commission (Case C-155/14P)

On June 16, 2016, the Court of Justice dismissed an appeal by Evonik Degussa GmbH ("Degussa") and AlzChem AG ("Alzchem") against the General Court's judgment of January 23, 2014, partially rejecting the appellants' appeal against a Commission decision concerning the calcium and magnesium reagents cartels.

On July 22, 2009, the Commission imposed fines totaling EUR 61 million on Degussa and AlzChem, among others, for infringing Article 101 TFEU by participating in a price-fixing and market-sharing cartel for calcium powder, calcium carbide granulates, and magnesium granulates through measures adopted by members of the staff of both Degussa and AlzChem's subsidiary SKW Stahl – Technik GmbH & Co. KG ("SKW").

On appeal, the General Court, while largely upholding the Commission's decision, reduced the fines imposed on Degussa and AlzChem, finding that the Commission erred in its application of the Leniency Notice and in the calculation of the multiplier applied to the basic fine amount to reflect the duration of their participation in the infringement.

Degussa and AlzChem based their appeal to the Court of Justice on five grounds.

The appellants principally argued that the General Court had erred in attributing to them the conduct of SKW, thus breaching the principles of personal responsibility, presumption of innocence and the fault principle, and ultimately making the rebuttal of the presumption of decisive influence subject to overly strict requirements.

The appellants claimed that SKW had acted against their instructions and that this should count as a rebuttal of the presumption of decisive influence, adding that: (i) SKW's director at the time had admitted that the director of AlzChem was unable to ensure compliance with these instructions; (ii) a presumption of liability requires the actual exercise (and not just the possibility) of decisive influence, which the General Court had not shown; and (iii) the General Court distorted the evidence by concluding that influence existed merely because of a reporting obligation from SKW to AlzChem.

The Court of Justice held that the appeal was inadmissible insofar as the appellants contested the General Court's assessment of the factual evidence, as it is for the General Court alone to "*assess the value which should be attached to the evidence produced to it*."

As to the substance, the Court of Justice held that a parent company's control over its subsidiary raises a presumption of responsibility, which the parent company must rebut.

The Court of Justice repeated its settled case law that responsibility for a subsidiary's infringement may be imputed where the subsidiary does not independently decide its own conduct and where the parent and subsidiary form the same economic unit. Similarly, a rebuttable presumption that the parent actually exercises decisive influence over a subsidiary arises where a parent company holds, directly or indirectly, all or almost all of its share capital. The Court of Justice added that it is not necessary for a subsidiary to comply with all of the parent company's instructions to demonstrate decisive influence. A refusal to comply would only rebut the presumption if the failure to carry out the parent's instructions is the norm. The Court of Justice concluded that the appellants failed to demonstrate this. All other grounds of appeal were also dismissed.

General Court Judgments

RENV – Groupement des Cartes Bancaires v Commission (Case T-491/07)

On June 30, 2016, the General Court handed down its second judgment on the appeal by Groupement des Cartes Bancaires ("GCB") against the Commission's finding of a breach of Article 101 TFEU.[1] GCB is a French economic interest group, consisting of 148 banking institutions, which was set up to manage a system for bank card withdrawals and payments. On October 17, 2007, the Commission had found that GCB's adoption of specific fees for card issuers constituted a restriction of competition by object and by effect, because these fees were applied in a way that effectively hindered the issuance of cards by new members of GCB at a lower price than that of large banks.[2] GCB appealed to the General Court, which upheld the Commission's decision.[3]

On further appeal, the Court of Justice upheld GCB's claim that the General Court had erred in its assessment of whether the measures constituted a restriction by object in light of their content, objectives, and context.[4] It found that the General Court had failed to analyze the economic and legal context of the measures, and referred the case back to the General Court, to determine whether the measures in question had the effect of restricting competition.

In its second judgment, the General Court first considered whether the Commission had breached the principle of equal treatment in its analysis of the measures and the markets. It examined whether the Commission had taken into account the actual context in which the relevant measures took place, the analysis of the state of competition in the market for payment systems absent GCB's tariffs, and the determination of the geographic market.

The General Court dismissed GCB's arguments on these points. In particular, it found that, in defining a market for card payment systems, the Commission did not breach the principle of equal treatment by taking a different approach from the *Visa* cases, in which it had to examine the interdependencies between acquiring and issuing activities. In GCB's case, the Commission had to assess the competitive situation between the members of GCB on the issuing market, which warranted a different approach. According to the General Court, the Commission also rightly found that, without the measures at issue, the card payment systems would have allowed more cards to be issued at competitive prices, without jeopardizing the survival of the system.

Further, GCB claimed that the Commission had committed various errors of law, fact, and assessment in its analysis of the effects of the measures at issue. In particular, GCB argued that the Commission should have taken into account the benefits received by new entrants in exchange for the fees imposed on them. But the General Court dismissed GCB's arguments noting, *inter alia*, that the fees, which created anticompetitive effects, were separate from the GCB membership fees.

The General Court rejected GCB's further arguments based on a breach of Article 101(3) TFEU and of the principle of sound administration. GCB's claim that the measures were necessary to prevent free riding were rejected, because GCB failed to provide valid proof of the existence of such free riding. Further, the General Court found that GCB had provided no evidence to show that clerical errors made in the decision were sufficient to change the Commission's conclusion.

Finally, GCB argued that the Commission's decision, which required GCB to refrain from adopting any measure or behavior in the future that would have an

[1] *Groupement des Cartes Bancaires v Commission* (Case T-491/07) ECLI:EU:T:2016:379.

[2] *Groupement des Cartes Bancaires* (Case COMP/38.606), Commission decision of October 17, 2007.

[3] *Groupement des Cartes Bancaires v Commission* (Case T-491/07) ECLI:EU:T:2012:633. Previously reported in EU Competition Report Q4 2012.

[4] *Groupement des Cartes Bancaires v Commission* (Case C-67/13P) ECLI:EU:C:2014:2204. Previously reported in EU Competition Report Q3 2014.

identical or similar object or effect to the prohibited behavior under the Commission's decision, was disproportionate. The General Court upheld part of this ground of appeal on the grounds that the injunction not to adopt any measures with "*an identical or similar object*" could not be maintained because the Court of Justice had already considered GCB's measures not to be anticompetitive by object.

Commission Decisions

Paramount Commitments on Cross-Border Pay-TV Services (Case AT.40023)

On July 26, 2016, the Commission accepted the commitments offered by Paramount Pictures International Limited ("Paramount") in its investigation into the provisions found in the licensing agreements between pay-TV service providers.[5]

On July 23, 2015, the Commission issued a Statement of Objections to six major US film studios (Disney, NBCUniversal, Paramount Pictures, Sony, Twentieth Century Fox, and Warner Bros.), in which it took the preliminary view that each of the addressees had entered into bilateral agreements with Sky UK ("Sky") that restricted trade between Member States through the grant of absolute territorial exclusivity.[6] The Commission found, in particular, that the licensing agreements between Paramount and Sky: (i) prohibited or limited Sky from making its retail pay-TV services available in response to unsolicited requests from consumers residing or located in the EEA but outside the U.K. and Ireland ("Broadcaster Obligation"); and/or (ii) required Paramount to prohibit or limit broadcasters located within the EEA but outside the U.K. and Ireland from making their retail pay-TV services available in response to unsolicited requests from consumers residing or located in the U.K. and Ireland ("Paramount Obligation"). These clauses were held to have the object of restricting competition within the meaning of Article 101(1) TFEU, without any economic or legal circumstances justifying a finding that such clauses would not impair competition or be an exemption under Article 101(3) TFEU.

In response, Paramount offered four commitments, applicable for a period of five years in the EEA, in order to address the Commission's concerns: (i) when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re)introduce contractual obligations, which prevent or limit a broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the broadcaster's licensed territory (*i.e.*, no Broadcaster Obligation); (ii) when licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re)introduce contractual obligations, which require it to prohibit or limit broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory (*i.e.*, no Paramount Obligation); (iii) Paramount would not seek to bring an action before a court or tribunal for the violation of a Broadcaster Obligation in an existing licensing agreement; and (iv) Paramount would not act upon or enforce a Paramount Obligation in an existing licensing agreement.

These commitments arise in the context of the Commission's on-going Digital Single Market efforts and e-commerce sector inquiry, through which it seeks to ensure that users who buy online content can access it throughout the Member States. Paramount's commitments provide additional guidance as to the acceptable minimum standard. However, there remains uncertainty as to the feasibility of such commitments because broadcasters must currently abide by national copyright regimes which may prevent them from allowing copyrighted content portability.

5 Commission Press Release IP/16/2645, "Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV service", July 26, 2016.

6 Commission Press Release IP/15/5432, "Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland", July 23, 2015.

Fining Policy

ECJ – Advocate General Opinions

Pilkington Group Ltd and Others v Commission (Case C-101/15 P), Opinion of Advocate General Kokott

On April 14, 2016, Advocate General Kokott advised the Court of Justice to dismiss the appeal brought by Pilkington Group ("Pilkington") against the Commission's decision in the car glass cartel. On November 12, 2008, the Commission had fined four companies a total of EUR 1.4 billion for participating in a market-sharing cartel in the glass sector.[7] Pilkington received a fine of EUR 357 million. It appealed unsuccessfully to the General Court,[8] and subsequently appealed to the Court of Justice.

First, Pilkington claimed that the General Court had erred in its interpretation of the Commission's 2006 Fining Guidelines by holding that the Commission was entitled to take account of sales made pursuant to contracts pre-dating the infringement periods—and not re-negotiated during that period—when calculating the relevant value of sales to determine the basic amount of the fine.

In her opinion, Advocate General Kokott rejected this argument, noting that point 13 of the Fining Guidelines encompasses "*all goods or services supplied by the relevant cartel member to which the infringement* … directly or indirectly relates … *in the relevant geographic area*".[9] The above sales indicated the economic importance of the cartel on the relevant market, as well as Pilkington's relative weight in the cartel, and should therefore be taken into account in calculating the fine.

Second, Pilkington argued that the amount of fine exceeded the statutory 10% cap outlined by Article 23(2) of Regulation 1/2003, and that the appropriate exchange rate to calculate the 10% cap should have been the ECB average exchange rate applicable on the date the decision was issued. Advocate General Kokott disagreed, explaining that the appropriate exchange rate, as determined by the General Court, should be the average exchange rate during the last financial year preceding the adoption of the decision imposing the fine. In particular, she noted that currency fluctuations can yield both advantages and disadvantages, so that currency fluctuations alone could not render inappropriate a fine that is lawfully fixed.

Third, Pilkington claimed that the General Court erred in its application of the rules on equal treatment and proportionality. It further alleged that the General Court had failed to exercise its unlimited jurisdiction correctly.

Advocate General Kokott advised the Court of Justice to dismiss these claims, noting that a fine which represents a significant financial burden for the relevant undertaking did not mean in any way that the fine is disproportionately high. Further, she recalled that the General Court's exercise of its unlimited jurisdiction could only be reviewed by the Court of Justice in case of "*manifest error*".[10] Under Article 261 TFEU, the General Court is entitled to substitute its own decision to that of the Commission regarding the amount of a fine, including cancelling, reducing, or increasing its amount. Thus, the General Court did not err in the exercise of its unlimited jurisdiction.

General Court Judgments

Portugal Telecom SGPS v. Commission (Case T-208/13)

On June 28, 2016, the General Court rejected Portugal Telecom SGPS's ("PT") request to annul the

7 *Carglass* (Case COMP/39.125), Commission decision of November 12, 2008.

8 *Pilkington and Others v Commission* (Case T-72/09) ECLI:EU:T:2014:1094.

9 *Pilkington and Others v Commission* (Case C-101/15 P) ECLI:EU:C:2016:258, opinion of Advocate General Kokott, para.30.

10 *Pilkington and Others v Commission* (Case C-101/15 P) ECLI:EU:C:2016:258, opinion of Advocate General Kokott, para.112.

Commission's decision of January 23, 2013,[11] but ordered the Commission to adjust the EUR 12.3 million fine imposed on PT.

In 2010, PT and Telefónica SA ("Telefónica") concluded a stock purchase agreement ("SPA") which gave Telefónica sole control over the Brazilian mobile operator Vivo Participações SA ("Vivo"), which was previously jointly owned by the parties. The SPA contained a non-compete clause stipulating that, to the extent permitted by law, neither PT nor Telefónica could directly or indirectly invest in any projects that would compete with the other party on the Iberian market. In 2013, the Commission adopted a decision classifying the clause in question as a market sharing agreement, in breach of Article 101 TFEU.

PT appealed the decision arguing that the clause related to the agreed stock purchase option or to the resignation of members of PT's board of directors, which were elected by Telefónica at the time that Vivo was a joint venture of both parties. The General Court explained that a non-compete clause can be an ancillary restraint to the main transaction when: (i) the restriction is objectively necessary for the implementation of the main transaction; and (ii) it is proportionate to it. The General Court then found that PT had failed to explain how the non-compete clause was an ancillary restraint to either the purchase option or to the resignation of several board members.

In addition, PT argued that, due to the phrase "*to the extent permitted by law*" in the non-compete clause, the clause could not be contrary to EU competition law. Rather than restricting competition, the clause imposed an obligation upon the parties to assess whether it was permitted by law to refrain from competing with the other party. However, the General Court rejected this argument pointing out that the wording of the clause was unclear as to whether such an assessment was a pre-requisite for its application.

Furthermore, PT argued that PT and Telefónica could not be regarded as potential competitors due to legislative entry barriers and expansion barriers in the Portuguese market for electronic communications, and the barriers that are inherent to the market's structure and the characteristics and peculiarities of the markets concerned. As a consequence, the Commission was not in a position to assess whether, given the structure of the relevant markets and the economic and legal context, real concrete possibilities existed for PT and Telefónica to compete on the markets allegedly envisaged by the non-compete clause. The General Court disagreed and pointed out that no detailed analysis of potential competition in each specific market is required. The General Court also emphasized that the Commission identified in its decision three adequate reasons which justified leaving a detailed market analysis aside, namely: (i) the existence of the clause indicated that the parties considered themselves to be potential competitors; (ii) the clause had a very wide scope, covering both electronic communications and television services; and (iii) the validity of the clause needed to be assessed in light of the EU's liberalisation efforts in the field of electronic communications, which encourages competition among operators.

As a last resort, PT challenged the Commission's fine calculation and claimed that the Commission wrongly took into account all services offered by PT as opposed to only the services offered on the Iberian market for which PT and Telefónica were potential competitors. The Commission stated that the scope of the clause was so wide that it justified taking all services into account without checking whether potential competition existed between PT and Telefónica. The General Court agreed with PT on this point, holding that the Commission was not obliged to investigate the likelihood of potential competition for every service in order to establish the existence of a breach of competition law, but had to do so in connection with the fine calculation. The Commission erred in including sales of services that were not related to the breach. In particular, the General Court recalled that

11 *Telefónica and Portugal Telecom* (Case COMP/39.839), Commission decision of January 23, 2013.

by issuing the Fining Guidelines,[12] the Commission limited the discretion it has in setting fines. Therefore, it ordered the Commission to recalculate the fine, taking into account only the sales falling within the scope of the non-compete clause.

Mergers And Acquisitions

Commission Decisions

Phase II Decisions With Undertakings

Liberty Global/BASE Belgium (Case COMP/M.7637)

On February 4, 2016, the Commission conditionally approved the proposed acquisition by Telenet NV ("Telenet"), based in Belgium and controlled by Liberty Global Broadband I Limited ("Liberty Global"), of BASE Company NV ("BASE"), also based in Belgium. Telenet is a cable network operator, which specializes in the supply of fixed internet, fixed line telephony, and cable television services. Telenet offers retail mobile telecommunications services as a mobile virtual network operator ("MVNO") through Mobistar's network. BASE is one of the three Belgian mobile network operators ("MNOs")[13] and also offers retail mobile telecommunication services and access to its network to MVNOs.

The Commission analyzed the effects of the transaction on the market for retail mobile telecommunications at a national level.[14] The Commission further considered vertically affected national markets at the wholesale level, namely markets for access to mobile networks; call termination services; international roaming services; leased lines; internet services; and TV services.

The Commission expressed concerns about the impact of the transaction on the Belgian retail mobile telecommunications market. Prior to the transaction, BASE and Telenet were, respectively, the largest MVNO and the largest MNO in Belgium. The Commission noted that the transaction would remove an important independent competitive force from the market. Moreover, the Commission was concerned that the transaction would negatively impact two vertically affected markets in two ways. First, it would reduce BASE's incentives to offer wholesale access to its network to MVNOs other than Telenet. Second, it would increase Telenet's ability to sell its fixed line services to BASE's mobile customers through bundling practices, which could lead to the exclusion of competitors on the wholesale markets for lease lines, internet services, and TV services.

The Commission's Phase II investigation did not support the concerns in relation to wholesale network access conditions for MVNOs or potential bundling practices. It did, however, confirm that BASE and Telenet competed strongly on price in the overall retail mobile market. Respondents noted that BASE competed aggressively on the Belgian retail mobile market, challenging competitors with attractively priced offers, and Telenet was a highly successful MVNO whose mobile offers had contributed in bringing mobile prices down. The Commission therefore concluded that a merger of these two players would significantly reduce competition with the risk of higher prices and less choice and innovation for Belgian mobile consumers.

To address the Commission's concerns, Liberty Global committed to sell BASE's share in Mobile Vikings, an MVNO using BASE's network, to Belgian competing broadcaster Medialaan. Moreover, Liberty Global undertook to transfer part of BASE's customers to Medialaan. BASE and Medialaan have a branded partner agreement under which BASE sells mobile services under the brand JIM Mobile, itself owned by Medialaan; Liberty Global thus committed to transfer BASE's JIM Mobile customers to Medialaan. Finally, Liberty Global also agreed to give Medialaan access to

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

[13] Along with Proximus and Mobistar.

[14] Whilst confirming the existence of a single retail market, the Commission also analysed different sub-segments—on the basis of type of customer, tariff, technology, or service—in order to assess whether negative effects on a segment could have repercussions on the overall market.

BASE's mobile network under conditions that will allow it to compete effectively as a full MVNO.

The Commission was satisfied that these commitments addressed its concerns by ensuring that a new competitive MVNO player would enter the retail mobile market, thereby compensating for the loss of competition resulting from Telenet's disappearance as an independent MVNO.

Phase I Decisions With Undertakings

Honeywell/Elster (Case COMP/M.7737)

On December 21, 2015, the Commission conditionally approved the acquisition of Teaford GmbH ("Teaford"), the holding company of Elster, by Honeywell International Inc. ("Honeywell"). Honeywell is a US-based diversified technology and manufacturing company operating worldwide. Elster is a German manufacturer of gas, electricity and water meters plus related communications, and networking and software solutions.

The Commission assessed the effects of the transaction on the markets for: (i) residential heating products; (ii) industrial heating products; and (iii) metering products for up-/mid-stream gas. With respect to residential heating products, the Commission found that gas valves, electronic boards, and gas control systems constituted distinct product markets. The Commission, however, left open whether these markets could be further segmented into standard efficiency and high efficiency systems. The Commission also left the product market definition open regarding industrial heating products. With respect to gas upstream and midstream products, the Commission concluded that the product market for gas meters should be sub-segmented by application (*i.e.*, fiscal and non-fiscal) and by metering technology (*i.e.*, turbine and ultrasonic). In addition, the Commission defined separate markets for Digitale Schnittstelle für Gasmessgeräte ("DSFG")[15]-compliant gas flow computers, DSFG-compliant electronic volume correctors, and gas stations. The Commission found the geographic scope of all these markets to be at least EEA-wide.

The transaction raised competitive concerns in several upstream and midstream gas metering markets, namely markets for turbine gas meters for fiscal applications and DSFG gas flow computers and gas chromatographs. In these markets, the transaction would reduce the number of significant competitors from three to two, leaving only one significant alternative supplier. Although the increment was low (5–10%), the Commission raised competitive concerns because: (i) the transaction would create a duopoly accounting for 80–90% of the turbine gas meters market; (ii) significant barriers to expansion exist, including the development of an in-house calibration facility; (iii) customers have a limited degree of countervailing buyer power; and (iv) small competitors would not be able to exert a sufficient competitive constraint upon the merged entity.

To address the Commission's concerns, the parties committed to divest Honeywell's activities in turbine gas meters, gas flow computers, gas chromatographs, ultrasonic gas meters, and electronic volume correctors.

Phase I Decisions Without Undertakings

Amadeus/Navitaire (Case COMP/M.7802)

On January 19, 2016, the Commission unconditionally approved the acquisition of sole control of Navitaire LLC ("Navitaire") by Amadeus IT Group S.A ("Amadeus"). Amadeus's main activities are the provision of global distribution system ("GDS") services[16] and internal IT solutions for airlines and airports. Navitaire is a wholly-owned subsidiary of Accenture plc that provides IT solutions mainly to airlines. The parties' activities overlapped in the market for passenger service system ("PSS") solutions, which are used by airlines to internally manage reservation, inventory, and departure control.

[15] The DSFG is a data protocol for gas metering equipment mainly used by customers in German-speaking areas.

[16] GDS is a platform that allows travel agencies to compare information on timetables (schedules), capacity, inventory, availability and prices.

The Commission had not previously considered the field of PSS, and left open whether the PSS solutions belonged to a broader market for software products or IT services. For the purposes of assessing the competitive impact of the transaction, however, the Commission analyzed a product market for PSS solutions. The Commission considered the market for PSS services to be a single but differentiated market, encompassing products with basic functionalities at one end of the spectrum and complex functionalities at the other end. The Commission did not consider that in-house provision of PSS presented an alternative to external PSS providers because, in the event of a price increase, an in-house solution would not be available to airlines using a third party PSS. The Commission defined the geographical scope of the PSS market as worldwide.

The Commission's investigation revealed concerns relating to horizontal overlaps in the supply of PSSs to airlines, and potential conglomerate effects arising from the supply of GDSs and PSSs to airlines.

Competition for PSS. The Commission concluded that, in spite of the high market shares of the parties (40–50% in the full service carriers; 60–70% in the low cost carriers; and 50–60% in the hybrid carriers), the overlaps in the supply of PSS to airlines did not raise concerns:

— *Product differentiation*. As supported by tender bidding data, the parties' offerings were not close competitors and targeted different types of customers: Amadeus's product is a complex PSS with rich functionality; Navitaire's product is a basic, comparatively inexpensive PSS. They compete only in the hybrid segment, which comprises the airlines whose business models fall in between full service and low- cost.

— *Credible competitors*. The Commission considered that there was a multitude of competitors in each market segment able to offer PSS solutions in competition to each of the merging parties.

— *Buyer power*. The Commission considered that airlines, many of which are part of large groups, are able to play PSS supplies off against each other at tenders.

In light of the tendency in the airline sector to converge toward the hybrid model, the Commission assessed whether the transaction would lead to the removal of a significant potential competitor in the hybrid segment. The parties' internal documents demonstrated, however, that this was speculative. The parties had run into significant difficulties in their attempts to appeal to a broader range of customers. The Commission therefore considered it unlikely that they would have become significantly closer competitors in the next two to three years.

The Commission also considered that Amadeus would not have an incentive to downgrade or stop developing Navitaire's low cost PSS because: (i) Amadeus did not have an offering of its own in the low cost segment; and (ii) it would destroy substantial corporate value that it had just acquired.

Tying/Bundling PSS and GDS. The Commission assessed the risk that the merged entity—active in both GDS and PSS—would, post transaction, engage in a bundling/tying strategy to disadvantage its competitors on the PSS market. The Commission dismissed this concern in light of two main reasons. First, Amadeus—as a supplier of both GDS and PSS—could already have adopted bundling/tying practices. Second, Amadeus's incentives were unlikely to change following the transaction as any bundling of GDS and low cost PSS (Navitaire's product) would be unprofitable because low cost carriers typically do not distribute via GDS.

Dell/EMC (Case COMP/M.7861)

On February 29, 2016, the Commission unconditionally approved the proposed acquisition of EMC Corporation ("EMC") by Denali Holding, Inc., the owner of Dell Inc. ("Dell"). Dell is a US-based company active in the development, sales, repairs, and support for computers and related products and services, including storage products. EMC—also US-based—is active in data storage, virtualization, information security, cloud computing and other IT services. The transaction therefore combines two global providers of IT systems and software.

The Commission assessed the transaction's effects on the markets for: (i) storage systems;[17] (ii) servers;[18] (iii) virtualization software;[19] and (iv) converged infrastructure ("CI") solutions.[20] In particular, it examined the horizontal effects on the market for storage systems and external enterprise storage systems ("external ESS"),[21] and the non-horizontal effects arising from Dell being active in servers and storage systems and EMC being a supplier of virtualization software that can be used in conjunction with servers and storage.

Storage and external ESS. Whereas Dell's and EMC's activities overlap in external ESS and some of its possible segments, the combined market share of the merging parties is moderate—in the range of 20–40%—and the increment is 5–10%. Furthermore, the market testing demonstrated that strong established players, including IBM, HP, Hitachi, and NetApp, as well as recent entrants, will continue to exert a sufficient competitive constraint on the merged entity. The Commission concluded that the transaction does not raise horizontal concerns.

Virtualization software. VMware's—a subsidiary of EMC—virtualization software can be used in conjunction with some of Dell's hardware products, such as servers, external ESSs, and CI solutions. The Commission examined the risk that, post-transaction, the merged entity could: (i) restrict or degrade access to VMware's software to competing hardware vendors (input foreclosure); and/or (ii) foreclose other storage virtualization software vendors by depriving them of a sufficient customer base (customer foreclosure). Notwithstanding VMware's leading position on the market for server virtualization software, the Commission dismissed these concerns in light of the following considerations.

— *Viable alternatives*. VMware's software is facing increasing competition from a number of alternative server visualization vendors—such as Citrix, Microsoft, Red Hat, and Oracle. In addition, public cloud providers also exert competitive pressure as virtual machines are increasingly created in the cloud instead of in a traditional virtualized data centre. Therefore, sufficient credible alternative options remain open post-transaction.

— *VMware's open and non-discriminatory policy*. VMware has a history of adopting a hardware/software-neutral approach in close cooperation with a very large number of vendors without limiting or degrading access. The Commission considered that the transaction would not affect this policy. First, VMware has an incentive to endorse an open and non-discriminatory policy in order to promote a large adoption of its product. Second, Dell's CEO vowed in a public statement not to change VMware's open and independent approach.

— *No profitability*. The merging parties submitted economic evidence demonstrating that engaging in a strategy of restricting/degrading access to VMware's virtualization software would not be profitable because the increased sales of Dell's servers as a result of the foreclosure strategy

17 Storage solutions allow for information to be written to a storage solution (hard disk drive or flash drive), retained, and retrieved (read).

18 Servers are the computing power of the data centre.

19 Virtualization is the act of creating virtual versions of computer resources, like computer hardware, operating systems, storage devices, or network resources. Virtualization is an intermediary layer between hardware and other software components, such as operating systems and applications.

20 CI solutions refer to pre-bundled and pre-integrated data centre infrastructure which brings together products from one or more vendors across servers, storage, networking, and supporting software.

21 External ESS is one component of a typical data centre, which works in conjunction with other IT components (such as servers, networking hardware), security hardware (*e.g.*, firewalls), and redundant power and cooling systems to store, manage and disseminate data for an enterprise.

would not outweigh the costs in terms of lost sales of VMware virtualization software.

— *Customer multi-sourcing*. Customers typically multi-source from several visualization software providers. Therefore, in the event the merged entity decides to foreclose/degrade its virtualization software, customers can easily switch to a product they are already using.

Based on a similar reasoning, the Commission concluded that the merged entity would have neither the ability nor the incentive to engage in a foreclosure strategy with respect to the markets for storage and virtualizations software and CI solutions.

Western Digital/SanDisk (Case COMP/M.7772)

On February 4, 2016 the Commission unconditionally approved the acquisition of SanDisk Corporation ("SanDisk") by Western Digital Corporation U.S.A. ("Western Digital"). Western Digital is a producer of data storage ("storage") solutions, including hard disk drives ("HDDs"),[22] and solid state drives ("SSDs")[23] for enterprise applications. SanDisk is a storage producer specializing in flash memory solutions,[24] including SSDs, for both client and enterprise use.

The case concerned storage solutions. Based on its market investigation, the Commission defined two distinct product markets: "enterprise" storage solutions (*i.e.*, storage solutions used in high workload environments, such as corporate data centres), and "client" storage solutions (*i.e.*, storage for lower workload environments that are usually for use by individual consumers, such as personal computers); both worldwide in scope. The Commission further segmented the enterprise storage market between enterprise HDD and enterprise SSD solutions.[25] The parties' activities mainly overlapped in the enterprise SSD segment. The Commission considered further segmenting the enterprise SSD market based on interface—the mechanism by which a storage drive connects to the rest of the computer. Interfaces can influence some characteristics of SSDs, such as performance and reliability.[26] Although the Commission left open the question of splitting the enterprise SSD market by interface, it assessed the impact of the transaction on two interface-based sub-segments where the parties overlapped: SAS enterprise SSDs and PCIe enterprise SSDs. Finally, the Commission identified a market for NAND flash memory, which is flash memory based on negative-AND transistors.

The Commission assessed horizontal, vertical, and conglomerate effects.

Competition for SSDs. The Commission's investigation revealed that the merged entity would have considerable market share in the market for enterprise SSDs, especially in the SAS enterprise SSD segment, where the combined revenue share was between 70% and 80%. However, the investigation also revealed that these markets are populated by a sufficient number of viable competitors and are characterized by a high degree of buyer power resulting from complex procurement procedures and customers' practice of multi-sourcing. In light of these factors, the Commission did not view the high market shares as a conclusive indication of market power. Moreover, there was limited overlap in the parties' customers (typically original equipment manufacturers), and no further evidence that the parties were close competitors. Further, the Commission observed that incumbents face substantial competitive pressure from the emerging memory

22 An HDD is a storage solution that uses one or more rotating metal or glass disks with magnetic surfaces to store and allow access to data.

23 An SDD is a storage solution that uses NAND flash memory to store data.

24 Flash memory is a type of non-volatile storage technology that stores data in transistors and that does not require power to retain data.

25 The question of whether client HDDs and client SSDs belong to the same or to separate product markets was left open as it did not change the outcome of the competitive assessment.

26 The three most common interfaces used in enterprise SSDs are SATA, SAS, and PCIe.

technologies and potential entrants to the market or to specific segments of it (*e.g.*, the threat of Intel's entry into SAS enterprise SSDs constitutes a competitive constraint on the merged entity). For all these reasons, the Commission found that the transaction would not give rise to horizontal concerns.

Vertical integration. The Commission examined whether any vertical concerns arose from the vertical relationship between the parties (SanDisk produces NAND flash and therefore was active upstream of Western Digital). The Commission dismissed the possibility of input foreclosure because the parties' combined share on the upstream NAND flash memory market was found to be negligible and downstream customers would have multiple NAND flash memory suppliers to choose from. As for customer foreclosure, the Commission concluded that the merged entity would not be able to engage in any such strategy, given its lack of market power downstream for the reasons set out above, including the number of competitors that will remain active in the market.

Tying/bundling practices. Because the markets for enterprise solid state storage, as well as certain client and enterprise storage markets,[27] are closely related, the Commission assessed whether the merged entity would have the ability or the incentive to offer bundles for storage solutions at a lower price or refuse to sell certain products on a standalone basis. The Commission concluded that the merged entity would not have sufficient market power to engage in such strategies and that, even if it were to do so, the number of competitors capable of offering similar tied or bundled storage solutions would render such strategy ineffective.

27 In particular, the Commission considered that the markets for HDDs, client SSDs, and embedded flash storage (encompassing several types of non-SSD flash storage where SanDisk was active) on the one hand and the markets for enterprise solid state storage on the other hand are closely related markets.

State Aid

General Court Judgments

General Court Upholds Commission Decision Regarding Excise Duty For Alumina (Case T-56/06 RENV II., Joined Cases T-60/06 RENV II., and Joined Cases T-50/06 RENV II and T-69/06 RENV II)

On April 22, 2016, the General Court[28] upheld a 2005 Commission decision that declared an exemption from excise duties for alumina production – adopted based on the Commission's proposal and implemented by Ireland, Italy, and France, in 1983, 1993, and 1997, respectively – as state aid.[29]

The Commission found that the exemption constituted state aid compatible with the common market, but that aid granted between February 2002 and December 2003 was incompatible insofar as the beneficiaries did not pay a rate of € 13.01 per 1000 kg of heavy fuel oils. It thus ordered recovery of the incompatible aid.

The General Court annulled the contested decision twice (in December 2007 and in March 2012).[30] Both times, the Court of Justice reversed (in December 2009 and in December 2013)[31] and remanded the case to the General Court for further proceedings. The General Court is currently reviewing the case for the third time.

28 *France v. Commission* (Case T-56/06 RENV II) EU:T:2016:228; *Italy v. Commission* (Joined Cases T-60/06 RENV II, T-62/06 RENV II) EU:T:2016:233; *Ireland v. Commission* (Joined Cases T-50/06 RENV II and T-69/06 RENV II) EU:T:2016:227.

29 Commission decision C(2005) 4436 of December 7, 2005, OJ 2006 L 119/12.

30 *Ireland and others v. Commission* (Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06) ECLI:EU:T:2007:383; *Ireland and others v. Commission* (Joined Cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV) EU:T:2012:134.

31 *Commission v. Ireland and others* (Case C-89/08) EU:C:2009:742; *Commission v. Ireland and others* (Case C-272/12) EU:C:2013:812.

In its prior considerations of this case, the General Court has confirmed the Commission's power to investigate and assess state aid cases. It has held that Council authorization decisions do not predetermine the effects of decisions adopted by the Commission in the exercise of its powers in the area of state aid. It also has rejected claims of infringement of legitimate expectations. It has recognized that the Council authorizations were adopted on proposals from the Commission, which created an "equivocal situation," where the beneficiaries were likely to have legitimate expectations that the exemption was lawful, and which the Commission ought to have clarified before adopting the contested decision. The General Court, however, concluded that the publication of the Commission's decision to investigate the case put an end to those legitimate expectations.

With regard to legal certainty and reasonable time claims, the General Court has acknowledged that the Commission had failed to adopt the contested decision within a reasonable period, but has concluded that this delay could not be regarded as an exceptional circumstance capable of giving rise to legitimate expectations that the aid was lawful, and could not prevent the Commission from requesting recovery. This conclusion is also supported by *Demesa and Territorio Histórico de Álava v. Commission* where the Court of Justice held that despite the Commission's inaction/failure to act, legitimate expectations could not arise in case of un-notified aid.[32]

Italy and Ireland appealed the General Court's judgment to the Court of Justice[33] which, this time, will likely uphold the General Court's judgment.

France and IFP Énergies Nouvelles v. Commission (Joined Cases T-479/11 and T-157/12)

On May 26, 2016, the General Court annulled the Commission's decision finding that the French state's unlimited implied guarantee to the Institut Français du Pétrole ("IFP") constituted state aid.[34] The General Court found that the Commission did not prove that such a guarantee gave IFP an economic advantage when dealing with banking and financial institutions, its suppliers, and its customers.

France initially set up IFP as a legal person governed by private law. IFP conducts missions of public interest relating to oil extraction and refining, notably research and development. In 2006, however, France transformed IFP into a legal person governed by public law, an *Etablissement Public à Caractère Industriel et Commercial,* or "EPIC." As a consequence, IFP was no longer subject to common law insolvency proceedings and thus benefited from the French state's unlimited implied guarantee.

The Commission has previously found such an arrangement to constitute state aid granted to the relevant legal person.[35] On January 26, 2010, the Commission found that La Poste benefitted from better financial conditions from banking and financial institutions because the French state's unlimited guarantee protected it from any insolvency risk.

Relying on this precedent, the Commission applied the same analysis to IFP's relationships to banking and financial institutions, its suppliers, and its customers to show that the state's unlimited implied guarantee gave it an economic advantage. The Commission did not find that, post-2006, IFP benefited from improved financial conditions in its relationships with banking and financial institutions. However, the Commission took the view that IFP's protection from insolvency risk allowed it, *inter alia*, to benefit from lower prices from its suppliers and improved conditions from its customers. The Commission concluded that the unlimited guarantee benefitting IFP as a result of its transformation into an EPIC constituted state aid.

The General Court, however, held that the Commission did not sufficiently substantiate its

32 *Demesa and Territorio Histórico de Álava v Commission* (Joined Cases C‑183/02 P and C‑187/02 P) EU:C:2004:701, para. 52.

33 Case C-323/16 P and Case C-369/16.

34 *France and IFP Énergies Nouvelles v. Commission* (Joined Cases T-479/11 and T-157/12) EU:T:2016:320.

35 Commission decision C(2010) 133 of January 26, 2010 (state aid C 56/2007 (ex E 15/2005)), OJ 2010 L274/1.

finding that the unlimited guarantee eased IFP's relationships with its suppliers and customers. Notably, the General Court concluded that the Commission had failed to demonstrate: (1) how IFP's 2006 transformation affected IFP's customers' and suppliers' behavior toward it(for instance, by making the latter more likely to offer IFP lower prices); and (2) that such hypothetical more favorable conditions did not result from other factors, such as the contractual relations' duration or the orders' volume. The General Court thus found the Commission's analysis insufficient to conclude that IFP's EPIC status gave it an economic advantage.

Additionally, the General Court rejected the Commission's argument that it did not have to show the EPIC status's actual effects and could, instead, rely on a presumption of such effects. The Commission, relying on previous case law, had argued that the existence of an economic advantage is presumed for EPICs, and that the mere existence of the state guarantee is sufficient to show such an advantage.[36] The General Court first pointed out that the Court of Justice's jurisprudence that the Commission relied on analyzed only an EPIC's relationship with banking and financial institutions, and not with its suppliers and customers. The General Court also held that the possibility of resorting to a presumption depends on the plausibility of the assumptions at hand. Here, the General Court found that the Commission's unsubstantiated assumptions that IFP's EPIC status improved its relationships with both its suppliers and customers due to their perception of IFP's lower insolvency risk lacked plausibility. As a consequence, the Commission will now have to show the state guarantee's effects. This will probably be a challenging task for the Commission, given that the Commission itself has previously found that IFP's post-2006 relationships with banking and financial institutions remained unchanged.

36 *Commission v. France* (Case C-559/12 P) EU:C:2014:217.

Germany v Commission (Case T-47/15)

On May 10, 2016, the General Court dismissed Germany's challenge of the Commission's finding that the German law on renewable energy ("EEG 2012") involved state aid, although the Commission had eventually largely approved the aid.[37, 38]

EEG 2012 was aimed at fostering the expansion of renewable energy production in Germany. It introduced a scheme supporting producers of electricity from renewable energy sources and mine gas ("EEG electricity"). EEG 2012 guaranteed EEG producers a price higher than the market price. To finance this support, EEG 2012 created an "EEG surcharge" on the suppliers of EEG electricity to the final customers. Some undertakings, such as electricity-intensive undertakings in the manufacturing sector ("EIUs") were eligible for a surcharge cap to preserve their international competitiveness. In practice, the surcharge was passed on to the final customers.

On November 25, 2014, the Commission concluded that the measures described above constituted state aid. It also found, however, that: (i) the support for EEG electricity producers; and (ii) most of the measures related to the EEG surcharge for electricity-intensive undertakings, were compatible with EU law. The Commission therefore ordered recovery only in respect of a limited part of the cap.

The General Court dismissed the action brought by Germany seeking to annul the Commission's decision.

First, the General Court rejected Germany's argument that the revenue generated by the EEG surcharge does not correspond to State resources because the collection and administration of such revenue by the EEG producers are "under the dominant influence of

37 *Germany v. Commission* (Case T-47/15) EU:T:2016:281.

38 The action brought by Germany in the present case had the effect of withdrawing another action previously brought by Germany seeking the annulment of the Commission's decision to initiate the formal investigation procedure in respect of the EEG 2012.

public authorities."[39] The General Court explained that the present scheme differed from the previous German electricity scheme, which the Court of Justice assessed in *PreussenElektra*.[40] Previously, the measures did not qualify as state aid because the revenue was directly transferred from private parties to the producers of renewable energy, *i.e.*, without any involvement of a State-controlled intermediary.

Second, the General Court rejected Germany's claim that the EIUs did not receive an advantage, but rather were compensated for a competitive disadvantage, which arose because economic burden was lower in other EU Member State. The Court recalled that differences in economic conditions with other Member States can never justify the disqualification of a measure as state aid.

Following an appeal lodged by Germany in July 2016, the General Court's ruling will be reviewed by the Court of Justice.

Commission Decisions

Luxembourg – Aid granted to Fiat (SA.38375 (2014/C))

On June 9, 2016, the Commission published its decision holding that transfer pricing arrangements accepted by the Luxembourg tax authorities on calculating the taxation of Fiat Finance and Trade ("FFT") constituted unlawful state aid.[41] This decision concerns the tax ruling[42] on transfer pricing granted by Luxembourg to FFT on September 3, 2012.

After a preliminary investigation of Luxembourg's tax ruling practice, in 2014, the Commission decided to initiate a formal investigation procedure in accordance with Article 108(2) TFEU. The Commission concluded that the tax ruling measure constituted an aid measure within the meaning of Article 107(1) TFEU, because the tax ruling: (1) was issued by a State authority; (2) was liable to affect trade between Member States, because FFT is part of the Fiat group, a globally active entity operating in all Member States; (3) distorted or threatened to distort competition; and (4) conferred a selective advantage on FFT.

FFT provides financial services, such as intra-group loans, to other Fiat subsidiaries. The Commission noted that, because these activities are comparable to those of a bank, FFT's taxable profits can be determined in a similar way as for a bank. However, the Commission found that the tax ruling endorsed a complex and artificial methodology that was not appropriate for the calculation of taxable profits reflecting market conditions.

In particular, in assessing the return on capital deployed by FFT, the tax ruling: (1) approximated the capital base at a much lower level than FFT's actual capital; and (2) estimated the remuneration applied to that capital at lower-than-market rates. The Commission found that taxable profits declared in Luxembourg would have been 20 times higher if estimations on capital and remuneration had corresponded to market conditions.

Given that the measure lowered FFT's tax liability under the general Luxembourg corporate income tax system compared to non-integrated companies taxable in Luxembourg that transact on market terms, the Commission determined that the measure did not comply with the arm's length principle and, thus, conferred a selective advantage. The beneficiaries of the advantage were both FFT and the Fiat group, notwithstanding the fact that the group is organised in different legal personalities. This was because FFT and the Fiat group as a whole benefited from the more favourable tax treatment afforded to FFT by Luxembourg.

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39 *Germany v. Commission* (Case T-47/15) EU:T:2016:281, para. 127.

40 *PreussenElektra AG v. Commission* (Case C-379/98) EU:C:2001:160.

41 Commission decision C(2015) 7152 of October 21, 2015 (state aid SA.38375 (ex 2014/NN)), not yet published.

42 Letters issued by tax authorities giving an individual taxpayer some degree of certainty regarding how corporate income tax law will be applied in a given set of circumstances.

The Commission concluded that the tax ruling constituted operating aid because it gave rise to a reduction of charges that ordinarily would have been borne by FFT in the course of its business operations. The aid was deemed incompatible with the internal market because Luxembourg had failed to establish its compatibility. The Commission also found the aid to be unlawful because Luxembourg had not complied with the notification obligation to inform the Commission of any plans to grant aid, nor did it respect the standstill obligation set out in Article 108(3) TFEU. The Commission ordered Luxembourg to recover the full amount of aid. Luxembourg claimed that recovery of the aid would breach the principle of legitimate expectations and would infringe the principle of legal certainty. The Commission found these claims to be without merit.

Dutch Tax Rulings for Starbucks Constitute Unlawful State Aid

On June 25, 2016, the Commission published its decision of October 21, 2015, which found that the tax ruling issued by the Dutch authorities in favour of Starbucks Manufacturing EMEA BV ("SMBV") constituted illegal state aid.[43]

The tax ruling at issue takes the form of an advance pricing agreement ("APA")[44] concluded in April 28, 2008 by the Dutch tax administration with SMBV, a Netherlands-based subsidiary of the Starbucks group that roasts, sells, and distributes coffee and related products (*e.g.*, cups, packaged food, pastries) to Starbucks outlets in Europe, the Middle East, and Africa.[45] According to the APA, the Dutch authorities accepted that SMBV's tax base be determined based on an arm's length remuneration. According to the Commission, however, this APA unduly reduced SMBV's tax burden since 2008 by €20–€30 million.

The Commission first established that the SMBV APA constitutes state aid within the meaning of Article 107 (1) TFEU. While the Commission readily found: (i) intervention by the Dutch State; (ii) that is liable to affect trade between Member States; and (iii) that distorts or threatens to distort competition. The Commission's analysis focused on explaining its finding of a selective advantage.

The Commission concluded that the SMBV APA "confer[s] a selective advantage upon Starbucks, in so far as it results in a lowering of SMBV's tax liability in the Netherlands by deviating from the tax SMBV would be due under the general Dutch corporate income tax system."[46] According to established case law, the Commission first identified the scope of the "reference system" at issue and found that it corresponded to "the general Dutch corporate income tax system irrespective of whether corporate income tax under that system is imposed on group or stand-alone companies."[47] The Commission then assessed whether the APA deviated from that reference system and concluded that it did. The Commission's investigation established that the APA at issue artificially reduced SMBV's taxes in two ways:

43 Commission decision C(2015) 7143 of October 21, 2015 (state aid SA.38374 (ex 2014/NN)), not yet published. The Commission's decision was previously announced via a press release on October 21, 2015 (*See* European Competition Report Q4 2015) but the publication of the full decision provides more details of the Commission's investigation and its reasons for deciding that the Dutch's APA was illegal.

44 APAs are initiated by a taxpayer and correspond to agreements between a tax administration and a taxpayer regarding the application of tax law to future transaction for the purposes of applying an arm's length pricing for those transactions. APAs determine tax bases or asses intra-group transactions by the acknowledgment of criteria (*e.g*,. method, comparables, and appropriate adjustments thereto, critical assumptions as to future events).

45 SMBV is the only European coffee roasting subsidiary of the Starbucks group.

46 Commission decision C(2015) 7143 of October 21, 2015 (state aid SA.38374 (ex 2014/NN)), para. 226.

47 The Commission rejected the Dutch government's argument that the reference system only concerned group companies (*e.g.*, Section 8b of the Corporation Tax Act and the Transfer Pricing Decree, which contain specific rules for group companies) because it would otherwise make an artificial distinction between companies on the basis of their company structure.

— First, it required SMBV to pay an artificial and considerable royalty to Alki[48] for coffee-roasting know-how. On the one hand, the Commission found that the royalty paid by Starbucks Manufacturing to Alki did not adequately reflect market value. This is because Starbucks Manufacturing was the only company of the Starbucks group to pay such a royalty for using the same know-how in the same situation, and even independent roasters were not paying such a royalty in the same situation. On the other hand, the Commission noted that this royalty allowed the Starbucks group to transfer to Alki a large part of its taxable profits, while Alki did not have to pay any corporate tax in the UK or the Netherlands.

— Second, it e inflated the price SMBV pays to Starbucks Coffee Trading SARL for green coffee beans, which artificially reduces SMBV's profits.[49] The Commission found that, due to this practice, SMBV's coffee roasting activities would not generate sufficient profits to pay Alki the royalty for coffee-roasting know-how. According to the Commission, this shows that the royalty was therefore mainly transferred to Alki profits generated from sales of other products sold to the Starbucks outlets, such as tea, pastries and cups, which represent most of the turnover of Starbucks Manufacturing.

The precise amount to be recovered from Starbucks is to be determined by the Dutch tax authority on the basis of a methodology laid out in the Commission decision. The decision is however being challenged by the Netherlands before the European Court of Justice following an annulment action brought in December 2015.

48 Alki is a UK-based subsidiary of the Starbucks group that does not pay any taxes in the UK.

49 Starbucks Coffee Trading SARL is a Switzerland-based subsidiary of the group.

Regulatory Developments

Commission Publishes Communication on Notion of Aid

On May 19, 2016, the Commission published a Notice on the notion of state aid ("the Notice").[50] The Notice substitutes the Draft version, published in 2014, and forms the final part of the Commission's state aid modernization initiative first launched in 2012.

The Notice constitutes a binding document with respect to the Commission's application of the notion of aid and consolidates current practice and jurisprudence. It provides guidance in distinguishing between public support measures which fall within and outside the scope of EU state aid rules.

The Notice aims to facilitate public investment in the EU by helping Member States design public funding in ways that do not distort competition in the Single Market or risk crowding out private investment. Key clarifications in the Notice on numerous areas of activity are summarized below:

Social Security (Section 2.3). To determine whether social security schemes are classified as involving an economic activity, their actual structures will be instructive. "Solidarity-based" schemes that have certain characteristics such as non-profit, exclusively social purposes, and State supervision, typically do not involve economic activity. "Economic activity" schemes contain characteristics such as optional membership, capitalisation principles, and profit-making.

Health Care (Section 2.4). Public hospitals that are part of a national health service, are directly funded from social security contributions, and provide free services on the basis of universal coverage, exist in a "solidarity" based structure and as such, do not act as undertakings. In such a structure, if an organization carries out activities that could be of an economic nature, but conducted for the provision of a

50 Commission notice on the notion of state aid, OJ 2016 C 262/1.

non-economic service, it does not act as an undertaking.

Education and Research Activities (Section 2.5). Public education services are distinguishable from services financed through other sources by: their system of public education that is financed mainly by public funds; lack of intention to be involved in remunerative activities; and focus on social, cultural, and educational tasks.

Cultural Activities (Section 2.6). Public financing of certain cultural activities which are not commercial, but provided for free, or for a minimal fee, will not fall under state aid rules.

The Notice also provides clarifies the following:

— **Market Conditions (Section 4)**. A transaction is consistent with market conditions where it is carried out under the same terms and conditions by public bodies and private operators who are in a comparable situation. Further, if a sale and purchase of assets, goods and services are carried out under TFEU principles on public procurement, those transactions will be in line with market conditions.

— **Cross-border Effect on Trade (Section 6)**. Funding that has only a marginal impact on cross-border investment between Member States, such as that provided to local infrastructures that are unlikely to attract customers from other Member States, is unlikely to be caught by state aid rules.

— **Infrastructure (Section 7)**. Funding of infrastructure not intended for commercial exploitation is in principle excluded from state aid rules. If an entity is engaged in economic and non-economic activities, the funding for non-economic activities cannot be used to cross-subsidize the economic activities. The Commission considers that an effect on trade between Member States or a distortion of competition is normally excluded with respect to construction of infrastructure where: (i) an infrastructure typically faces no direct competition (such as "natural monopolies"); (ii) private financing is insignificant; and (iii) the infrastructure is not designed to favour a specific undertaking or sector but provides benefits for society at large. Roads, railway infrastructure, inland waterways and water supply and waste water networks are typically not subject to state aid rules. On the other hand, infrastructure in areas such as energy, broadband, airports, or ports, will fall under state aid rules.

If infrastructure is built with state aid, operators and users will not have received an economic advantage if they paid market prices, and the infrastructure is made available under market terms, for example, as a result of a competitive, non-discriminatory, and unconditional tender.

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