HORIZONTAL AGREEMENTS

ECJ Advocate General Opinions

***VM Remonts SIA, formerly DIV un Ko SIA, Ausma grupa SIA v. Konkurences padome* (Case C-542/14), Opinion of Advocate General Wathelet**

On December 3, 2015, Advocate General Wathelet gave his opinion in a preliminary ruling request from the Latvian Supreme Court concerning the issue of whether proof of knowledge at a company's executive level that a subcontractor working on behalf of the company was also working on behalf of other companies is necessary to find that the company was engaged through the subcontractor in a concerted practice under Article 101(1) TFEU with these other companies.

In 2011, the Latvian Competition Council found that three companies, VM Remonts SIA (formerly DIV un Ko SIA, "DIV"), Ausma grupa SIA ("Ausma"), and Partikas kompanija SIA ("PK"), had breached Article 11 of the Latvian Competition Law by jointly preparing bids. In 2013, a Latvian Regional Administrative Court annulled the decision as to PK. DIV and Ausma then brought the case to the Latvian Supreme Court, which referred the case to the European Court of Justice.

To participate in a tender by the Jurmala city council, PK hired a company for the preparation of its bid, which, in turn, hired a subcontractor, MMD lietas SIA ("MMD"). MMD received PK's bid project, which PK had prepared independently. In parallel, and without informing PK, MMD also committed to prepare DIV's and Ausma's respective bids. In this context, an MMD employee allegedly used PK's bid as a reference in order to prepare the other two companies' bids and ensure that DIV's bid would be the lowest.

Advocate General Wathelet pointed out that, under Article 101(1) TFEU, a company cannot be held liable for a concerted practice without it being established that it deliberately participated in it, or that it could not ignore that its behavior had the effect of restricting competition.[1] The subcontractor here acted within the context of its contract with PK, but took initiatives, which violated competition law, outside of its appointed mission, without it being established that PK's executives knew of the subcontractor's infringement or that they had consented to it.

Advocate General Wathelet pointed out that PK determined the price of its bid independently, and MMD was only an agent in charge of drafting the technical documents.[2] Thus, MMD's decision to use PK's bid as the basis for its preparation of Ausma's and DIV's bids fell outside of its attributed mission and should not, in Advocate General Wathelet's opinion, be attributed to PK. Ultimately, there were no elements demonstrating PK's knowledge and/or approval of the agent's actions.

Advocate General Wathelet suggested the creation of a rebuttable presumption of liability in these circumstances, which would be triggered by proof of the existence of a competition law violation by a person working for a company without being, directly or indirectly, part of its organizational chart, even if the third party's actions are distinct from its appointed functions and it is not established that the hiring company knew of or consented to the actions. The company could rebut this presumption by showing that it did not know of the third party's infringement and that it took all necessary precautions to prevent it. Such a showing should be made at three key points: (i) at the time of hiring; (ii) during the performance of the third party's missions; and (iii) at the time of commission of the infringement. Thus, a company could rebut the

1 *Miller International Schallplatten v. Commission* (Case C-19/77) EU:C:1978:19; *Musique Diffusion française e.a. v. Commission* (Joined Cases C-100/80 to C-103/80) EU:C:1983:158; *IAZ International Belgium e.a. v. Commission* (Joined Cases C-96/82 to C-102/82, C-104/82, C-105/82, C-108/82 and C-110/82) EU:C:1983:310.

2 Advocate General Wathelet underlined that this is what distinguished the present case from *Minoan Lines v. Commission* (Case T-66/99) EU:T:2003:337.

presumption if it establishes that it took all necessary precautions at the time of appointment and during the mission, that the third party acted outside of its entrusted missions, and that, once it learned of the infringement, it publicly distanced itself or reported it to authorities.

General Court Judgments

***Air France & Others v. Commission* (Case T-63/11 *et seq*.)**

On December 16, 2015, the General Court issued 13 separate judgments addressing the appeals of several air freight cartel members[3] against a Commission decision which found 21 air freight carriers in breach of Article 101(1) TFEU.[4] The judgments do not differ in their reasoning or operative part, and annul the decision on the same grounds. In 2010, the Commission found that the air carriers had coordinated prices for their freight services, and in particular for fuel and security surcharges on routes between the EU, EEA, as well as other countries, over multiple periods of time. It thus concluded that this behavior constituted a single and continuous infringement of competition law.

In their appeals, the air carriers argued that the decision did not allow them to identify the nature and scope of the infringement they had allegedly committed. Notably, there was a substantial contradiction between the actual grounds on which the Commission relied in its decision and the operative section imposing sanctions on the addressees, which amounted to a failure to state reasons: the operative part of the decision referred to four separate infringements relating to different periods and routes, and committed by different carriers, whereas the grounds of the decision referred to one single and continuous worldwide infringement covering all the routes.

The General Court first recalled the legal principles concerning the Commission's obligations to state reasons appropriately and the addressees' right of defense. It underscored that the statement of reasons in a decision must disclose, in a clear and unequivocal manner, the Commission's reasoning and cannot contain inconsistencies that would prevent a proper understanding of the Commission's underlying reasons for taking such decision. The General Court also pointed out that the unambiguous nature of the operative part of a decision is crucial because it binds and guides national courts that rule on follow-on damages actions.

The General Court held that there was an evident contradiction between the grounds of the decision, which described the air carriers' actions as a single and continuous infringement, and its operative portion, which referred to four separate single and continuous infringements. It rejected the Commission's argument that the four distinct sections in the operative part of the decision described several anti-competitive conducts that ultimately constituted a single and continuous infringement, as maintained in the grounds of the decision. Moreover, according to the General Court, the grounds of the decision contained other inconsistencies with respect to the determination of the starting date of the infringement for some air carriers and the Commission's application of the relevant case law to establish a single and continuous infringement, all of which was sufficient to vitiate the decision.

These contradictions constituted a defective statement of reasons because the addressees could were not understand the extent to which the evidence set out in the

[3] *Air Canada v. Commission* (Case T-9/11) EU:T:2015:994; *Koninklijke Luchtvaart Maatschappij v. Commission* (Case T-28/11) EU:T:2015:995; *Japan Airlines v. Commission* (Case T-36/11) EU:T:2015:992; *Cathay Pacific Airways v. Commission* (Case T-38/11) EU:T:2015:985; *Cargolux Airlines v. Commission* (Case T-39/11) EU:T:2015:991; *Latam Airlines Group and lan Cargo v. Commission* (Case T-40/11) EU:T:2015:986; *Singapore Airlines and Singapore Airlines Cargo PTE v. Commission* (Case T-43/11) EU:T:2015:989; *Deutsche Lufthansa and Others v. Commission* (Case T-46/11) EU:T:2015:987; *British Airways v. Commission* (Case T-48/11) EU:T:2015:988; *SAS Cargo Group and Others v. Commission* (Case T-56/11) EU:T:2015:990; *Air France-KLM v. Commission* (Case T-62/11) EU:T:2015:996; *Air France v. Commission* (Case T-63/11) EU:T:2015:993; and *Martinair Holland v. Commission* (Case T-67/11) EU:T:2015:984.

[4] *Airfreight* (Case COMP/39258), Commission Decision of November 9, 2010. The Commission also found the air carriers in breach of Article 53 of the European Economic Area Agreement ("EEA Agreement") OJ L1 of 3.1.1994, and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport, OJ L 114, 30.04.2002, pp.73-79.

grounds established four separate infringements as opposed to a single and continuous one. In addition, such a failure to state reasons prevented the General Court from being able to review fully the legality of the decision because it was unable to conclude whether the evidence brought to prove a single and continuous infringement was sufficient to establish the existence of the four separate infringements found in the operative part of the decision.

ABUSE OF DOMINANCE

ECJ Judgments

***Post Danmark v. Danish Competition Authority* (Case C-23/14)**

On October 6, 2015, the Court of Justice ruled on a reference for a preliminary ruling from the Danish Maritime and Commercial Court in proceedings between Post Danmark A/S ("Post Danmark") and the Danish national competition authority ("NCA").[5] The Danish Court asked the Court of Justice to (i) provide guidance for the assessment of a rebate scheme with standardized volume thresholds uniformly applicable to all customers (including guidance on the need to demonstrate customer discrimination or to apply the "as-efficient competitor" test (the "AEC test"));[6] (ii) specify the probability and seriousness of anticompetitive effects required to find an abuse; and (iii) more generally, to clarify the circumstances relevant to determining whether a rebate scheme infringes Article 102 TFEU.

Since 2003, Denmark's historical mail operator, Post Danmark, had given customers volume-based rebates, ranging between 6% and 16%, on its regular tariffs for direct advertising mail. The rebate scheme was standardized and benefited all customers equally. Post Danmark determined the provisional price based on the expected purchase volume at the beginning of each reference year and retroactively adjusted the rebate at the end of the year. The final rebate was retroactive rather than incremental: it applied to all mailings sent during the year, not simply those exceeding the quantity initially estimated. Included in the rebate scheme was direct advertising mail, regardless of whether it was covered by Post Danmark's monopoly for the distribution of all mail weighing less than 50g.

In June 2009, the NCA found that Post Danmark had abused its dominant position during 2007–2008 on the Danish bulk mail market by operating an anticompetitive rebate scheme that had the effect of foreclosing competition in the direct advertising mail segment without creating countervailing efficiencies for consumers. The NCA considered that Post Danmark was both a dominant and unavoidable trading partner in the supply of bulk mail in Denmark, noting the company's statutory monopoly and the existence of high entry barriers. Yet, the NCA did not apply the AEC test because no competitor could be as efficient as Post Danmark in light of the market context. On May 10, 2010, the Competition Appeal Tribunal upheld the NCA's decision and Post Danmark appealed to the Danish Maritime and Commercial Court.

The Court of Justice retained the traditional distinction between (1) quantity discounts, which are based solely on the volume of purchases and do not constitute a *prima facie* infringement of Article 102 TFEU, and (2) unlawful loyalty rebates, which tend to prevent customers from obtaining all or most of their requirements from competitors.

The Court of Justice stated that, while the anticompetitive effect of the rebate scheme must be more than purely hypothetical, it need not be "concrete." It stipulated that there was no "*de minimis*" threshold for anticompetitive effect under Article 102 TFEU but the effect must be "probable." The Court of Justice recalled the "special responsibility" of dominant companies to ensure their behavior does not impair competition and concluded that markets featuring dominant companies were already distorted and that any further weakening of the market structure—no matter how slight—could amount to an abuse.

[5] *Post Danmark A/S v. Konkurrencerådet ("Post Danmark II")* (Case C-23/14) EU:C:2015:651.

[6] Under the AEC test, a rebate scheme is anticompetitive only if it would drive an as-efficient competitor out of the market.

The Court of Justice recognized the established distinction between quantity rebates and loyalty rebates (including exclusivity and other loyalty-inducing rebates), and placed Post Danmark's scheme in the second category. It observed that Post Danmark's rebates were not based on the volume of each individual order, but on the aggregate volume of orders placed over a certain period. This reference period retroactively covered orders over one year, without distinguishing between the contestable and the non-contestable part of demand. It also noted that Post Danmark held a very high market share, that it enjoyed a number of structural advantages resulting from its statutory monopoly on certain market segments, and that the market was characterized by high entry barriers, making it very difficult for competitors to outbid Post Danmark's rebates. The Court of Justice therefore considered these rebates to be capable of a strong "suction effect" on the majority of demand.

On the basis of these factors, the Court of Justice concluded that Post Danmark's rebate scheme tended to make it more difficult for customers to obtain supplies from competing undertakings and therefore had an anticompetitive exclusionary effect. The Court of Justice attributed less weight to the standardized (rather than individualized) nature of the rebate scheme, as it could nevertheless be loyalty-inducing and therefore exclusionary. It also indicated that the proportion of customers covered by the rebate scheme was not determinative of whether a rebate scheme was abusive, but could be useful evidence of the magnitude of its anticompetitive effect.

Finally, the Court of Justice confirmed that there was no legal requirement to apply the AEC test, stating that it is merely a tool for the Commission and Courts to assess the lawfulness of a dominant company's rebate scheme. It further explained that the AEC test is not well suited when the market structure "made the emergence of an as-efficient competitor practically impossible."[7]

[7] *Post Danmark II*, para. 59.

General Court Judgments

***Orange Polksa S.A. v. Commission* (Case T-486/11)**

On December 17, 2015,[8] the General Court rejected Orange Polska's appeal against the Commission's decision to impose a €127.5 million fine on Telekomunikacja Polska S.A. ("TP") for abusing its dominant position on the Polish wholesale broadband market.[9] In its appeal, Orange Polska S.A. ("OP"), which purchased TP in 2013, did not dispute that the infringement had taken place, but alleged, that the Commission erred in calculating the fine and failed to consider mitigating circumstances.

TP was the incumbent telecom operator in Poland, and had a monopoly on the Polish wholesale broadband market at the time of the infringement.

The Commission found that, from August 2005 until at least October 2009, TP engaged in anticompetitive practices aimed at refusing or restricting downstream competitors' access to its wholesale broadband network. In particular, TP proposed unreasonable access conditions, delayed negotiation or access implementation processes, rejected orders without justification, and refused to provide reliable and accurate information on technical parameters. These practices had the effect of preventing, or at least delaying, effective entry by alternative operators on the retail markets for broadband access.

On appeal, OP alleged that the Commission erred in calculating the basic amount of the fine. OP claimed, in particular, that the Commission did not take into account the varying duration and intensity of the individual elements constituting the infringement. The General Court, however, concluded that the Commission had properly taken these variations into account and that it was legitimate to assess TP's overall pattern of abusive conduct to determine the level of the fine.

[8] *Orange Polska v. Commission* (Case T-486/11) EU:T:2015:1002.

[9] *Polish Telecommunications* (Case COMP/39.525), Commission decision of June 22, 2011.

The General Court agreed with the Commission, observing that TP's infringement was particularly serious in light of TP's monopoly position. It considered the existence of multiple, flagrant, persistent, and intentional breaches, as well as TP's awareness that its conduct was illegal, and the considerable size and economic and social importance of the markets concerned.

Second, OP asserted that the Commission failed to consider mitigating circumstances, including that TP had incurred considerable modernization investments in its broadband infrastructure to the benefit of alternative operators and end-users, and that TP voluntarily terminated the infringement and offered commitments. However, the General Court determined that, although TP's modernization investments indirectly benefited end-users and alternative operators, these were not designed as a compensatory measure for the harm suffered because first and foremost they benefited TP as a wholesale infrastructure provider.

The General Court added that TP did not terminate the infringement immediately after the Commission's first intervention (through inspections at TP's premises). While TP gradually complied with competition rules, alternative operators continued to experience difficulties accessing TP's network until at least the end of the relevant period.

TP's proposed commitment to improve its conduct had not made it easier for the Commission to prove the infringement. Furthermore TP did not completely terminate the infringement until there could be no doubt as to its existence. Therefore, the General Court concluded that TP's promise did not go beyond its obligation to co-operate with the Commission.

Commission Decisions

Slovak Telecom (Case AT.39523)

On November 5, 2015, the Commission published its October 15, 2014 decision to fine Slovak Telekom and its parent company, Deutsche Telekom, a total of €69.9 million for infringing Article 102 TFEU.[10] Slovak Telekom was found to have denied its rivals access to unbundled local telecommunication loops (the line that connects customer premises to the edge of the common carrier's or telecommunications service provider's network) and to have engaged in a margin squeeze.

The Commission found that Slovak Telecom's terms and conditions for granting access to its infrastructure were unreasonable. Slovak Telekom delayed or prevented the entry of alternative operators into the Slovak retail broadband services market by withholding information on local loop availability, physical access sites, and coverage areas, unilaterally reducing the scope of its regulatory obligation to unbundle by reserving certain local loops and limiting access to others without technical justification, or otherwise rendering the operation of unbundled local loops unnecessarily unclear, burdensome, and expensive. In addition, Slovak Telekom set the access and retail prices at a level at which an equally-efficient competitor would incur a loss if it wanted to sell broadband services to retail customers at the same price, thereby delaying or barring its competitors' access to the Slovak market.

The Commission concluded that both types of behavior constitute abuses of Slovak Telekom's dominant position contrary to Article 102 TFEU. First, the Commission found Slovak Telekom's terms and conditions artificially raised barriers to entry to the retail broadband services market. Second, and more interestingly, the Commission found that Slovak Telekom had illegally reduced the possibilities for alternative operators to compete through their own networks. Despite the gradual development of alternative networks in Slovakia since 2007, the significant sunk costs and delays associated with building alternative networks resulted in less effective competition as compared to competition through unbundled local loops. In addition, without access to Slovak Telekom's local loops, alternative operators were not able to build up the minimum network size and customer base to establish and grow their own

[10] *Slovak Telekom* (Case AT.39523), Commission decision of October 15, 2014.

networks. Potentially anticompetitive effects of an operator's behavior on its own network may therefore affect the development of alternative operators' networks.

MERGERS AND ACQUISITIONS

Commission Decisions

Phase II Decisions With Undertakings

***DEMB/Mondelez/Charger OPCO* (Case COMP/M.7292)**

On May 5, 2015, the Commission conditionally approved the creation of a joint venture between D.E. Master Blenders 1753 B.V. ("DEMB") and Mondelez International Inc ("Mondelez").[11] DEMB is an international coffee and tea company based in the Netherlands, and Mondelez is a US-based global company offering a range of food and snack products such as biscuits, chocolate, candy, powdered beverages, and coffee. DEMB owns the Senseo trademark and develops and markets the Senseo system with Phillips. Mondelez owns the Tassimo trademark and develops and markets the Tassimo system with Bosch. The transaction combined DEMB's assets and Mondelez's coffee business. The joint venture will be active in all coffee formats including roast and ground coffee ("R&G"), filter pads, and capsules compatible with the Nespresso machines ("N-capsules").

The transaction gave rise to horizontally affected markets in out-of-home ("OOH") sale of coffee products and in-home coffee. Within the in-home market, the Commission defined separate markets for: (i) R&G and whole beans, (ii) instant coffee, (iii) filter pads for Senseo machines and (iv) N-capsules. The geographic market was defined at the national level for all product markets.

In the market for OOH, the transaction led to a 10% share increment and combined shares below 40%. The Commission considered that a sufficient number of competitors, including Nestle and Tschibo, remained active in the market and concluded that the transaction did not raise concerns.

Concerning in-home coffee, the Commission found that the joint venture could raise prices above competitive levels in the R&G markets in France, Denmark and Latvia, where the parties' brands compete closely against each other. The parties' combined shares in these markets were around 50% and, according to the Commission, competitors would not be able to impose sufficient competitive constraint upon the joint venture. The transaction also raised concerns in the market for filter pads in Austria and France, where the parties' would have 70–80% combined market shares and their closest competitor accounted for less than 20% of the market.

Concerning single-serve systems, although the parties do not directly sell single-serve coffee machines for Tassimo and Senseo systems, the Commission found that they have both the ability and incentive to influence the machines' prices. Therefore, the Commission took into account in its competitive assessment the effects of the transaction on a wider market for single-serve system including both machines and consumables. The Commission concluded that the transaction does not raise concerns within this market because the parties' systems are not close competitors and the strong competition from Nestlé's Dolce Gusto and Nespresso systems would ensure sufficient incentive for the joint venture to market its products competitively and continue to support sales of Senseo and Tassimo coffee machines.

To address the Commission's concerns in the filter pads and R&G markets in France, Mondelez committed to sell its Carte Noire business across the EEA, including a manufacturing plant in France. Regarding the R&G coffee markets in Denmark and Latvia, DEMB committed to sell its Merrild business across the EEA. DEMB additionally committed to license its Senseo brand in Austria for five years.

[11] *DEMB/Mondelez/Charger OpCo* (Case COMP/M.7292), Commission decision of May 5, 2015.

***Orange/Jazztel* (Case COMP/M.7421)**

On May 19, 2015, the Commission conditionally approved the proposed acquisition of sole control of Jazztel P.L.C. ("Jazztel") by Orange S.A. ("Orange").[12] Orange provides telecommunication services in a number of countries worldwide. It is present in the Spanish telecommunication markets through its wholly-owned Spanish subsidiary, Orange España S.A.U. Jazztel is a telecommunications company registered in the UK but mainly active in Spain through its subsidiary Jazz Telecom S.A.U. Prior to the transaction, Orange and Jazztel were the third and fourth largest telecommunication suppliers in Spain.

The Commission found that the transaction raised competition concerns in the Spanish retail market for fixed internet access services, and possibly also in the markets for dual-play services, triple-play services, triple-and quadruple-play services, or multiple play services.

In its market definition for fixed internet access services, the Commission considered subdivisions of the market by product type (narrowband, broadband, or dedicated access), by distribution technology (copper, cable, or FTTH[13]), and by use (residential or small business compared to large business customers). In terms of product type, the Commission concluded that, even though the distinction between internet speeds above and below 30Mb/s is not artificial, the question of whether fixed access services on either sides of the bandwidth belong to the same market could be left open. Moreover, it determined that there is no reason to divide the relevant market according to distribution infrastructures because different distribution technologies compete in the market and customers base their choices on other factors. Finally, the Commission confirmed previous assessments that fixed internet access services for large business customers belong to a separate product market, referred to as retail business connectivity market.[14] In line with previous decisions,[15] the geographic scope of the market was found to be national. The relevant product market was therefore found to be the provision of internet access services to residential and small business customers in Spain.

The transaction would reduce the number of service providers from four to three. The Commission held that, in doing so, it would remove two of the most important competitive forces in the market. It argued this was due to the competitive constraints Orange and Jazztel had placed on one another in recent years, which has led to increased price competition in the market. The Commission was concerned that the merged entity would have lower incentives to compete in light of the market structure, the expected decrease in competition post-transaction, and indications contained in Orange's internal documents. In addition, the Commission found that the merged entity would likely increase its prices which would in turn reduce the competitive pressure on the two remaining competitors (Telefonica and Vodafone) as well as induce some of its existing customers to switch to said competitors. The Commission contended that the resulting stability in customer retention and increased demand experienced by the competitors would ultimately give them an incentive to raise their prices as well. The Commission argued that such an incentive to raise prices as a response to a price increase by another firm is a characteristic of oligopolistic competition.

In response to these concerns, the parties offered a series of commitments which the Commission repeatedly found insufficient to address the issues it had raised. Finally, the parties submitted a fourth and final set of commitments providing for the divestment of part of Jazztel's FTTH network in the areas where Orange's and Jazztel's FTTH networks currently overlap, as well as a wholesale ADSL bitstream access offer giving access to Jazztel's DSL

[12] *Orange/Jazztel* (Case COMP/M.7421), Commission decision of May 19, 2015.

[13] "Fiber To The Home" network.

[14] *Telefónica/Hansenet Telekommunikation* (Case COMP/M.5730), Commission decision of January 29, 2010, paras. 6 *et seq*.

[15] *Vodafone/Kabel Deutschland* (Case COMP/M.6990), Commission decision of September 20, 2013, para. 197.

network. Those two elements were put forward as indistinguishable and aimed at benefitting one single purchaser. The Commission considered that such a divestment package would allow a purchaser to enter the relevant retail markets as well as to replicate the competitive pressure that would have been otherwise lost due to the transaction. It also noted that some of the identified anti-competitive issues would be offset by the elimination of double marginalization of mobile services provided by Orange to Jazztel.

The Commission concluded that these commitments were sufficient to address the concerns and authorized the transaction.

***PRSfM/STIM/GEMA* (Case COMP/M.6800)**

On June 16, 2015, the Commission cleared, subject to commitments, the creation of a joint venture between PRSfM, STIM, and GEMA, the collecting societies managing copyrights in musical works in the United Kingdom, Sweden, and Germany.[16]

The main activities of the joint venture will be offering copyright administration services to right holders and centralizing the licensing of musical rights, including the parties' combined repertoire, across different European countries. The Commission noted that the creation of the joint venture was intended to address some difficulties currently encountered by digital service providers—such as iTunes, Spotify, or YouTube—in obtaining licenses for musical artworks.

The Commission found that the parties' activities overlap in copyright administration services and in the licensing of online rights in musical works. It departed from its previous decisional practice of viewing these markets as national in scope and acknowledged that they span the entire EEA. The shift in the Commission's assessment was partially due to collecting societies granting multi-jurisdictional licenses on their repertoires.

Copyright administrative services include the development of a database of musical works, conclusion of licensing deals on behalf of right holders, monitoring of authorized online usage, and judicial enforcement of copyrights. The Commission was concerned that the joint venture would forestall competition in the provision of these services to collecting societies. In particular, it raised concern that the parties' powerful processing tools and the considerable size of their combined repertoire would stifle alternative cooperation initiatives developed by other collecting societies.[17] According to the Commission, the joint venture could also potentially impede competition in administrative services provided to option 3 publishers.[18] The parties have exclusive mandates to license performing rights that correspond to option 3 publishers' mechanical rights and therefore could force these publishers to source administration services from the joint venture for the joint licensing of both categories of rights.

The Commission found no evidence of possible anticompetitive effects in the market for the licensing of online rights in musical works. The market investigation showed that the considerable size of the combined repertoire managed by the joint venture would not increase its bargaining power towards the right holders or its ability to charge higher royalties. Moreover, the Commission considered that the business separation measures envisaged by the participating parties would effectively prevent any exchange of commercially sensitive information within the joint venture.

Following a Phase II investigation, the Commission accepted PRSfM's commitment not to leverage its control over corresponding performing rights in order to force publishers to source administration services from the joint venture. The joint venture also committed to offer administration services to other collecting societies on fair,

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

[17] These cooperation initiatives include, for instance, Armonia, the NCB, Network of Music Partners (NMP), Polaris Nordic, and the Amsterdam Initiative.

[18] The publishers that have withdrawn their online mechanical rights from collecting societies repertoires are known as "option 3" publishers.

reasonable, and non-discriminatory terms and not to enter into exclusive or sole mandates with collecting societies, option 3 publishers, or any other prospective customer of the joint venture. The Commission concluded that these commitments would allow the joint venture's customers to switch to competing providers of administration services.

STATE AID

ECJ Judgments

***Comité d'entreprise de la Société Nationale Maritime Corse Méditerranée (SNCM) v. SNCM* (Case C-410/15 P(I))**

On October 6, 2015, the Vice-President of the Court of Justice found that the General Court had erred in rejecting SNCM's works council's request to intervene in support of the SNCM's request for annulment of the Commission's decision of November 20, 2013. Unlike the General Court, the Vice-President considered SNCM's work council to be an interested party in the sense of Article 108(2) TFEU.[19]

The Commission's decision declared incompatible with EU law a total of €220 million in state aid granted by France to SNCM as part of the SNCM restructuring and privatization and ordered France to recover this aid.[20] On January 2, 2015, SNCM appealed the Commission's decision to the General Court. On March 30, 2015, SNCM's works council requested to intervene in support of SNCM. Following the General Court's order of July 7, 2015, rejecting the works council's application for intervention,[21] the works council sought annulment of this order and asked the Court of Justice to grant its application to intervene.

The Vice President of the Court of Justice recalled that access to intervention before the EU Courts is limited to those who can justify an "interest in the proceedings' outcome," meaning a direct and present interest in the fate of the submission itself as opposed to its pleas and arguments.[22] Based on established case law, the applicant for intervention should be directly affected by the challenged decision and also have a "certain" interest in the outcome of the proceedings, *i.e.*, the outcome may alter its legal position.[23]

In this case, the Vice President held that the works council was an interested party under Article 108(2) TFEU because, as SNCM employees' representative, it could provide comments on social considerations that could be taken into account during the Commission's formal review. He recalled that the assessment of the compatibility of state aid in the maritime transport sector encompasses a large number of considerations of various kinds, including not only the protection of competition but also EU maritime policy, the promotion of EU maritime transport, and the promotion of employment.

Having concluded that the works council was an interested party under Article 108(2) TFEU that intended to support the submission of a party claiming the infringement of its procedural rights under the latter provision, the Vice President found that the works council had a direct and present interest in the proceedings' outcome under Article 40 of the Court's Statute.

Ultimately, the Vice President concluded that the General Court had erred in rejecting the work council's application for intervention in support of SNCM's submission and as a result annulled the General Court's order and granted SNCM's employee council's application for intervention.

***Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen* (Case C-505/14)**

On November 11, 2015, the Court of Justice issued a preliminary ruling on a German court's question of whether EU law precludes the application of a rule of national law enshrining the principle of *res judicata* when the

[19] *Comité d'entreprise de la Société Nationale Maritime Corse Méditerranée (SNCM) v. SNCM* (Case C-410/15 P(I)) EU:C:2015:669.

[20] Commission Decision C (2013) 7066 of November 20, 2013 (State Aid C 58/02 (ex N118/02)), OJ 2014 L 357/1.

[21] *SNCM v. Commission* (Case T-1/15) EU:T:2015:488.

[22] *See Commission v. EnBW* (Case C-365/12 P) EU:C:2013:83, para. 7.

[23] *See Mory e.a. v. Commission* (Case C-33/14 P) EU:C:2015:135, para. 7; *National Power and PowerGen v. Commission* (Cases C-151/97 P(I) and C-157/97 P(I)) EU:C:1997:307.

enforcement of a final judgment establishing the validity of a contract would give rise to illegal state aid.[24]

Under the contracts at issue in the main proceedings, the Forestry Administration of the Land Nordrhein-Westfalen (the "Administration") undertook to sell fixed quantities of wood to Klausner Holz between 2007 and 2014, at predetermined prices depending on the size and quality of the wood. In 2007 and 2008, the Administration supplied wood to Klausner Holz under the contracts. In 2008, Klausner Holz experienced financial difficulties, which resulted in occasional late payments. In 2009, the Administration rescinded the contracts and stopped supplying wood to Klausner Holz. However, in February 2012, the German Regional Court of Münster issued a judgment establishing that the contracts at issue had remained valid. This was confirmed on appeal by the Higher Regional Court of Hamm in a judgment of December 2012 which became *res judicata*.

Klausner Holz then sued the Administration before the Regional Court of Münster seeking damages for a breach of contract. The Administration argued that the contracts at issue amounted to illegal state aid because they had not been notified to the Commission pursuant to Article 108(3) TFEU. The Regional Court of Münster agreed with the Administration. However, it concluded that it could not annul the contracts because the December 2012 judgment of the Higher Regional Court of Hamm had previously held that they remained in force. Therefore, the issue had already been adjudicated. The Regional Court of Münster stayed the proceedings and made a preliminary reference to the Court of Justice.

The Court of Justice established that the application of the principle of *res judicata*, as the referring court interpreted it, would impede the application of EU law and be contrary to the principle of effectiveness.[25] According to the referring court, the principle of *res judicata* precluded it not only from re-examining the pleas already settled by the Higher Regional Court of Hamm, but also from examining issues or questions that could have been–but were not–raised before the Higher Regional Court of Hamm, such as the question whether the contracts at issue gave rise to illegal state aid.

The Court of Justice concluded that the existence of a definitive judgment declaring that a contract is valid does not prevent a national court from subsequently annulling such contract due to a breach of the EU rules on state aid if this issue had not been addressed in the former proceedings.

General Court Judgments

HSH Investment Holdings Coinvest-C and HSH Investment Holdings FSO v. Commission (Case T-499/12)

On November 12, 2015, the General Court dismissed an appeal by minority shareholders against the Commission's decision approving aid to HSH Nordbank.[26]

HSH Nordbank, the fifth largest German regional bank ("Landesbank"), was affected by the subprime crisis in 2007. HSH had to apply to the German Special Fund for Stabilizing the Financial Markets (the "Special Fund") for liquidity guarantees amounting to €30 billion. HSH benefited from (i) a €3 billion recapitalization by issuing shares in HSH Nordbank that were entirely subscribed by HSH Finanzfonds, a public entity and majority shareholder of HSH Nordbank, (ii) a general guarantee of €10 billion granted by the Länder of Hamburg and Schleswig-Holstein, and (iii) a liquidity guarantee of €17 billion, granted by the Special Fund.

On September 20, 2011, the Commission concluded that those measures constituted state aid compatible with the internal market.[27] However, compatibility was subject to

[24] *Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen* (Case C-505/14) EU:C:2015:742.

[25] The principle of effectiveness means that national law must not make it impossible or excessively difficult to enforce rights derived from EU law.

[26] *HSH Investment Holdings Coinvest-C and HSH Investment Holdings FSO v. Commission* (Case T-499/12) EU:T:2015:840.

[27] Commission Decision C (2011) 6483 of September 20, 2011 (State Aid C 29/09 (ex N 264/09)), OJ 2012 L 225/1.

compliance with certain commitments and conditions including the following: HSH Nordbank had to grant HSH Finanzfonds the right to a lump-sum payment of €500 million which then, HSH Finanzfonds had to contribute to HSH Nordbank through an ordinary contribution in kind (the "lump-sum transaction"). Moreover, HSH Nordbank was not allowed to pay dividends until the end of financial year 2014 at all, while paying dividends for 2015–2016 was restricted to 50% of the annual profit of the preceding financial year.

Two minority shareholders of HSH Nordbank, the Luxembourg investment funds HSH Investment Holdings Coinvest-C and HSH Investment Holdings FSO, sought to annul the Commission decision. Before the recapitalization, they held 25.67% of the capital of HSH Nordbank, and afterward—only 9.19%.

The General Court dismissed the appeal. It held that only the applicants' request for annulment of the lump-sum transaction was admissible. With respect to this transaction, the minority shareholders' interest could be differentiated from the interest of HSH Nordbank, which is why they have the right to take direct legal action. The General Court acknowledged that, while this transaction was neutral for HSH Nordbank, it resulted in a relative reduction of the minority shareholders' shareholdings, and thus in a reduction of their shareholders' rights.

Moreover, the General Court rejected the minority shareholders' claim that the Commission's decision contained procedural errors with respect to the lump-sum transaction. It acknowledged that the lump-sum transaction resulted in a reduced value of the minority shareholders' holdings. However, it held that this transaction was neither unlawful nor disproportionate: it required the minority shareholders to make a contribution proportional to that made by public shareholders in the recapitalization efforts. The fact that a majority shareholder, *i.e.*, HSH Finanzfonds, also received new shares may convey the impression that there was unequal treatment. However, this presents a distorted picture because HSH Finanzfonds did not receive those shares in its capacity as shareholder, but as provider of the aid. The same redistribution/burden-sharing among the shareholders would have been achieved by establishing a public body that is not a shareholder, but merely recipient of the funds. Thus, the General Court concluded that the lump-sum transaction was neither disproportional nor unlawful.

Commission Decisions

Dutch and Luxembourgish Transfer Pricing Tax Rulings for Starbucks and Fiat Constitute Unlawful State Aid

On October 21, 2015, the Commission decided that transfer pricing arrangements, accepted when calculating the taxation of Starbucks Manufacturing EMEA BV ("Starbucks Manufacturing") in the Netherlands and Fiat Finance and Trade ("FFT") in Luxembourg, constituted unlawful state aid.[28]

The Commission found that the tax rulings artificially lowered the tax due and the methods used to calculate the taxable profits of Starbucks Manufacturing and FFT did not reflect the economic reality. Such artificial rulings unfairly advantaged companies taxed on actual profits, which are typically SMEs.

FFT provides financial services to Fiat group companies in Europe. The Commission determined that a 2012 Luxembourgish tax ruling gave FFT a selective advantage of €20–€30 million. In particular, in assessing the return on capital deployed by FFT, the tax ruling: (i) approximated the capital base at a much lower level than FFT's actual capital; and (ii) 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.

[28] Decisions not yet published. *See* Commission Press Release IP/15/5880, "Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules," October 21, 2015.

Starbucks Manufacturing sells and distributes roasted coffee and coffee-related products to Starbucks outlets in EMEA. The Commission determined that a 2008 Dutch tax ruling gave Starbucks Manufacturing a selective advantage of €20–€30 million. In particular, the ruling had accepted a reduced level of taxable profits through: (i) profit shifting, by payment of above-market-value royalties to a UK-based Starbucks group company not liable to pay corporate tax in the UK or the Netherlands; and (ii) inflated prices for the purchase of green coffee beans from a Swiss-based Starbucks group company.

The Commission's decision provided the methodology to calculate the precise value of the undue competitive advantage enjoyed by FFT and Starbucks Manufacturing, however, the Netherlands and Luxembourg are ultimately responsible for the recovery of the unlawful state aid.

Starbucks and Fiat are appealing the decisions in separate actions before the Court of Justice.[29] Substantive grounds relate to the appraisal of transfer pricing under EU state aid rules, and procedural grounds relate to legal certainty and legitimate expectations as regards such transfer pricing analysis.

FINING POLICY

ECJ Judgments

AC-Treuhand AG v. Commission (Case C-194/14 P)

On October 22, 2015, the Court of Justice dismissed an appeal by AC-Treuhand AG ("AC-Treuhand") challenging the General Court's dismissal of its action against the Commission's decision in the heat stabilizers cartels.[30] In 2009, the Commission fined 24 companies for taking part in two cartels in the tin stabilizer sector and the epoxidised soybean oil and esters sector ("the ESBO/esters sector") in violation of Article 101(1) TFEU.[31] AC-Treuhand was not a party to the cartels, but had received two fines totaling €174,000 for facilitating the tin stabilizer cartel by providing consulting services to the cartel participants, arranging meetings, and supplying sales data on the relevant markets.

In proceedings before the General Court, AC-Treuhand sought to annul the 2009 decision, or, in the alternative, to reduce the fines it imposed.[32] The General Court dismissed the action and AC-Treuhand appealed to the Court of Justice.

First, AC-Treuhand maintained that it should not have been fined for merely acting as a consultancy firm to cartel participants because its contracts had no direct link with the infringement of competition identified and therefore would not constitute an "*agreement*" or "*concerted practice*" under Article 101(1) TFEU, then Article 81(1) EC. The Court of Justice rejected this argument, noting that, to follow such an interpretation of the Article, would undermine its effectiveness. AC-Treuhand's conduct had as its "*very purpose*" the realization of the cartel, with full knowledge of the facts.[33]

Second, AC-Treuhand claimed that the imposition of more than a symbolic fine infringed the principle that offences and penalties must be defined by law, because the fine was not reasonably foreseeable at the time of the offense. AC-Treuhand further contented that the General Court had infringed the principle of equal treatment, because the Commission's fine in the present case exceeded those it had imposed in prior cases.[34] The Court of Justice dismissed the argument as partly inadmissible and partly unfounded. AC-Treuhand's argument was different to its plea before the General Court and thus widened the ambit of the case beyond the Court of Justice's jurisdiction. Furthermore, the General Court could not be expected to adjudicate a plea that had not been presented before it.

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29 *See Netherlands v. Commission* (Case T-760/15); and *Fiat Chrysler Finance Europe v. Commission* (Case T-759/15).

30 *AC-Treuhand AG v. Commission* (Case C-194/14 P) EU:C:2015:717.

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

32 *AC-Treuhand AG v. Commission* (Case T-27/10) EU:T:2014:59.

33 *AC-Treuhand AG v. Commission* (Case C-194/14 P) EU:C:2015:717, para. 38.

34 *AC-Treuhand AG v. Commission* (Case T-99/04) EU:T:2008:256.

Third, AC-Treuhand appealed against the General Court's finding that the Commission was entitled to set fines as a lump sum under Article 23(2) and (3) of Regulation No 1/2003 and the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (the "Fining Guidelines").[35] AC-Treuhand argued that, instead, the fines should have been calculated according to the turnover relating to the infringement in question. The Court of Justice noted that, while turnover in the relevant markets is the usual starting point for fine calculation, the Commission may also use it to calculate fines. It thus confirmed the Commission's power to impose fines as a lump sum, following paragraph 37 of the Fining Guidelines.

Lastly, AC-Treuhand claimed that the General Court had failed to consider the principles of legality, proportionality, and equal treatment as it should have, in particular, because it failed to justify the difference between the fine in the present case and the symbolic fine imposed in Case T-99/04, and furthermore, did not take into account the duration of the infringement. The Court of Justice rejected this argument. It found that the General Court did not have to examine complaints *sua sponte* while exercising its powers of unlimited jurisdiction.[36] The argument was thus rejected, and the appeal dismissed in its entirety.

ECJ Advocate General Opinions

***Commission v. Keramag Keramische Werke GmbH and Others* (Case C-613/13 P), *Duravit AG and Others v. Commission* (Case C-609/13 P), *Villeroy & Boch AG v. Commission* (Case C-625/13 P), *Roca Sanitario v. Commission* (Case C-636/13 P), and *Villeroy & Boch SAS v. Commission* (Case C-644/13 P), Opinion of Advocate General Wathelet**

On November 26, 2015, Advocate General Wathelet delivered his opinion on five appeals against four General Court judgments,[37] all concerning the validity of the Commission's decision[38] in the bathroom fittings and fixtures cartel. He focused on two issues central to the appeals: the contradictory conclusions reached by the General Court in different judgments on the same issue, and the General Court's exercise of unlimited jurisdictions in setting fines.

As to the first issue, the General Court's judgment in *Keramag Keramische Werke et al v. Commission* and three other appealed judgments appeared to contradict one another, although all these decisions were issued the same day, by the same judges. In the *Keramag* judgment, the General Court considered a statement made by a leniency applicant uncorroborated and denied it any probative value. In the other three judgments, the General Court relied on that very same statement to find an infringement and consequently reduce the fine imposed on the leniency applicant that made that statement.

Advocate General Wathelet rejected the defendant's claim that the General Court did not err in reaching diverging conclusions in different judgments, because these decisions were based on different arguments and evidentiary materials. According to Advocate General Wathelet, such a radically different interpretation of the same document in parallel cases manifestly exceeded the limits of a reasonable assessment of the evidence by the General Court.

Moreover, in his opinion, the General Court's reasoning in *Keramag* was vitiated by an error of law, insofar as it concluded that one leniency statement had no probative value based on an allegedly contrary statement that was not included in the General Court's case file, merely referred to in the Commission's decision. Advocate

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

[36] *AC-Treuhand AG v. Commission* (Case C-194/14 P) EU:C:2015:717, para. 77.

[37] *Keramag Keramische Werke and Others v. Commission* (Joined Cases T-379/10 and T-381/10) EU:T:2013:457; *Duravit and Others v. Commission* (Case T-364/10) EU:T:2013:477; *Villeroy & Boch Austria and Others v. Commission* (Joined Cases T-373/10, T-374/10, T-382/10, and T-402/10) EU:T:2013:455; and *Roca Sanitario v. Commission* (Case T-408/10) EU:T:2013:440.

[38] *Bathroom Fittings and Fixtures* (Case COMP/39092), Commission decision of June 23, 2010.

General Wathelet also found that, in *Keramag*, the General Court took an unreasonable and overly rigorous approach in examining documentary evidence, ignoring the precedent on the reciprocal corroboration of evidentiary materials and the overall assessment of evidence.

Having recommended that the *Keramag* judgment be set aside, Advocate General Wathelet agreed with the opposite approach adopted by the General Court in the three other judgments, and requested that the Court of Justice reject the appeals brought against them.

The General Court's unlimited jurisdiction to set fines was at issue in *Roca Sanitario v. Commission*. In its decision, the Commission imposed fines calculated according to the same coefficients for all undertakings involved. The General Court acknowledged the lesser gravity of Roca Sanitario's conduct compared to that of other cartelists, but decided not to lower the amount of the fine imposed on this undertaking. It concluded that the fine was still adequate and proportional to Roca Sanitario's infringement, while fines imposed on other cartelists were too low.

According to Advocate General Wathelet the approach adopted by the General Court was "clearly incorrect."[39] Imposing the same fines for infringements of different gravity would necessarily be insufficiently dissuasive with respect to one, or disproportional with respect to the other. He therefore recommended that the Court of Justice remand the case to the General Court, so that it may draw the necessary inferences from its own findings and consequently lower the fine imposed on Roca Sanitario.

General Court Judgments

Corporacion Empresarial de Materiales Construccion v. Commission (Case T-250/12)

On October 6, 2015 the General Court dismissed an appeal by Corporación Empresarial de Materiales de Construcción, SA ("CEMC"), upholding a €4.2 million fine imposed by the Commission.[40]

In July 2008, the Commission imposed fines totaling €79 million on eight sodium chlorate paper bleach producers for participating in a market-sharing and price-fixing cartel from 1994 to 2000. CEMC was the parent company of Aragonesas, one of the eight participants in the cartel. CEMC and Aragonesas appealed the Commission's decision in separate proceedings. The General Court dismissed the claims related to CEMC's liability for the infringement committed by Aragonesas. However, the General Court annulled the Commission's decision with regard to Aragonesas by reducing the length of the infringement.

In March 2012, the Commission amended its sodium chlorate paper bleach cartel decision to reflect the General Court's judgment and reduced the fine imposed on CEMC and Aragonesas to €4.2 million. CEMC appealed to the General Court, claiming that the Commission had infringed Article 25 of Regulation No 1/2003 by imposing a new fine after expiry of the five-year limitation period.

Under Article 25, the statute of limitations begins to run when the infringement is committed, unless the infringement is continuous or repeated, in which case the statute of limitations begins to run on the day on which the infringement ceases. Article 25 also provides that any action taken by the Commission or by a NCA for the purpose of the investigation or proceedings interrupts the limitation period (and the period restarts).

CEMC claimed that, because the General Court had annulled the entirety of the fine imposed in the 2008 decision, the Commission had imposed a new fine in the 2012 decision. This decision was, therefore, subject to all the requirements of Article 25. CEMC also claimed that, because the infringement was classified as a continuous one, the limitation period had begun to run by the end of the infringement in December 1998 and it had expired in

[39] *Duravit and Others v. Commission* (Case C-609/13 P) EU:C:2015:785, opinion of Advocate General Wathelet, para. 260.

[40] *Corporación Empresarial de Materiales de Construcción v. Commission* (Case T-250/12) EU:T:2015:749.

December 2003. According to CEMC, a leniency application by one of the cartelists could not interrupt the limitation period.

The General Court concluded that the Commission had not adopted a new decision when imposing the fine on CEMC. Rather, the new fine was intended to effectively maintain the fine originally imposed by the 2008 decision. The General Court agreed that the infringement was a single and continuous one, and therefore, the limitation period began to run on the day on which the infringement ceased, in December 1998. The General Court examined whether the limitation period was interrupted before December 2003, and, more specifically, if granting one of the participating companies leniency in September 2003 was an action that interrupted the limitation period. The court concluded that this was the case.

The General Court noted that the list of actions capable of interrupting the limitation period according to Article 25 of Regulation 1/2003 is not exhaustive. Rather, one should analyze whether the Commission action was taken for the purpose of the investigation or proceedings in respect of the infringement. In this regard, the Court concluded that the Commission's leniency program "pursues the objective of investigating, suppressing and deterring practices forming part of the most serious infringements of Article 101 TFEU."[41] Thus, a decision to grant a company immunity is fundamental to enable the Commission to investigate and initiate proceedings and should be considered an action capable of interrupting the limitation period.

The General Court concluded that the Commission's decision to grant a company leniency in September 2003 interrupted and restarted the limitation period. The limitation period was interrupted once again by the request for information sent on September 2004 and ran thereafter until July 2008 when the Commission adopted the first decision against all sodium chlorate paper bleach producers.

POLICY AND PROCEDURE

ECJ Judgments

Alcogroup and Alcodis v. Commission (Case C-386/15 P (R))

On September 17, 2015, the Court of Justice dismissed an appeal against an order of the General Court[42] which refused to grant interim measures relating to Commission inspections in the oil, biofuel and bioethanol markets.[43]

In May 2013, the Commission carried out inspections in the headquarters of a number of undertakings active in the ethanol and crude oil market segments,[44] and in October 2014, the Commission conducted inspections in the headquarters of both Alcogroup SA ("Alcogroup") and Alcodis SA ("Alcodis").[45] Alcogroup and Alcodis requested the assistance of their lawyers and exchanged a number of documents with them. These exchanges of information were covered by professional secrecy, and were labeled "legally privileged."

At the same time, the Commission initiated another investigation seeking to ascertain the existence of agreements or concerted practices between undertakings active in the bioethanol marketing sector.[46] The Commission issued a decision ordering that both Alcogroup and Alcodis submit to another inspection within the scope of the new investigation (hereinafter, the "first decision"). At the start of the inspection, the Commission's officials agreed to exclude from the searches any document labeled

[41] *Corporación Empresarial de Materiales de Construcción v. Commission* (Case T-250/12) EU:T:2015:749.

[42] *Alcogroup and Alcodis v. Commission* (Case T-274/15 R) EU:T:2015:389.

[43] *Alcogroup and Alcodis v. Commission* (Case C-386/15 P(R)) EU:C:2015:623.

[44] Commission investigation registered with the reference AT.40054, Oil and Biofuel Markets.

[45] Article 20 (4), Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[46] Commission investigation registered with the reference AT.40244.

"legally privileged." However, according to Alcogroup and Alcodis, Commission officials analyzed and selected for seizure a number of privileged documents. Although the documents were subsequently excluded from the Commission's investigation, Alcogroup and Alcodis claimed that the inspectors had already examined them. On April 21, 2015, Alcogroup and Alcodis sent a letter to the Commission asking for the immediate suspension of any inspection in their headquarters. This request was rejected on May 8, 2015 by a Commission decision (hereinafter, the "second decision").

Alcogroup and Alcodis appealed the first and the second decision to the General Court while simultaneously filing a request for interim measures, asking the General Court to: (i) suspend the execution of the first and second Commission decisions, and (ii) order the Commission to suspend all Commission investigative acts related to them.

The General Court rejected the request for interim measures as being inadmissible before the expiry of the deadline set for the Commission to deliver its observations in the main proceedings. It found that (i) the request for the suspension of the execution of the first decision was inadmissible because the decision had already been fully implemented, (ii) the second decision could not be suspended, because of its negative nature, and (iii) the request for suspension of any investigation relating to the defendants was beyond the scope of the appeal in the main proceedings because, by deferring the request, the General Court would be anticipating the measures that could be adopted by the Commission following a possible ruling annulling the first and second decisions.

The defendants appealed to the Court of Justice, asking for an annulment of the General Court's order and the adoption of the interim measures described above. They claimed that the General Court erred in law when it assessed (i) the admissibility of the request for suspension of all Commission investigative acts related to them, and (ii) the admissibility of the requests for the suspension of the first and second Commission decisions. The Court of Justice rejected the appeal in its entirety.

Concerning the first request, the Court of Justice found that the mere fact that Commission personnel had read documents subject to professional secrecy was not enough to demonstrate the necessity of adopting interim measures to ensure the full effectiveness of a future decision. These documents were no longer in the Commission's possession and there was no risk that they would be disclosed to third parties or relied on in a procedure against the defendants. As to the appellants' argument that the General Court infringed the effective judicial protection principle by adopting an excessively demanding interpretation of the admissibility criteria applicable to interim measure requests, the Court of Justice reiterated that the appellants had failed to show that they suffered harm that could not be eliminated retroactively.

Regarding the second request, the Court of Justice upheld the General Court's finding that the execution of the first decision could not have been suspended because it had already been fully implemented and that the second decision, because of its negative nature, did not require any execution acts.

ECJ Advocate General Opinions

HeidelbergCement 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), Opinions of Advocate General Wahl

On October 15, 2015, Advocate General Wahl delivered four opinions on the conditions for, and limits to, the Commission's power to require undertakings to supply information in the context of an antitrust investigation. The decisions were issued in the course of the Commission's investigation into several undertakings active in the cement industry.[47]

The opinions largely supported HeidelbergCement's, Schwenk Zement's, Buzzi Unicem's, and Italmobiliare's appeals against judgments of the General Court dismissing

[47] *See* European Commission, daily news of July 7, 2015, available at http://europa.eu/rapid/press-release_MEX-15-5462_en.htm?locale=en.

their actions challenging a Commission decision to request information ("RFI"). Advocate General Wahl concluded that the General Court erred in law when it dismissed their pleas. In particular, he did not agree with the findings of the General Court on the adequacy of the statement of reasons and the necessity of the requested information.

The appellants argued that the extensive RFIs contained a very general statement of reasons, and several requests concerned publicly available information or information that had already been received by the Commission. Additionally, they noted that the Commission had imposed strict formatting requirements for the replies and a failure to comply could subject the appellants to fines. The appellants argued that the Commission's statement of reasons left the purpose of the RFI unclear and that the information sought did not meet the requirement of Article 18(1) of Regulation 1/2003[48] according to which the Commission may only request information necessary to carry out its duties.

As regards the adequacy of the statement of reasons, Advocate General Wahl emphasized that the question to be answered is whether, taking into account the stage of the procedure at which the contested decision was adopted, the statement of reasons is sufficiently clear to (i) enable the recipient to exercise its right of defense and assess its duty to cooperate with the Commission and (ii) to allow the exercise of judicial review by the EU Courts.

Although the Commission's investigation had started three years earlier, the statement of reasons contained (i) a nearly all-inclusive description of the presumed infringements, (ii) an imprecise determination of their geographical scope, and (iii) a very broad definition of the products concerned. The RFI also referred to the statement of reasons of the Commission's decision to initiate proceedings. In his analysis, Advocate General Wahl confirmed that the statement of reasons in the decision to open the investigation could be regarded as 'context' for the second decision. He further stated that the mere fact that a statement of reasons is vague does not render the decision invalid if the questions of the RFI reveal what information the Commission seeks and its reasons for seeking the information. However, he found that, in the case at hand, the "extraordinarily numerous" questions that covered "very diverse types of information" failed to reveal the scope of the Commission's investigation.[49] Rather, the questions indicated a scope that would be more appropriate under Article 17 of Regulation 1/2003, which covers sector inquiries. Advocate General Wahl concluded that the purpose of the Commission's RFI was insufficiently clear and unambiguous, which increased the risk of the respondents' providing self-incriminatory answers and rendered judicial review by the EU Courts significantly more difficult.

Advocate General Wahl emphasized that the criterion of the necessity of the requested information must be assessed by reference to the purpose of the investigation. Accordingly, the purpose of the RFI has to be sufficiently well-defined to enable the recipient to verify whether the necessity requirement is fulfilled for every set of questions included in the RFI. He added that there needs to be more than a mere connection between the requested information and the alleged infringements: the key issue is whether the Commission could reasonably expect this information to be helpful to determine the existence and precise nature and scope of the specific infringements under investigation. Concerning the Commission's strict formatting requirements, Advocate General Wahl found that undertakings cannot be requested in all circumstances to deliver information in a specific format. Otherwise, the Commission would in practice "outsource" its task to build a case against the undertaking. Considering in particular the vagueness of the RFI's statement of reasons, the extremely burdensome instructions and formatting requirements, the broad range of questions, including

[48] 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.

[49] *HeidelbergCement 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) EU:C:2015:694, opinions of Advocate General Wahl.

requests for publicly available information and information that had already been provided by the defendants, Advocate General Wahl concluded that the General Court had erred in examining the necessity and proportionality of the RFIs.

If the Court of Justice follows Advocate General Wahl's opinion, the Commission will have to consider carefully the way in which it drafts its RFIs in the future to ensure that the purpose is clearly defined, only necessary information is requested, and the instructions and formatting requirements do not impose an excessive burden on the recipients.

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