Horizontal Agreements

ECJ Judgments

***SIA VM Remonts, SIA Ausma Grupa v. Konkurences padome and Konkurences padome v. SIA Partikas* (Case C-542/14)**

On July 21, 2016, the Court of Justice issued a preliminary ruling following a request from the Latvian Supreme Court on the issue of whether a company was liable for anticompetitive conduct by its service provider.

In October 2011, the Latvian Competition Council found that three companies had breached Article 11(1) of the Latvian Law on Competition (equivalent of Article 101(1) TFEU). DIV un KO ("DIV"), Ausma grupa ("Ausma"), and Partikas kompanija ("Partikas") each bid in a tender. Partikas instructed legal counsel to prepare its bid and the same legal counsel subsequently also prepared the bids for DIV and Ausma. The legal counsel had allegedly used the tender prepared for Partikas as a point of reference in preparing the two other tenders, including on price: Ausma's price was set at 5% lower than Partikas's, and DIV's price was set at 5% lower than Ausma's.

In July 2013, the Regional Administrative Court annulled the decision as to Partikas, but upheld it as to DIV and Ausma, concluding that the pricing showed a concerted practice, but there was no evidence showing Partikas's participation. On appeal, the Latvian Supreme Court referred a question to the Court of Justice the question of whether, under Article 101(1) TFEU, an undertaking may be held liable for a concerted practice caused by actions of an independent service provider.

The Court of Justice noted that an undertaking can be part of an economic unit even if that unit consists of several legal entities. An employee that performs his duties under the direction of the undertaking that employs him is deemed to be incorporated into that undertaking's economic unit. However, unlike an employee, an independent service provider that offers services in return for payment must be considered a separate undertaking, and its acts cannot automatically be attributed to the undertaking using its services.

The Court of Justice recognized that there are circumstances in which an apparently independent service provider is in fact acting under the direction of the undertaking: for example, when the service provider has little or no autonomy or flexibility with regard to the way in which the activity concerned is carried out. Such a situation may be inferred from the existence of particular organizational, economic, and legal links between the service provider and the user of the services.

The Court of Justice added that, where the service provider is truly independent, its actions may result in liability for its customer undertakings only if either of the following conditions is satisfied (as determined by national courts):

- The undertaking was aware of the anticompetitive objectives of the concerted practice and intended to contribute to them by its own conduct. This condition is met when the undertaking aimed to share competitively sensitive information through an intermediary, or when it expressly or tacitly consented to the sharing of the information. This condition is not met if the service provider shares competitively sensitive information without informing the undertaking using its services.
- The undertaking reasonably could have foreseen that the retained service provider would share its competitively sensitive information and was prepared to accept the risk.

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General Court Judgments

Lundbeck v. Commission (Case T-472/13)

On September 8, 2016, the General Court issued six judgments dismissing the appeals by Lundbeck S.A. ("Lundbeck") and several producers of generic medicines against the 2013 Commission decision[1] that had found that the "pay for delay" agreements between Lundbeck and the generic companies violated Article 101 TFEU.[2]

The Commission found that, in 2002, Lundbeck had entered into several agreements with generic companies to delay the entry of cheaper generic versions of Lundbeck's branded drug Citalopram, its best-selling product at the time. Although Lundbeck's basic EEA patent for Citalopram was to expire by 2003, several generic drug producers agreed not to enter the market in exchange for Lundbeck paying them significant lump sum amounts, purchasing their stock, and offering guaranteed profits through distribution agreements. Based on these facts, the Commission concluded that Lundbeck and the generic drug producers were potential competitors, and the agreements between them constituted a restriction of competition by object within the meaning of Article 101 TFEU. Accordingly, it fined Lundbeck approximately €94 million, and it fined the generic companies around €150 million in total.

Lundbeck appealed the Commission's decision, claiming that the Commission had erred in assessing the existence of actual and potential competition between it and the generic companies and in applying the legal standard for restrictions by object. Lundbeck also argued that the Commission committed errors in the calculation of the fine. The General Court, however, dismissed Lundbeck's appeal in its entirety and thus confirmed, for the first time, that "pay for delay" agreements constitute a restriction of Article 101 TFEU by object.

First, the General Court upheld the Commission's finding that Lundbeck and the generic drug producers were actual or potential competitors at the time of entering into the agreements. The General Court emphasized that, to find potential competition, it is sufficient for there to be an undertaking outside the market, regardless of whether that undertaking intends to enter the market in the near future. Moreover, the fact that the generic drug producers had no marketing authorizations and might not have entered did not exclude the existence of potential competition, as these producers had real, concrete possibilities of entering the market through obtaining authorization within a sufficiently short period. The General Court also noted the existence of other real and concrete routes to enter the market, such as launching the product with the risk of facing litigation with Lundbeck.

Second, the General Court confirmed the Commission's finding that the "pay for delay" agreements at issue were object restrictions because the size and disproportionate nature of the payments provided an incentive for the generic drug producers to accept the restrictions that they would otherwise not have accepted. The General Court pointed out that the payments could not be justified on the basis of avoiding the irreversible harm (such as irreversible price falls or regulatory price cut) that could have been caused by unlawful generic entry, because this is a characteristic of the pharmaceutical sector and constitutes a normal commercial risk.

Lundbeck had argued that the agreements at issue should also be assessed from a viewpoint of protecting IP rights. In response, the General Court first recalled that the exercise of intellectual property ("IP") rights may well be caught by Article 101 TFEU when such exercise appears to be the object, the means, or the consequence of a restrictive agreement. The General Court went on to note that, while the protection of patent rights indeed includes the right to oppose

[1] *Lundbeck* (Case COMP/AT.39226), Commission decision of June 19, 2013.

[2] *See also*: *Xelia Pharmaceuticals and Alpharma v. Commission* (Case T-471/13) EU:T:2016:460; *Sun Pharmaceutical Industries and Ranbaxy (UK) v. Commission* (Case T-460/13) EU:T:2016:453; *Arrow Group and Arrow Generics v. Commission* (Case T-467/13) EU:T:2016:450; *Generics (UK) v. Commission* (Case T-469/13) EU:T:2016:454; and *Merck v Commission* (Case T-470/13) EU:T:2016:452.

infringements, it does not include the right pay actual or potential competitors not to enter the market. Such agreements need to be assessed under Article 101 TFEU. Accordingly, even if certain restrictions in the agreements at issue would have been within the scope of patent protection,[3] the agreements nevertheless constituted restrictions of competition by object because they intended to delay the competitors' market entry in exchange for significant reverse payments, which, among other things, corresponded to approximately the profits that the generic companies would have expected to generate had they had entered the market. The payments ultimately transformed the uncertainty of market entry into certainty that market entry would not take place during the term of the agreements.

Finally, Lundbeck argued that, due to the complexity and novelty of the issues raised, and based on the principle of legal certainty, the Commission should have imposed only a symbolic fine. The General Court disagreed, stating that, it follows from a literal reading of Article 101 TFEU that agreements between competitors for the exclusion of some of them from the market are illegal. The agreements at issue pursued this object and the fact that they were concluded in the form of settlement agreements concerning IP rights did not render their unlawfulness under competition law novel or unforeseeable. The General Court observed that the fact the Commission had previously not characterized a certain type of agreement as restrictive of competition cannot prevent it from later making such a finding and imposing fines[4] following an individual, detailed examination of the measures at issue in the light of their content, purpose, and context. The General Court concluded that the Case law does not require such an agreement to be *prima facie* harmful to competition *without* the detailed examination of its content, purpose, and context. It also observed that, in the Case at hand, there was evidence that Lundbeck and the generic drug producers were aware of the infringing nature of their agreements.

Commission Decisions

Container Shipping Commitments on Future Pricing Intentions (Case AT.39850)

On September 6, 2016, the Commission published in the Official Journal the summary of its decision under Article 9 of Regulation 1/2003 to make legally binding the commitments offered on July 7, 2016 by fourteen container liner shipping companies[5] to resolve the Commission's investigation into their signaling practices.[6]

These fourteen container liner shipping companies would regularly announce their respective intended future increases of freight prices to the public, both through their websites and through press releases. These price announcements, referred to as general rate increases ("GRI"), did not indicate the final price for the freight service concerned, but focused on the increase in cost per transported container unit on a specific trade route and specified the date on which the increase would go into effect.

Container liner shipping companies typically made GRI announcements three to five weeks before their intended implementation date. Following one

[3] The General Court found that the Commission had not established to the requisite legal standard that the restrictions in the agreement with one of the generic drug producers, namely Generics UK, went beyond the scope of Lundbeck's patents, but held that the finding was not determinative as the agreement was, in any event, anticompetitive by object.

[4] The Court referred to the judgment of the Court of Justice in *AstraZeneca v. Commission* (Case C-457/10 P) EU:C:2012:770, which also concerned the finding of an unprecedented infringement relating to protection of IP rights in the pharmaceutical sector.

[5] The shipping companies were: CMA CGM S.A., China COSCO Container Lines Co., Ltd., Evergreen Marine Corporation (Taiwan) Ltd., Hamburg Südamerikansche Dampfschifffahrts-Gesellschaft KG, Hanjin Shipping Co., Ltd., Hapag-Lloyd AG, Hyundai Merchant Marine Co. Ltd., A.P. Møller – Maersk A/S, Mitsui O.S.K. Lines, Ltd., MSC Mediterranean Shipping Company S.A., Nippon Yusen Kabushiki Kaisha, Orient Overseas International Ltd., United Arab Shipping Company (S.A.G.), and ZIM Integrated Shipping Ltd.

[6] *Container Shipping* (Case COMP/AT.39850), Commission decision of July 7, 2016.

competitor's announcement, some or all of the other companies would announce a similar GRI for the same or similar routes effective as of same or similar dates. The Commission opened an investigation of these practices, which were not sufficiently specific to have been made to inform customers, based on coordination concerns. The Commission considered that GRI announcements reduced the level of uncertainty on the market, decreased the companies' incentives to compete, and had the potential to cause higher prices for customers in breach of Article 101(1) TFEU.[7]

To remedy the Commission's preliminary concerns, the fourteen container liner shipping companies offered the following commitments. First, they would stop publishing GRI announcements and only issue price changes as percentages. Second, they would provide more detailed pricing information to customers to reflect the components of what is charged. Third, their pricing announcements would become binding maximum prices for the period of validity. Fourth, they would ensure that any pricing announcement would be made no more than a month prior to its effective date.[8]

The Commission's preliminary view that such pricing announcement practices amount to a restriction of competition by object reaffirms the approach previously taken by the Court of Justice in Dole,[9] where an exchange of information capable of removing uncertainty about other market participants' future commercial behavior was deemed anticompetitive by object.

Fining Policy

ECJ Judgments

***Pilkington Group Ltd and Others v. Commission* (Case C-101/15 P)**

On September 7, 2016, the Court of Justice dismissed the appeal brought by Pilkington Group Ltd. ("Pilkington") against a General Court judgment that upheld the fine imposed by the Commission for Pilkington's involvement in the car glass cartel. The Court of Justice followed the Opinion of Advocate General Kokott[10] and dismissed all of Pilkington's arguments.

In 2008, the Commission imposed a €1.4 billion fine on four companies for participating in a market sharing cartel in the glass sector.[11] Pilkington received a fine of €357 million and appealed to the General Court. The General Court dismissed Pilkington's appeal and upheld the Commission's decision in its entirety.[12] Pilkington appealed to the Court of Justice seeking annulment of the General Court's judgment in so far as it upheld the Commission's calculation of the fine.

Pilkington claimed that the General Court had erred in its interpretation of the Commission's 2006 Fining Guidelines[13] by holding that, when determining the basic amount of the fine, the Commission was entitled to consider the sales made pursuant to contracts predating the infringement periods and not renegotiated during that period.

The Court of Justice disagreed, holding that sales made under such contracts also fell within the scope of the cartel, and therefore could have been taken into account when determining the fine. This was because the purpose of the cartel was to allocate all supplies of automotive glass between the cartel participants, comprising both existing and new contracts.

Pilkington also argued that the amount of fine exceeded the statutory 10% cap set out in Article 23(2) of Regulation 1/2003[14] because the Commission used

7 *Ibid*, para. 55.

8 *Ibid.*, paras. 77-80.

9 *Dole Food and Dole Fresh Fruit Europe v. Commission* (Case C-286/13 P) EU:C:2015:184, para. 122. *See also*, EU Competition Quarterly Report Q1 2015.

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

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

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

13 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2, point 13.

14 Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in

the European Central Bank ("ECB") average exchange rate for the business year prior to the adoption of the decision. According to Pilkington, 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.

The Court of Justice agreed with Advocate General Kokott and concluded that the Commission could use the average exchange rate for the business year prior to the adoption of the decision to calculate the 10% cap on the fine. The Court of Justice held that the use of turnover figures of the last business year prior to the decision is intended to reflect the financial capacity of an undertaking when it is identified as being responsible for the infringement. This rationale also justifies the use of the exchange rate applicable during that period. In addition, the Court of Justice clarified that such approach by its very nature tends to neutralize the effect of monetary fluctuations on the level of the statutory ceiling of the fine, whereas a method of currency conversion based on a daily exchange rate, which was suggested by Pilkington, is bound to be uncertain and unpredictable.

Pilkington further claimed that the General Court had erred in applying the rules on equal treatment and proportionality, as, due to its lower diversification, the fine imposed on Pilkington was proportionally higher than these imposed on other cartel participants. Pilkington argued that the General Court did not take into account Pilkington's financial difficulties resulting from the fine, thus failing to correctly exercise its unlimited jurisdiction.

The Court of Justice pointed out that, when determining the amount of fines, the Commission is not required to consider differences based on undertakings' overall turnover. On the contrary, such an approach would be tantamount to conferring an advantage on the least diversified undertakings based on criteria that are irrelevant in light of the gravity and duration of the infringement.

The Court of Justice added that, while, in exceptional circumstances, financial difficulties may justify a reduction of the fine imposed on an undertaking, such exceptional circumstances were not present here. The General Court therefore did not fail to exercise its jurisdiction, but merely concluded that Pilkington's circumstances were not exceptional and therefore could not warrant a reduction of fine.

General Court Judgments

RENV – Parker Hannifin Manufacturing and Parker-Hannifin v. Commission (Case T-491/07)

On July 14, 2016, the General Court issued its second judgment in the Parker-Hannifin case.[15] The General Court confirmed the Commission's decision on the application of the principle of economic continuity and reduced the fines imposed on Parker ITR and Parker-Hannifin for their participation in the marine hoses cartel.

In 2001, ITR SpA ("ITR"), which was part of the Saiag group, formed a subsidiary, ITR Rubber Srl ("ITR Rubber"), transferring its cartelized business to this subsidiary a few months later. In 2002, Parker-Hannifin acquired ITR Rubber (which was later renamed Parker ITR).

On January 28, 2009, the Commission imposed a total fine of €131 million on several undertakings (including Parker ITR and Parker-Hannifin) for their participation in the marine hoses cartel.[16] Parker ITR was held liable for the entire duration of the infringement (*i.e.*, between 1986 and 2007), while Parker-Hannifin was held liable only from January 2002 onward (*i.e.*, the date on which it acquired Parker ITR). The Commission invoked the concept of economic continuity to hold Parker ITR liable for the entire duration of the infringement as the economic successor of the marine hoses business. According to the principle of economic continuity, the Commission may attribute liability for competition law

Articles 81 and 82 of the Treaty, OJ 2003 L 1/1, Article 23(2).

15 *Parker Hannifin Manufacturing and Parker-Hannifin v. Commission* (Case T-491/07) EU:T:2016:411.

16 *Marine Hose* (Case COMP/39406), Commission decision of January 28, 2009.

infringements not to the initial operator but to the new operator of the undertaking involved in the infringement (*i.e.*, a legal entity that has not committed the infringement).

In its first judgment, the General Court found that the Commission should not have applied the principle of economic continuity, and that Parker ITR should have been held liable only as of 2002, when it started functioning as a marine hoses business.[17] However, in 2014, the Court of Justice concluded that the General Court had erred in failing to apply the principle of economic continuity as it had overlooked the existence of structural links between ITR and ITR Rubber.[18] The Case was referred back to the General Court.

In the second judgment, the General Court found that there was a rebuttable presumption that ITR had exercised decisive influence over Parker ITR since it owned 100% of Parker ITR's assets. The General Court rejected the parties' attempts to rebut this presumption, based in part on claims that the prior consent of the purchaser was necessary for any decision outside the ordinary course of business. As a result, the principle of economic continuity was applied and Parker ITR was held liable for its predecessor's conduct. Parker-Hannifin remained jointly and severally liable for the infringement as of January 2002.

Parker ITR contested the Commission's decision to impose a 30% uplift on its fine due to its role as a cartel leader for more than 2 years (from June 1999 to September 2001). The General Court found that the Commission had correctly imposed such an uplift on Parker ITR. The Commission also imposed the same uplift on Parker-Hannifin's fine. In this respect, the General Court held that this the Commission had erred because the aggravating circumstance had occurred before Parker-Hannifin's acquisition of Parker ITR (*i.e.*, before the starting point of Parker-Hannifin's liability for the infringement). Accordingly, Parker-Hannifin's fine was reduced to €6.4 million by the General Court.

The General Court also reduced Parker ITR's fine, ruling that the Commission had failed to correctly calculate the 10% turnover ceiling to fines pursuant to Article 23(2) of Regulation 1/2003.[19] Based on the Commission's decision, Parker ITR was exclusively liable for €19.2 million. The Commission should have calculated the 10% of the total turnover cap solely on the basis of the turnover of Parker ITR (*i.e.*, €135 million). Therefore, the amount of the fine for which Parker ITR was exclusively liable was reduced to €13.5 million.

Commission Decisions

***Trucks* (Case AT.39.824)**

On July 19, 2016, the Commission imposed a record fine totaling €2.9 billion on four truck producers.[20] The Commission found that five producers of medium and heavy trucks (MAN, Daimler, Iveco, Volvo/Renault, and DAF) infringed Article 101 TFEU by: (i) coordinating gross pricing behavior; and (ii) exchanging information and coordinating the introduction of certain emission technologies required by EURO emissions standards, and passing on to customers the costs of the introduction. The infringement lasted 14 years and covered the entire EEA.

In imposing this record breaking fine, the Commission took into account the serious nature of the infringement, the very high combined market share of the undertakings involved (*i.e.*, around 90%), the geographic scope of the infringement and its long duration, and the high value of sales of the cartelized trucks.

[17] *Parker ITR and Parker Hannifin v. Commission* (Case T-146/09) EU:T:2013:258.

[18] *Commission v. Parker Hannifin Manufacturing and Parker-Hannifin* (Case C-434/13P) EU:C:2014:2456. Previously reported in EU Competition Quarterly Report Q4 2014.

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

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

In September 2010, MAN, a subsidiary of Volkswagen, was the first undertaking to blow the whistle and apply for immunity from fines pursuant to the Leniency Notice (avoiding a fine of approximately €1.2 billion).[21] Three other truck producers also received fine reductions for cooperating with the Commission. The fine reductions were based on the timing of each undertaking's cooperation and the value of the evidence that it provided to support the Commission's case. Volvo/Renault was granted a fine reduction of 40%, Daimler – of 30%, and Iveco – of 10%. All of the trucks producers addressed in the Commission's decision also received an additional 10% fine reduction pursuant to the Settlement Notice.

The final fines imposed by the Commission amounted to €1 billion for Daimler, €495 million for Iveco, €670 million for Volvo/Renault, and €753 million for DAF.

The Commission also initiated proceedings against Scania, also a Volkswagen subsidiary. Scania is not covered by this settlement decision and the investigation continues under the standard (non-settlement) cartel procedure for this company. This makes the Case a hybrid settlement case.

Intellectual Property and Licensing

ECJ Judgments

Genentech Inc. v. Hoechst GmbH and Sanofi-Aventis Deutschland GmbH (Case C-567/14)

On July 7, 2016, the Court of Justice issued a decision on a request of the Paris Court of Appeal for a preliminary ruling on Article 101(1) TFEU in the context of a patent license dispute between Genentech Inc. ("Genentech"), on one side, and Hoechst GmbH ("Hoechst") and Sanofi-Aventis Deutschland GmbH ("Sanofi-Aventis"), on the other side.

The question referred to the Court of Justice arose in the context of the Paris Court of Appeal's consideration of Genentech's appeal against the finding of the International Court of Arbitration of the International Chamber of Commerce that Genentech was liable to Hoechst and Sanofi-Aventis for unpaid running royalties under a patent licensing agreement, even though the underlying patents had been revoked. Genentech argued that its obligation under the agreement to pay royalties contravened Article 101(1) TFEU because it placed Genentech at a competitive disadvantage compared to third parties who could use the technology for free. Genentech also claimed that the agreement no longer served any purpose due to the revocation of the licensed patents.

The Court of Justice held that, as long as the licensee can terminate the contract, Article 101(1) TFEU does not prohibit the imposition of a contractual requirement to pay royalties for the exclusive use of a technology no longer covered by a patent. The royalty is the price to be paid for commercial exploitation of the licensed technology with the guarantee that the licensor will not exercise its industrial-property rights. According to the Court of Justice, given that the licensee could freely terminate the license, the obligation to pay royalties did not undermine competition by foreclosing the licensee or restricting its freedom of action.

This judgment reconfirms and builds on the Court of Justice's holding in *Ottung,*[22] where the Court of Justice concluded that, while a license agreement is in effect, the payment of the royalty is still due even after the expiration of industrial property rights, provided the license can be freely terminated.

Abuse

General Court Judgements

Morningstar, Inc. v. Commission (Case T-76/14)

On September 15, 2016,[23] the General Court rejected Morningstar's appeal of the Commission's decision to accept Thomson Reuters' commitments in relation to an alleged abuse of dominance in the real-time data

[21] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/17.

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

[23] *Morningstar v. Commission* (Case T-76/14) EU:T:2016:481.

feeds sector.[24] This is the General Court's second judgment on a commitment decision.[25]

In its preliminary assessment of September 19, 2011, the Commission alleged that Thomson Reuters, the main operator in the worldwide market for consolidated real-time data feeds, abused its dominant position by preventing customers from using Reuters Instrument Codes ("RICs")[26] to source data from competitors. To address this concern, Thomson Reuters committed to license the use of RICs to its customers and to third-party developers (allowing them to retrieve data feeds from other providers and set up mapping tables to enhance interoperability with competitors). Data feeds competitors were not included in the scope of the compulsory license. On appeal, Morningstar alleged that Thomson Reuters' commitments did not appropriately address the Commission's concerns.

The General Court confirmed Morningstar's standing to appeal. Although it was never explicitly mentioned in the decision, the General Court found that the decision directly and individually concerned Morningstar based on its active participation in the administrative procedure at the invitation of the Commission (involving several meetings, telephone conversations, exchanges of documents, and requests for information), and its position as one of the few competitors of an allegedly dominant undertaking.

On the scope of its review, the General Court recalled that the Commission has broad discretion to accept or reject commitments (the standard of review of the Commission's determinations in this regard is a manifest error of assessment). The General Court also confirmed the limited application of the principle of proportionality. Unlike in the Case of infringement decisions, where the penalty must be proportionate to the infringement, the General Court only ensures that the commitments at a minimum address the Commission's concerns. The appellant could thus not argue that other or additional commitments would have been more favorable to competition or that the commitments exceeded their purpose.

On the facts, the General Court noted that the focus of the Commission's concerns was on the restrictions imposed by Thomson Reuters on customers. Although the creation of mapping tables for interoperability purposes involved certain costs, the General Court considered that these were reasonable and would not represent an excessive obstacle to switching providers. The General Court also found that the scope of the license was sufficiently broad to allow customers to benefit from an equivalent service by competing providers. An extension of the compulsory license to competitors was therefore not strictly necessary to address the Commission's concerns.

Vertical Restraints

Commission Decisions

***ISDA/Markit Commitments* (Case 39745)**

On July 20, 2016, the Commission published its decision accepting the commitments offered by the International Swaps and Derivatives Association Inc. ("ISDA") and the information service provider Markit, in its investigation into the licensing practices of credit default swaps ("CDS") derivatives data.[27]

CDS are financial products traded between financial institutions or investors. CDS transfer credit risks or risks of default, and protect the risk holder against the risk arising from holding debt instruments. CDS can also be used to speculate on the future creditworthiness of the debt issuer, earning the CDS buyer profits should their view prove correct.

CDS agreements can be traded (1) "over the counter" ("OTC"), *i.e.*, privately or through CDS dealers (dealers are often investment banks who are acting as

[24] *Reuters Instrument Codes* (Case COMP/39.654), Commission decision of December 20, 2012.

[25] *See Alrosa v Commission*, Case T-170/06, EU:T:2007:220, set aside by *Commission v. Alrosa* (Case C-441/07 P) EU:C:2010:377.

[26] RICs are alphanumerical codes that identify securities and their trading locations and allow customers to retrieve data from Thomson Reuters' feeds.

[27] Commission Press Release IP/16/2586, "Antitrust: Commission accepts commitments by ISDA and Markit on credit default swaps," July 20, 2016.

market makers, and charging fees for the transactions); and (2) on electronic exchange platforms that automatically match supply and demand. To match supply and demand, electronic exchange platforms need access to CDS-related IP, namely the Final Price and CDS indices that allow for the correct pricing and trading of CDS derivatives.

On April 29, 2011, the Commission opened two parallel investigations relating to the CDS markets. The first investigation concerned allegations of collusion and/or abuse of dominance between several investment banks and Markit. The second investigation, not relevant to the ISDA or Markit, concerned CDS clearing. On March 26, 2013, the Commission extended the scope of the first investigation to include the ISDA.

The first investigation followed the Commission's initial concern that investment banks, along with the ISDA and Markit, breached Article 101 TFEU by colluding to prevent access of data to exchange platforms by refusing to license the CDS-related IP. The Commission stated that this prevented the exchanges from entering the derivatives market from 2006 to 2009. A statement of objections was issued in July 2013 to 13 investment banks,[28] as well as the ISDA and Markit. In December 2015, the Commission closed its proceedings against the banks due to lack of evidence. The Commission, however, continued its investigation into the ISDA and Markit. To address the Commission's concerns, the ISDA and Markit offered commitments.

The commitments, which will apply for 10 years, seek to facilitate the emergence of exchange platform trading. ISDA undertook to license its rights in the Final Price for the exchange trading on fair, reasonable, and non-discriminatory ("FRAND") terms, while Markit committed to license its rights in the iTraxx and CDX indices on FRAND terms for exchange traded financial products based on the indices it owns. Additionally, behavioral measures were put in place to prevent investment banks from influencing the ISDA's or Markit's management.

This decision follows the Commission's attempts to improve market transparency and fairness in the CDS market with regards to pricing. The Commission's conclusions that the OTC trading of CDS leads to higher transaction costs for the investors and higher stability risks for the derivatives market in general is in line with its previous commitments to "*complement regulatory initiatives to make financial markets more efficient, resilient and transparent*."[29]

Mergers And Acquisitions

Commission Decisions

Phase I Decisions With Undertakings

Plastic Omnium/Faurecia Exterior Automotive Business (Case COMP/M.7893)

On July 11, 2016, the Commission conditionally approved the proposed acquisition of the automotive plastic exterior component business of Faurecia S.A. ("Faurecia") by Compagnie Plastic Omnium S.A. ("Plastic Omnium"). Plastic Omnium, a subsidiary of Burelle SA, is a French-based company specializing in manufacturing automotive equipment and offering waste management and environment-related services. Faurecia's automotive plastic exterior business manufactures and supplies original equipment manufacturers ("OEMs") with painted plastic automotive exterior components and assembles front-end modules for light vehicles.

The Commission's concerns focused on the markets for: plastic front and rear bumpers, front-end carriers,[30] plastic hatchbacks and tailgates, and front-end modules.[31] The Commission estimated the parties' market shares based on catchment areas of OEMs'

[28] The investment banks were: Bank of America Merrill Lynch, Barclays, Bear Stearns, BNP Paribas, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan, Morgan Stanley, Royal Bank of Scotland, and UBS.

[29] Commission Press Release IP/11/509, "Antitrust: Commission probes Credit Default Swaps," April 29, 2011.

[30] Front-end carriers are the structural component behind the bumper.

[31] Front-end modules often include the front-end carrier, crash beam, bumper, grilles, etc.

production plants to determine the geographic closeness of parties and competitors, and supplemented this analysis with tender data. The market for plastic front and rear bumpers was found to be regional in scope and to encompass a catchment area of 250 km around each OEM's production plants. The geographic market for front-end carriers and front-end modules was defined as EEA-wide. The Commission left open the market definition for plastic hatchbacks and tailgates.

The Commission found that the parties' combined market shares exceeded 50–60% in all markets, reaching 80–90% in the market for plastic hatchback and tailbacks, and the barriers to entry and expansion were high. The Commission was concerned that the transaction would lead to further concentration in an already concentrated markets in the north, east, and west of France, Belgium, and Spain. Additionally, the quantitative analysis based on catchment areas that the Commission used to measure geographic closeness of the parties and the tender data showed that the parties were close competitors. The Commission therefore concluded that the merged entity would not face adequate competitive constraints from alternative supplies. The Commission rejected the parties' argument that the OEMs' countervailing buyer power would outweigh the reduced competitive constraint.

To address the Commission's concerns, Plastic Omnium committed to divest its manufacturing plants and R&D centers in France, Spain, and Germany. The Commission found that these commitments eliminated all competitive concerns and approved the transaction.

***CMA CGM/NOL* (Case COMP/M.7908)**

On April 29, 2016, the Commission conditionally approved the acquisition of Neptune Oriental Lines ("NOL") by CMA CGM. CMA CGM, headquartered in France and active in containerized liner shipping and port terminal management, offers a full range of services, including shipping, reefer transport, handling facilities in ports, freight transport, and logistics on land. NOL is Singapore's former national shipping line solely controlled by the government-owned investment company Temasek Holdings. NOL is active in all aspects of cargo container transportation through its container shipping brand American President Lines.

The Commission analyzed the transaction's horizontal effects in the market for deep-sea container liner shipping services, which involves the provision of regular, scheduled services for the carriage of cargo by container. The geographic market was found to consist of single trades, defined by the range of ports that are served at each end of the shipping route.

The Commission examined horizontal overlaps between the parties' activities in container liner shipping services on 17 trade routes connecting Europe with the Americas, the Middle East, the Indian Subcontinent, the Far East, and Australasia & Oceania. The Commission also analyzed possible vertical effects arising from CMA CGM's activities in container terminal services, which may be used by container liner shipping companies, including CMA CGM and NOL.

Horizontal effects. The parties' combined shares in container liner shipping were below 30% on each of the 17 trade routes, and resulted from small increments of between 0–10%. However, like many other carriers, CMA CGM and NOL offered services through cooperation agreements (known as "consortia") with other shipping companies of the same alliance.[32] Members of a consortium would jointly agree on the capacity that will be offered by their vessels, schedule, and ports of call. Each member would then provide vessels for operating the joint service and receive in exchange a number of container slots across all vessels based on the total capacity contributed. The allocation of container slots is usually pre-determined and shipping companies are not compensated if the slots attributed to them are not used. The costs for the operation of the service are

[32] Consortia are operational vessel-sharing agreements between shipping companies for the provision of a joint service on either single or multiple trades. Consortia with the same members operating across several trade routes are typically coined "alliances". CMA CGM and NOL were respectively members of the O3 and G6 alliances.

generally borne by the vessel provider individually. Given the significant influence that a consortium member can have on the characteristics of the services provided, the Commission assessed horizontal overlaps by also taking into account the aggregate market shares of the parties' respective consortia.

On this basis, the Commission found competition concerns on two trade routes: the Northern Europe–North America route ("NE–NA"), on which the parties (including their consortia) had combined shares of up to 60–70%; and the Northern Europe–Middle East route ("NE–ME"), on which the parties (including their consortia) had combined shares of up to 50–60%. The Commission expressed concerns that the combined entity would participate in more consortia than CMA CGM and NOL would have done individually, and would generate links between previously independent consortia. In particular, the combined entity could benefit from an increase in prices induced by a reduction of capacity on one consortium through the profits generated by the other consortium in which it participates.

Vertical effects. The Commission identified no vertical concerns given the parties' moderate combined shares (below 30%)[33] in container terminal services, and their moderate combined shares (below 30% on each of the 17 trade routes) and a low increment (below 10%) in the downstream market for container liner shipping.

To address the Commission's concerns relating to the horizontal overlaps between the parties' consortia, CMA CGM undertook to withdraw NOL from the G6 alliance by March 2017 to remove the link that would have been created between NOL's consortium G6 and CMA CGM on the NE–NA and NE–ME routes. The Commission agreed that, following NOL's withdrawal, the G6 alliance would become independent from the merged entity and CMA CGM's O3 alliance, on which it would be able to impose significant competitive constraints due to the strong market position of other G6 members.

On the basis of these commitments, the Commission cleared the transaction.

***Dentsply/Sirona* (Case COMP/M.7822)**

On February 25, 2016, the Commission approved, subject to conditions, the acquisition of sole control over dental equipment supplier Sirona Dental Systems, Inc. ("Sirona") by Dentsply International Inc. ("Dentsply").

Dentsply is active in the market for dental consumables for professionals. Sirona is active in the market for dental technology and equipment with a focus on the development of innovative solutions for dentists. It is the leading supplier of chairside computer-aided design (CAD) and computer-aided manufacturing (CAM) systems.[34] Both parties also produce materials used in CAD/CAM systems.[35] The transaction combines Dentsply's dental consumables/materials business[36] (*e.g.*, blocks) with Sirona's dental equipment business (*e.g.*, chairside CAD/CAM systems). The Commission assessed: (horizontal overlaps in dental CAD/CAM materials and small dental equipment, and conglomerate relationships between Sirona's chairside CAD/CAM systems and both parties' CAD/CAM materials.

Horizontal effects. The Commission found that the parties' low combined share in zirconia CAD/CAM blocks and discs (the highest share in the EEA being 20–30% in Germany) did not raise competition concerns. In the small dental equipment market, the overlaps between the parties' activities in endodontic motors and contra-angle hand pieces (combined shares

[33] With the exception of three ports located in Central America and South America, where the combined entity would have combined shares in excess of 70%.

[34] Technology used by dentists in their office to manufacture restorative materials according to the needs of individual patients.

[35] Such materials include crowns, veneers, inlays, onlays, and bridges.

[36] CAD/CAM materials are shaped in the form of blocks and discs. While multiple units can be produced from one disc, each block is used to produce only one unit. Discs are generally used by laboratories while blocks are used by dentists.

below 30–40%) also did not raise to competition concerns given the presence of many other competitors and the fact that no concerns were identified in the market investigation.

Conglomerate effects. CAD/CAM blocks and CAD/CAM systems are closely related and blocks cannot be used without systems. The Commission was concerned that Sirona's dominant position in the market for CAD/CAM systems (Sirona's market share ranged from 50% to 100% in all Member States), combined with Dentsply's CAD/CAM blocks business (market shares of 5% with a strong expansion potential), could lead to foreclosure of other CAD/CAM block manufacturers, which need access to Sirona's systems. The Commission found that the merged entity would have the ability and incentive to tie Dentsply's CAD/CAM blocks and Sirona's CAD/CAM chairside systems by marketing them as a closed system. The Commission considered that the merged entity's foreclosure practices could take various forms (*e.g.*, refusing to supply to competing block manufacturers, degrading the interoperability between Sirona's chairside system and the CAD/CAM blocks of Dentsply's competitors, or weakening its cooperation with competing block manufacturers in the research and development of new blocks).

The Commission rejected the parties' argument that a closed system would lead to a loss of profit because customers (dentists) were found not to be price sensitive when purchasing blocks. An increase in CAD/CAM block prices would be ultimately passed on to final consumers (patients) who are not aware of the costs of each specific item used for their treatment. The Commission rejected the economic model that the parties used to demonstrate that a foreclosure strategy would not be profitable because the Commission could not verify the model's accuracy. Specifically, the Commission found that Dentsply and Sirona overestimated the costs of implementing a foreclosure strategy and failed to consider the combined entity's presence in the market for chairside CAD/CAM blocks The Commission also found that, absent other competing block providers, the merged entity's incentive to innovate in the blocks market could be substantially weakened.

Commitments. To remedy the Commission's conglomerate concerns, the parties committed to: (i) extend the duration of existing licensing agreements between Sirona and third party CAD/CAM block manufacturers for the use of CAD/CAM systems until March 1, 2026; and (ii) ensure that Sirona's CAD/CAM systems are compatible with competitors' CAD/CAM blocks. The latter entailed the obligation to provide the necessary know-how to competitors and to not discriminate in favor of the merged entity's own blocks (including by using confidential information provided by competing block manufacturers).

The Commission cleared the transaction subject to these behavioral remedies.

Statoil Fuel and Retail/Dansk Fuels (COMP/M.7603)

On March 23, 2016, the Commission approved Alimentation Couche-Tard Inc.'s proposed acquisition, through Statoil Fuel and Retail ("SFR"), of sole control over Shell's Danish retail and wholesale fuels business ("Dansk Fuels").

SFR is part of the Statoil Fuel & Retail Group, a road transport fuel retailer operating across Scandinavia, Poland, the Baltics, and Russia. In Denmark, SFR is active in the retail sale of motor fuels and lubricants (with a nationwide network of 370 service stations), non-retail sale of refined oil products, and retail sale of consumer goods at convenience outlets. Dansk Shell is active in retail sales of motor fuels (with a nationwide network of 317 service stations), as well as in non-retail refined oil products and non-retail aviation fuels,.

Relevant markets. The Commission distinguished between ex-refinery sales (fuels sold directly from the refinery to third parties in cargo), non-retail sales (the re-selling of refined fuel products by wholesalers to retailers and other large industrial customers), and retail sales (for example, the sale of fuels to motorists

at petrol service stations),[37] noting that the parties' activities overlap only at the non-retail and retail levels. In line with its previous decisions, the Commission considered that, at the non-retail level, each refined oil product constitutes a separate relevant product market.[38] In the retail area of motor fuels, the Commission held that the retail supply is an integrated market, covering all types of fuels sold at service stations.[39]

The Commission defined narrow, national geographic markets for both retail and non-retail sale of refined oil products because virtually all customers are supplied by Danish competitors, which are unlikely to be subject to meaningful competitive constraint from suppliers located outside of Denmark.

Competition concerns. The Commission was concerned that the transaction would allow the merged entity to exclude resellers/retailers from the downstream market for non-retail sales of gasoline, diesel, and light heating oil to end-customers and result in higher prices for customers in Denmark. The Commission assessed the following horizontal overlaps:

— **Non-retail supply of refined oil products.**[40] According to the Commission, the transaction combined the two largest competitors into what would be by far the largest supplier of non-retail refined oil products in Denmark, with a combined shares ranging from 40–50% in light heating oil to 80–90% in industrial heavy fuel oil. The Commission concluded that competitors would not sufficiently constrain the merged entity.

— **Retail supply of motor fuel.** The Commission concluded that the transaction would lead to a significant increment (10–20%) resulting in a large combined market share (40–50%). The transaction would combine the largest and third-largest suppliers, which are close competitors in terms of network characteristics (both operate many manned stations and have a strong presence in densely populated areas). The Commission found the customer base to be dispersed and rejected arguments that countervailing buyer power would balance any increase in market power resulting from the transaction. Barriers to entry were found to be high because potential new entrants would face the challenge of building a new network of service stations, requiring approvals from local municipalities and entailing significant sunk costs.

The Commission also analyzed the transaction's vertical effects arising from the parties' upstream activities in non-retail sale of gasoline, diesel, and light heating oil to resellers and retailers, and the downstream activities in non-retail sale of those products to large industrial and commercial end-customers (*e.g.*, hospitals, car rental fleets, factories).

The Commission concluded that, due to the parties' high market shares and the limited availability of alternative suppliers in the upstream market, the merged entity could engage in input foreclosure by cutting off downstream competitors (resellers/retailers) from refined oil products. According to the Commission, the combined entity would have an incentive to engage in such strategy due to higher margins on the downstream market (relative to the upstream market) .

Remedies. To address the Commission's concerns, the parties proposed to divest a total of 205 Shell and SFR petrol stations, as well as Shell's commercial (non-retail) fuels business and aviation fuel activities. To ensure the viability of the divested business, Statoil would transfer existing employees and two thirds of its business customers to the buyer of the divested business. In addition, Statoil included in the

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[37] *See, e.g.*, *Rosneft/TNK-BP* (Case COMP/M.6801), Commission decision of March 8, 2013.

[38] *See* *Statoil/SDS* (Case COMP/M.3375), Commission decision of July 1, 2004; *Statoil/Hydro* (Case COMP/M.4545), Commission decision of May 3, 2007; *Galp Energia/Exxonmobil Iberia* (Case COMP/M.5005), Commission decision of October 31, 2008.

[39] *See*, *e.g.*, *Motor Oil (Hellas) Corinth Refineries/Shell Overseas Holdings* (Case COMP/M.5637), Commission decision of March 15, 2010.

[40] Including gasoline, diesel, light heating oil, gasoil, and heavy fuel oil.

divestment package behavioral commitments that consisted of: (i) a refinery supply agreement; (ii) oil terminal access; (iii) a trademark license; and (iv) retail loyalty program access. The Commission considered that these remedies would ensure that there is a new nationwide supplier capable of replacing the lost competition at the national and local levels. It cleared the transaction once the parties committed to sell the divestment business to an upfront buyer, the Ireland-based DCC Energy, which would add the divested assets to its existing oil distribution business in Denmark.[41]

Phase II Decisions Without Undertakings

***Siemens/Dresser-Rand* (Case COMP/M.7429)**

On June 29, 2016, following a Phase II investigation, the Commission unconditionally approved the proposed acquisition of Dresser Rand Group, Inc. ("DR") by Siemens AG ("Siemens"). Both companies supply compressors and gas turbines for the oil and gas industry ("O&G").

The Commission was initially concerned that the transaction could restrict competition in markets for turbo compressor trains driven by aero derivative gas turbines ("ADGTs") and small steam turbines (less than 5MW).

Turbo compressor trains driven by ADGTs. The Commission found a substantial degree of substitutability between light industrial gas turbines ("IGTs") and ADGTs, in particular for upstream offshore and midstream pipeline applications.[42] It therefore considered that both types of compressors belonged to the same market. The Commission however left open whether this market could be further sub-segmented: (i) by power requirement (below and above 23 MW), and (ii) by application (*e.g.* upstream off-shore and midstream pipeline applications, midstream liquefied natural gas ("LNG"), midstream storage, or midstream gas processing). The geographic scope of this market was defined as worldwide but excluding projects taking place in ex-USSR countries.

The transaction was a 3-to-2 merger in this market, the main suppliers being Siemens/Rolls-Royce, DR, and General Electric. The Commission concluded that the transaction would not significantly impede effective competition for the following reasons.

First, the Commission examined bidding data and concluded that the parties are not close competitors, mainly because they focus on different applications. DR has a strong focus in upstream off-shore applications (*i.e.* open sea exploration and production of underground/underwater crude oil and natural gas including oil and gas separation, gas lift and high pressure gas re-injection). By contrast, Siemens is strong in midstream, and especially in midstream pipeline applications (*i.e.* transportation and storage of gas and crude oil, which requires compressors to boost the gas to reach its final destination). Between 2008–2014, the parties bid on the same projects only in about 15-40% of tenders, and one rarely lost to the other.

Second, combined shares were moderate, ranging between 30–50% in the segment for power requirements above 23MW and 40–60% in the segment for power requirements below 23MW, with increments below 10%. General Electric has comparable or higher shares ranging from 40–50% to 60–70%, respectively.

Third, the transaction would not reduce the competitive constraint that the merging parties exert on General Electric. This is because, based on the Commission's review of tender data, General Electric typically won tenders in which only one of the parties was a strong competitor.

Steam turbines. Steam turbines can be used as drivers of mechanical equipment ("MD steam turbines") or of power generators ("GD steam

[41] The Commission clearance of the purchase of the divestment business is available in *DCC/Dansk Fuels* (Case COMP/M.8000), Commission decision of June 20, 2016.

[42] ADGTs are gas turbines that have been derived from aero engines designed to propel aircrafts, whereas IGTs are designed specifically for industrial purposes. ADGTs are quick starters, lighter in weight, and their maintenance is more convenient compared to IGTs in general. Light IGTs are a hybrid between IGTs and ADGTs.

turbines”). The Commission left open the question of whether this market could be further subsegmented: (i) between MD and GD steam turbines; or (ii) by power output (*i.e.* turbines with a power range up to 5 MW and between 5 MW and 45 MW). The geographic market definition was also left open but the Commission analyzed the market on global and EEA-wide bases.

Combined shares in MD turbines in the EEA ranged between 40–50%, but the Commission did not raise concerns because it concluded that Siemens and DR were not close competitors and barriers to entry and expansion were very low. DR is strong mainly in MD steam turbines for O&G applications, whereas Siemens’s business focuses on power generation. Indeed, more than 80–90% of DR’s sales were attributable to O&G applications, which represent only 20–30% of Siemens’ total sales of MD steam turbines below 5 MW. Regarding barriers to entry and expansion, the Commission’s market test indicated that a number of existing competitors could easily expand. Additionally, competitors currently offering GD stream turbines could easily switch to MD stream turbines.

***Hutchison 3G UK/Telefonica* (Case COMP/M. 7612)**

On May 11, 2016, following a Phase II investigation, the Commission prohibited the proposed acquisition of Telefonica UK’s O2 (“O2”) by Hutchison 3G UK’s Three (“Three”). Both O2 and Three offer mobile telecommunications services such as voice, SMS, MMS, mobile internet, mobile broadband, roaming, and call termination services in the UK. The transaction was a 4-to-3 merger that would have created a new market leader in the UK mobile market with a combined share above 40%.

The Commission found that the transaction affected the markets for retail mobile telecommunication services, and wholesale access and call aggregation on public mobile telephone retailers. The geographic markets for both services were defined as UK-wide.

Retail mobile telecommunication services. The Commission pursued two main theories of harm in relation to this market: elimination of O2’s closest competitor, and reduction of mobile network operators (“MNOs”)[43] through network-sharing agreements.

— **Close competitors.** O2 is the market leader by revenue and the second largest provider by subscriber. Three, as the latest entrant and the fourth largest provider, was defined by the Commission as the most aggressive and innovative MNO in the UK market. Three and O2 therefore were found to impose significant competitive pressure on one another, and are the only MNOs in the UK whose market shares have consistently increased over the past few years. The Commission’s qualitative and quantitative analyses showed that merging two close and strong competitors would reduce the choice and quality of services for UK consumers and result in higher prices. The Commission also found that the two remaining MNOs (*i.e.*, Vodafone and BT’s Everything Everywhere (“EE”)) and non-MNOs would not have been able constrain the combined company.

— **Network-sharing agreements.** Four MNOs are currently parties to two network-sharing agreements: Vodafone and O2 are parties to the CTIL/Beacon agreement, and Three and EE are parties to the MBNL agreement. These agreements incentivize the operators to jointly improve the common elements of their services to achieve better networks relative to the MNOs in the other network-sharing agreement. Post-transaction, the merged entity would have been part of both agreements and would have had a full overview of network plans of all operators, which, in the Commission’s view, would have weakened Vodafone and EE and impeded the future development of mobile infrastructure in the UK.

43 Competitors in these markets were identified based on their access to network infrastructures. While MNOs have access to their own network infrastructure, mobile virtual network operators (“MVNOs”) provide services by relying on agreements concluded with MNOs. O2 and Three are MNOs.

Wholesale access and call aggregation on public mobile telephone retailers. Mobile virtual network operators ("MVNOs") purchase access at wholesale level from MNOs to offer mobile services to retail subscribers by using the MNOs' infrastructure to process calls. The transaction would have combined the second (O2) and the fourth (Three) wholesale service providers in the UK market. The Commission considered that, despite being the smallest operator, Three provides competitive rates for new technologies such as 4G and has significantly improved its position in the wholesale market. It also appears to be regarded as an important competitor by other operators. The Commission was concerned that a reduction in the number of MNOs hosting MVNOs on the wholesale market would reduce the competitive strength of non-MNOs and, in turn, the incentive of O2 and Three to offer commercially attractive terms to non-MNOs.

The Parties argued that the transaction would lead to significant network and scale efficiencies resulting from an increase in network capacity, quality, and speed post-transaction. The Commission however considered that these alleged efficiencies would not outweigh the harm to consumers.

To address the Commission's concerns regarding the reduction of the number of MNOs willing to host MVNOs, the parties offered commitments including divestitures to strengthen existing MVNOs or facilitating entry of new ones. The Commission, however, considered that even after divestment, MNOs and MVNOs would not be able to exert competitive constraint on the market, given MVNOs' commercial and technical dependence on the merged entity, which would hinder their ability to differentiate their services. The behavioral remedies offered by the parties to allow MVNOs access to future technologies through the sharing of infrastructure were deemed to be commercially unattractive and vague in terms of implementation.

State Aid

General Court Judgements

Germany v. Commission (Case T-143/12)

On July 14, 2016, the General Court upheld Germany's petition to set aside the Commission decision dated January 25, 2012, ordering Germany to recover from Deutsche Post part of the subsidies paid for former civil servant postal workers' pensions.[44]

Deutsche Post was formed in 1995 following the privatization of the state postal service operator. Deutsche Post undertook to contribute to a pension fund for all existing civil servant postal service workers, with the German federal state subsidizing the remaining balance.

The Commission found that the public financing for the payment of the pension funds for former civil servants employed by Deutsche Post constituted unlawful state aid incompatible with the internal market and ordered Germany to recover the subsidies granted from January 1, 2003 onwards.[45]

Germany appealed the decision to the General Court, *inter alia* challenging the classification of the subsidies as state aid by alleging that the Commission failed to establish the conferral of a selective economic advantage.

The General Court's analysis focused on whether the subsidies in question conferred a selective economic advantage on Deutsche Post. The General Court first emphasized that the selective economic advantage assessment pertains to the existence and classification of aid. Thus, the General Court found that the Commission had erred in law by making this assessment as part of its analysis of the measure's compatibility with the internal market.

[44] Commission Decision C (2012) 636 of January 25, 2012 (State Aid C 36/07 (ex NN 25/07)), OJ 2012 L 289/1, set aside by the General Court in *Germany v. Commission* (Case T-143/12) EU:T:2016:406.

[45] Commission Decision C (2012) 636 of January 25, 2012 (State Aid C 36/07 (ex NN 25/07)), OJ 2012 L 289/1.

The General Court stressed that the concept of a selective economic advantage only covers measures that provide relief from charges an undertaking would normally bear and that the undertaking would not have obtained under normal market conditions. Following its precedent, the General Court emphasized that state subsidies aiming to curb an undertaking's structural disadvantage arising from its obligation to continue employing its predecessor's staff and to contribute to their pension funds do not mitigate charges normally born by an undertaking.[46]

Accordingly, the General Court held that the subsidies paid in respect of former civil servant postal workers' pensions would not constitute an economic advantage in so far as they do not exceed what is necessary to place Deutsche Post on an equal-footing *vis-à-vis* its competitors, given the structural disadvantage arising from the privileged and costly status of its civil servants. The General Court found that the fact that Deutsche Post became less disadvantaged as a result of the subsidies it received is not sufficient to establish that the subsidies conferred an economic advantage on Deutsche Post.

Consequently, the General Court annulled the January 25, 2012 Commission decision as to the subsidies paid for former civil servant postal workers' pensions, based on the Commission's failure to establish Deutsche Post's selective economic advantage.

FIH Holding and FIH Erhversbank v. Commission (Case T-386/14)

On September 15, 2016, the General Court upheld the FIH Holding A/S and FIH Erhversbank A/S's (together, "FIH") bid to annul the Commission decision dated March 11, 2014, classifying the measures taken by Denmark in relation to FIH as state aid.[47]

Historically, FIH has held high amounts of government-backed bonds, which constituted 50% of the bank's balance sheet. In 2012, to address liquidity problems arising from the maturity of the bonds, Denmark proposed measures that foresaw the transfer of assets from FIH to a newly created subsidiary, which would then be purchased by the Danish Financial Stability Company ("FSC"). Denmark had previously guaranteed a capital injection totaling approximately €225 million to FIH, which was approved by the Commission as state aid compatible with the internal market.[48] In June 2012, the Commission concluded that the impaired asset relief measures, which amounted to approximately €300 million, were state aid, but temporarily approved these measures with conditions.[49] On March 11, 2014, the Commission decided that the measures constituted state aid compatible with the internal market.

On May 24, 2014, FIH appealed the Commission's decision to the General Court. FIH first argued that, by applying the private investor test, the Commission used the wrong legal framework and thus incorrectly classified the measure as aid.

The General Court found that action taken by public authorities as regards the capital of an undertaking may constitute state aid regardless of the form of the measure. To determine whether such a measure constitutes state aid, it is necessary to examine whether a private investor under similar conditions would have entered the same transaction on the same terms. The General Court followed its previous Case law distinguishing between private investors and private creditors, the former being interested in making profits and the latter being interested in minimizing loss arising from its initial investments. Accordingly, the General Court upheld the private creditor standard as the applicable test for measures concerning recovery of public debts.

The General Court further emphasized that the current measures could still fulfill the market economy creditor test even if the previous injections made by

[46] *Danske Busvognmænd v. Commission* (Case T-157/01) EU:T:2004:76 .

[47] *FIH Holding and FIH Erhversbank v. Commission* (Case T-386/14) EU:T:2016:406.

[48] Commission Decision C (2009) 776 of February 3, 2009.

[49] Commission Decision C (2012) 359/01 of June 26, 2012 (State Aid C 359/01 (ex 2012/N)), OJ 2012 C 359/1.

the same public undertaking were classified as aid. The General Court upheld FIH's submission that, for the purposes of the current proceedings, Denmark acted as a private creditor seeking to minimize the losses that would have arisen from its previously granted capital injection, as opposed to a private investor aiming to maximize profitability. The General Court asserted that the Commission's failure to examine the cost that would have arisen had Denmark not adopted the 2012 measures following its initial capital injection resulted in the application of the wrong framework. The General Court, thus, held that the Commission erred in applying the market economy investor principle instead of the market economy creditor principle.

Accordingly, the General Court upheld FIH's first ground of appeal and annulled the appealed decision concerning the transfer of property related assets from FIH to FSC.

Commission Decisions

***Irish Tax Rulings for Apple Constitute Unlawful State Aid* (Case SA. 38373)**

On August 30, 2016, the Commission declared two advanced tax rulings ("ATRs") granted by the Republic of Ireland to Apple to constitute illegal state aid amounting to €13 billion.

ATRs, which the Commission has been investigating extensively for three years, are comfort letters issued by tax authorities to clarify to a taxpayer how its tax will be applied. They are legal from a state aid perspective as long as they do not give better tax treatment to selected companies.[50] The ATRs at hand were deemed illegal because they provided Apple with a selective tax treatment, which substantially and artificially lowered the tax paid by Apple since 1991.[51]

The Commission found that the Irish ATRs endorsed a profit allocation method for two of Apple's Irish incorporated companies[52] that did not correspond to economic reality. According to the arm's length principle, the intra-group allocation of profits must reflect economic reality, that is to say the arrangements must take place as if under commercial conditions between autonomous undertakings. In Apple's case, the vast majority of profits recorded by the two Apple companies were internally, artificially attributed to a "head office" which could not have produced such profits because it had no sales operations and only existed on paper. However, because this "head office" was not located in any country, the profits were not subject to tax in any country under specific provisions of the Irish tax law[53]. In fact, only a small fraction of Apple's profits were allocated to its Irish branch and subject to tax in Ireland (the remaining profits remained untaxed because they were allocated to the "head office"). These ATRs were therefore declared illegal under EU state aid rules because they gave Apple a significant advantage over other undertakings subject to the same national taxation rules.

While the Commission found that the Irish ATRs enabled Apple to pay substantially less tax than other companies, which is illegal under EU state aid rules, it recognized that this decision did not call into question Ireland's tax system or corporate tax rate.

Moreover, in terms of recovery, the Commission considered that the amount of unpaid taxes to be recovered by Ireland should be reduced if other countries were to require Apple to pay more taxes on the profits recorded by the two Irish companies for the concerned period.

[50] In October 2015, the Commission found that Luxembourg and the Netherlands respectively granted selective tax advantages to Fiat and Starbucks. In January 2016, the Commission found the Belgian excess profit tax scheme to be illegal. Currently, the Commission is investigating the tax rulings granted by Luxembourg to Amazon and McDonald's.

[51] This decision was taken following an in-depth investigation launched in June 2014.

[52] The two companies were: Apple Sales International and Apple Operations Europe.

[53] These Irish provisions are no longer in force.

As expected, following an appeal lodged by Ireland, the Commission's decision will be reviewed by the General Court.

Policy and Procedure

ECJ Judgments

***SEA Handling Spa v. Commission* (Case C 271/15 P)**

On July 14, 2016, the Court of Justice dismissed the appeal of SEA Handling SpA ("SEAH") against a General Court judgment[54] rejecting SEAH's action for annulment of the Commission's refusal to grant access to documents relating to a state aid investigation concerning capital injections made by the publicly owned Milan airport manager, SEA SpA ("SEA").[55]

After an in-depth investigation into ground handling services at the Milan airports, on December 19, 2012, the Commission found that the capital injections made between 2002 and 2010 by SEA in favor of its ground handling subsidiary SEAH constituted unlawful state aid that had to be recovered. On February 27, 2013, SEAH requested access to documents relating to the administrative procedure leading to the adoption of this decision. The Commission ignored this first request and, having extended the time limit for its answer, rejected SEAH's follow-up application. SEAH appealed the Commission's decision, but the General Court rejected its action for annulment on March 25, 2015.

On June 3, 2015, SEAH petitioned the Court of Justice to overturn this refusal to grant access to documents. SEAH claimed, in particular, that the General Court had failed to sanction the Commission's infringement of procedural rules under Regulation 1049/2001 regarding public access to documents held by the EU institutions.[56] The Court of Justice did not find any procedural irregularity, and dismissed SEAH's appeal in its entirety.

The Court of Justice confirmed that Article 4(2), Regulation 1049/2001 had been interpreted correctly.[57] The Court of Justice held that the general presumption of confidentiality that applies to state aid procedure had not been rebutted; even though the investigation procedure was closed, disclosure of the requested documents was likely to undermine the investigation because the Commission could be required to resume its activities as a result of pending appeals.

The Court of Justice also held that the absence of response to the first request for access was without legal consequences for SEAH because it could file a confirmatory application under Article 7(4) of Regulation 1049/2001. It further found that the Commission's successive extensions of the time limit to respond to the confirmatory application were not valid, but recalled that Regulation 1049/2001 provides for an implied refusal decision if an institution does not answer within the foreseen time limit. This implied refusal decision, however, does not preclude the Commission from issuing a late reasoned decision because the very purpose of this mechanism is to offer the applicant the possibility to obtain such reasoned decision by challenging the implied refusal.

CLEARY GOTTLIEB

54 *Sea Handling v. European Commission* (Case T-456/13) EU:T:2015:185. *See* EU Competition Quarterly Report Q1 2015.

55 Commission Decision C (2012) 9448 of December 19, 2012 (State Aid C 14/2010 (ex NN 25/2010)(ex CP 175/2006)), OJ 2015 L 201/1.

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

57 Article 4(2) allows European institutions to refuse access to documents where disclosure would undermine the protection of commercial interests, court proceedings, or investigations, unless there is an overriding public interest in disclosure.

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