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HORIZONTAL AGREEMENTS

ECJ – Judgments

Case C-209/07 *The Competition Authority v Beef Industry Development Society and others*

On November 20, 2008, the European Court of Justice held that agreements made by the Irish Beef Industry Development Society ("BIDS") to reduce overcapacity in the beef processing industry had the object of restricting competition in violation of Article 81(1) EC.

A 1998 study had concluded that it was necessary to reduce the number of beef processors in Ireland and recommended that the remaining undertakings ("the stayers") should compensate the undertakings forced to withdraw ("the goers"). A task force set up by the Ministry for Agriculture in 1999 seconded these recommendations. In 2002 the beef processors formed the BIDS with the purpose of implementing these recommendations by reducing processing capacity in Ireland by 25% in one year.

The stayers would pay BIDS a levy of EUR 2 per head of cattle up to their traditional cattle kill volume and EUR 11 for each head in excess to compensate the goers. The goers were to undertake to decommission their processing plants and to respect a two-year non-compete clause. They would further undertake not to use land associated with the decommissioned plants for the purposes of beef processing for a period of five years and to sell the equipment used for primary beef processing to beef processors in Ireland only for use as back-up equipment or spare parts.

The Irish Competition Authority opposed the BIDS agreements and applied to the Irish High Court for a declaration that they infringed Article 81 EC. The application was rejected by the High Court and the Irish Competition Authority appealed to the Supreme Court of Ireland. The Supreme Court of Ireland asked the European Court of Justice to advise, in essence, on whether agreements with features such as those of the BIDS agreements are to be regarded by reason of their object alone, as being anti-competitive and prohibited by Article 81(1) EC or whether in order to reach that conclusion anti-competitive effects must be demonstrated. On September 4, 2008, Advocate General Trstenjak advised the Court that the BIDS agreements had indeed the object of restricting competition in violation of Article 81(1) EC.

The Court recalled that determining whether an agreement falls within the scope of Article 81(1) EC does not require the taking into account of its actual effects once it appears that its object is to prevent, restrict or distort competition within the common market. This examination must be made in the light of the agreement's content and economic context.

BIDS argued that the agreements were not anti-competitive in purpose and did not entail injurious consequences for consumers or, more generally, for competition. They aimed at rationalizing the beef industry in order to make it more competitive by reducing, but not eliminating, production overcapacity.

The Court responded that, in order to determine whether an agreement comes within the prohibition laid down in Article 81(1) EC, close regard must be paid to the wording of its provisions and to its intended objectives. Even supposing that the parties to an agreement acted without any subjective intention of restricting competition, the fact that they did so with the object of remedying the effects of a crisis in their sector is irrelevant for the purposes of applying Article 81(1) EC. It is only in connection with Article 81(3) EC that matters such as those relied upon by BIDS may be taken into consideration.

BIDS further contended that an agreement on the reduction of excess capacity in a sector could not be assimilated to an agreement to "limit production" within the meaning of Article 81(1)(b) EC. That concept must be understood as referring to a limitation of total market output rather than a limitation of the output of certain operators who voluntarily withdraw from the market, without causing a lowering of output. The Court however held that the BIDS agreements were intended essentially to enable several undertakings to implement a common policy, which had the object of encouraging some of them to withdraw from the market and of consequently reducing the overcapacity, which affected their profitability by preventing them from achieving economies of scale. That type of arrangement conflicts patently with the concept inherent in the EC Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt. The Court noted that, without such arrangements, the member of the BIDS would have had no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations.

With the BIDS agreements it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration particularly as a result of the levy of EUR 2 per head processed by each of the stayers.

The Court added that the means put in place to attain the objective of the BIDS agreements included restrictions whose object was anti-competitive. The levy of EUR 11 constituted an obstacle to the natural development of market shares as regards some of the stayers who, because of the dissuasive nature of that levy, would have been deterred from exceeding their usual volume of production. In relation to the restrictions imposed on the goers as regards the disposal and use of their processing plants, the Court found that they sought to avoid the possible use of those plants by new operators entering the market in order to compete with the stayers. The Court observed that the fact that those restrictions, as well as the non-competition clause imposed on the goers, were limited in time did not call into question the finding as to the anti-competitive nature of the BIDS agreements.

The Court concluded that the reply to the question referred must be that an agreement with features such as the BIDS agreements has as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC.

Commission

Preliminary Report in the Pharmaceutical Sector Inquiry

On November 30, 2008, the Commission released its Preliminary Report on its inquiry into competition in the EU pharmaceutical sector.[1] The inquiry was started on January 15, 2008,[2] in order to establish the reasons for the launch of fewer innovative pharmaceutical products and the apparent delayed entry of generic products. The inquiry began with unannounced inspections at a range of pharmaceutical companies and continued with a long series of detailed questionnaires addressed to pharmaceutical companies, public authorities, and other stakeholders since March 2008. The publication of the final report is expected in the spring of 2009.

The Preliminary Report focuses on competition between originator and generic companies. It identifies a number of practices (referred to collectively as "the tool-box") that originator companies may use in order to try to restrict access of generic companies to the market:

- *Filing numerous patent applications across the EU in relation to a single medicine ("patent clustering")*. The Preliminary Report notes that the number of pharmaceutical-related patent applications before the European Patent Office almost doubled during the relevant period (2000-2007), with the patent portfolios in relation to a blockbuster product often increasing throughout the product's lifecycle. In addition, there are "divisional patent" applications, which allow an originator company to split an initial application. These applications continue to be examined even if the original application is withdrawn or revoked. The Preliminary Report suggests that such patent clusters may delay generic entry by making it more difficult for generic companies to challenge weak patents in order to clear the path for entry.
- *Engaging in high volumes of disputes and litigation with generic companies.* The Commission obtained information on at least 1,300 patent-related disputes and litigation procedures between originator and generic companies during the relevant period, and found that generic companies were successful in 62% of the 149 cases in which a final judgment was obtained. The Preliminary Report observes that patent litigation is lengthy (an average duration of 2.8 years) and expensive (the total cost of reported pharmaceutical litigation in the EU between 2000 and 2007 is estimated to have exceeded €420 million). The Preliminary Report considered that the cost and duration of litigation may make it difficult for generic companies to clarify the patent situation of potential generic products in a timely manner and might thus delay their entry to the market or even deter them from entering the market altogether.
- *Concluding settlement agreements with generics that may delay generic entry to the market.* The Preliminary Report states that originators and generic companies concluded more than 200 settlement agreements during the relevant period. The Preliminary Report's main concern was with agreements that restrict generic entry in some way in return for value in some form, such as a direct monetary payment or a royalty-free license. The Preliminary Report notes that the U.S. Federal Trade Commission has assessed such agreements as potentially anticompetitive. The implication of the report is that these agreements may require further scrutiny.
- *Intervening in national procedures for the approval of generic medicines.* The Preliminary Report notes that originator companies intervene at a national level in respect of generic applications for marketing authorization and pricing/reimbursement status. Originators typically claim that generic products are not as safe or effective as the branded product. Sometimes originators invoke

1 The Preliminary Report is available at http://ec.europa.eu/competition/sectors/ pharmaceuticals/inquiry/preliminary_report.pdf.

2 Commission Decision of 15 January 2008 initiating an inquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 (Case No COMP/D2/39.514) available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/decision_en.pdf.

their patent rights even though, according to the Commission's interpretation of EU legislation, marketing authorization bodies may not take into account such arguments. The Preliminary Report also observes that, when originator companies challenged decisions of the regulatory bodies, their claims were upheld in only 2% of the cases. The Preliminary Report considers that interventions before and litigation with regulatory bodies lead to further delays in generic entry.

- *Launching "second-generation" medicines.* The Preliminary Report suggests that originator companies launched second-generation medicines close to the date when the original product lost exclusivity with a view to converting patients to the new medicine prior to the entry of a generic version of the first-generation product. According to the Preliminary Report the launch of second-generation products can help delay generic entry if patients are successfully switched to the second-generation product prior to patent expiration and additional patents protect the second-generation product.

The Preliminary Report also discusses competition between originator companies, noting that originator companies employed "defensive patent strategies" to block the development of new and competing medicines by other originator companies, referring to situations in which originator companies file patent applications without intending to bring their own new or improved products to the market. Finally, the Preliminary Report makes a few observations on the regulatory framework noting the general support in the industry for a single European patent and patent judiciary and the criticism directed towards the bottlenecks in marketing authorization and pricing/reimbursement procedures.

MERGERS & ACQUISITIONS

Second-phase decisions without Undertakings

Case COMP/M.4956 *STX/Aker Yards*

On May 5, 2008, the Commission unconditionally approved STX's acquisition of Aker Yards. After an in-depth investigation, the Commission concluded that the transaction did not give rise to any competitive concerns.

The Norwegian company Aker Yards is a shipbuilding group focusing on sophisticated vessels including commercial vessels, specialised vessels and, to a large extent, cruise ships and ferries. STX is a Korean holding company active in a number of areas, including shipbuilding and marine equipment. By its purchase of 39.2% of the shares of Aker Yards, STX was considered to acquire effective control of Aker Yards.

The activities of the parties overlapped in the area of shipbuilding for commercial vessels, in particular in the areas of container ships and LNG carriers, chemical and oil tankers and product tankers. In addition, Aker Yards was a major player in the market for cruise ships and ferries. On the basis of its past decisional practice, the Commission defined the markets for cruise ships and ferries as distinct from those of other commercial vessels. The market for the construction of cruise ships forms the focus of the decision. In addition, the markets for ferries and ship engines are briefly analyzed, neither of which contain competitive concerns.

While STX was not active in the market for the construction of cruise ships, the Commission did assess the possible competitive constraint exercised by STX as a potential entrant. The second issue in relation to the market for the construction of cruise ships related to a complaint made by a third party concerning possible state aid and its effect on the financial strength of the merged entity.

In line with its guidelines, the Commission first assessed whether STX could be considered a potential entrant. While one could not exclude the long-term possibility of STX's entry on the market for the construction of cruise ships, the Commission concluded that STX lacked sufficient experience and know-how to be considered a credible entrant. The second leg of the test involved the assessment of whether other potential competitors might be capable of exerting a comparable influence on the market. The Commission held that three major Asian ship builders, notably Mitsubishi, Samsung and Daewoo, exerted the same if not greater competitive pressure on the market. Likelihood of entry was however, deemed to be low as a number of entry barriers were identified.

Secondly, further to a complaint received from a competitor, the Commission investigated the possible impact of alleged "state aid" in the form of certain investment grants, loans and guarantees granted by the South Korean government to STX, on competition in the market.

The complainant alleged that further to a judgment of the Court of First Instance, *RJB Mining*,[3] the Commission was required to assess the potential impact of the provision of state aid during the course of its merger investigation. In the Commission's view however, the judgment related to very specific circumstances, in which the alleged

3 Case T-156/98, *RJB Mining v Commission*, [2001] ECR II-337.

state aid was directly linked to, and indeed triggered by, the merger. The Commission stated that it is required by *RJB Mining*[4] to avoid inconsistencies when exercising its parallel competences in the fields of state aid and merger control. In its view, the Commission need not synchronize its merger investigation with matters outside the sphere of Community law and in particular with potential proceedings before the WTO. The Commission likewise rejected allegations by the complainant that the Commission's review was necessary because the WTO procedures were inadequate. In addition to the fact that WTO law is binding upon the EC, the Commission pointed out that the test under the relevant WTO instrument would not be sufficient to block a merger under the conditions laid down in the Merger Regulation. In any case, any alleged difference or inadequacy would not be a sufficient reason to extend the limits of merger control proceedings in order to essentially "correct" the inadequacies of the WTO procedures.

Despite finding that it was under no obligation to assess the existence of possible subsidies, the Commission proceeded to consider whether the alleged subsidies could have an impact on the competitive assessment. It held that, given the nature of the current subsidies, STX did not seem to have gained any additional financial strength vis-à-vis its competitors. As to the likelihood of future subsidies, the Commission found that the loans and guarantees were granted on commercial terms and that no subsidy was therefore involved. Given the market conditions and the nature of the subsidies, even if the alleged subsidies had contributed to STX's financial strength, such an increase would not have had a material impact on the competitive situation. In particular, such financial strength would not enable STX to attain substantial market power, particularly in light of the strong countervailing constraints imposed by its customers.

STX was also a potential entrant on the market for the construction of ferries. The Commission noted that the market for ferry construction shared many features with that of cruise ships, except that the former was not particularly concentrated. The Commission considered that the entry of STX would be unlikely and, even if it did occur, it would not substantially alter market conditions.

In relation to ship engine manufacture, the Commission identified a potential vertical issue whereby STX, as a manufacturer of ship engines, could reduce the costs of Aker Yards vis-à-vis its competitors and/or reduce supplies to competitors of Aker Yards. Both concerns were dismissed, however, with the Commission noting that STX did not currently produce engines for cruise ships.

First-phase decisions without Undertakings

Case COMP/M.5272 *Sony/SONYBMG*

In 2004, after having launched an in-depth Phase II investigation and issued a Statement of Objections, the Commission cleared the creation of SONYBMG, which amalgamated all of the A&R and music marketing and selling businesses of its parents, Sony and Bertelsmann. The Commission's decision was challenged and ultimately overturned before the Court of First Instance. As a result, Sony and Bertelsmann notified their joint venture (which had already closed) to the Commission a second time. After an investigation of unprecedented length and detail, the Commission issued a voluminous second clearance decision in the fall of 2007, a mere month before the appeal of the Court of First Instance decision was scheduled to be heard by the European Court of Justice. In 2008, the Court overturned the Court of First Instance's decision, and returned the case to the Court of First Instance to consider other grounds of appeal not addressed in its judgment. In the interim, the Commission's second clearance decision has also been appealed, although that appeal has not yet been heard.

With both clearance decisions pending before the Court of First Instance, Bertelsmann decided to sell its stake in SONYBMG to Sony. That transaction was notified to the Commission and cleared after a Phase I review on September 15, 2008. The legal effect of this newest clearance decision upon the two appeals currently pending before the Court of First Instance has not yet been determined.

Although the change from joint to sole control of SONYBMG would obviously have limited competitive impact on music markets, the Commission nevertheless issued a lengthy and considered assessment. Having extensively investigated the various music markets in its previous examinations of the SONYBMG cases (and other music cases), the Commission adopted its prior decisional practices on product and geographic market definitions, in the process rejecting the submissions of SONYBMG about the existence of wider product markets. Notably, the Commission's decision takes account of changing practices in the music industry, taking heed of the shift away from collecting societies and toward music publishers for the holding of copyright to online music. As online music retailers must usually acquire both the publishing rights and the recording rights to music before offering it for online sale, Sony would have two opportunities (through SONYBMG and through its joint venture music publishing business Sony ATV) to deny music to online music retailers. The Commission's investigation found that Sony would enjoy control shares in music ranging from 20% - 45% in most

4 *Ibid*.

countries. These control shares were below the 50% threshold identified in Universal/BMG Music Publishing as cause for concern.

In addition to horizontal overlaps, in response to objections received from several complainants, the Commission also investigated the transaction's effect on numerous vertical markets. In two of the four vertical markets examined by the Commission (online music retailing and portable digital music devices), the Commission relied upon its findings in its second SONYBMG decision to dismiss any competitive concerns. In the other two vertical markets (electronic game devices and software, and the film industry), the Commission found Sony's (or its subsidiaries') market share to be relatively low, ruling out any possible competitive concerns.

Finally, the Commission found in its second SONYBMG decision that the physical music market was characterized by strenuous competition. The Commission seized upon this previous finding in the present case to conclude that the probability of the transaction giving rise to coordinated effects was unlikely. The Commission also noted that the complainants' theories about Sony's unique vertical integration (which gave rise to the fears of vertical foreclosure) were indicative of Sony's inclination to compete, and as such, would tend to disprove any theories about the likelihood of coordinated effects.

Case COMP/ M.5148 *Deutsche Telekom/OTE*

On October 2, 2008, the Commission unconditionally cleared Deutsche Telekom's acquisition of part of the Greek government's 28% share in Greece's national telecom operator, OTE. Both Deutsche Telekom and OTE operate in markets outside of their respective home countries. Prior to the merger, Deutsche Telekom held 22% of OTE. The transaction gave both Deutshce Telekom and the government control of 25% plus one of the shares and voting rights in OTE, although the specific agreements between Deutsche Telekom and the government gave Deutsche Telekom sole control over OTE within the meaning of Article 3(1)(b) of the EC Merger Regulation.

The transaction raised both horizontal and vertical issues relating to the parties activities in numerous retail and wholesale telecommunication markets. Notably, in a number of instances throughout the decisions, in particular fixed retail lines and wholesale roaming services, the Commission concluded that existing regulation contributed to the absence of competitive concerns.

The main horizontal competitive analysis related to the provision of telecommunication services in the Romanian market where both Deutshce Telekom and OTE are present via their subsidiaries Combridge and RomTelecom respectively. In the market for retail access to public telephone networks at a fixed location in Romania,the Commission concluded that competitive concerns would not arise given: (1) a minor accretion of market shares; (2) the differing business models of the two undertakings, and (3) the absence of any further concentration of network infrastructure due to the fact that Combridge did not operate its own independent network.

Other horizontally affected markets included wholesale leased lines in Romania, the global market for international wholesale carriers and the global telecommunication systems ("GTS") market. In all three markets the Commission found that the incremental market share increase post-transaction was not of a significance to cause competitive concern. The Commission rejected a third party complaint predicated on the theory that the GTS market was regional (South East Europe) in scope; instead, the Commission reaffirmed its original finding of an EEA (if not global) market for GTS. The Commission also noted that even if the GTS market was regional, the transaction would not give rise to a significant increase in market shares or any corresponding competitive concern.

The Commission examined also the transaction's effect on competition in a number of vertical markets. The decision's most extensive examination focused on the wholesale roaming services the two parties operated as both customers and suppliers in various countries. Deutsche Telekom companies offer wholesale roaming services in their respective countries to OTE retail service providers based in Greece, Bulgaria and Romania ("OTE outbound") and visa versa ("Deutsche Telekom outbound"). In relation to wholesale roaming services, two potential competitive concerns were analyzed: (1) input foreclosure whereby Deutsche Telekom wholesale service providers would no longer supply competitors of OTE and (2) customer foreclosure whereby Deutsche Telekom subsidiaries would no longer purchase wholesale roaming services from competitors of OTE and vice versa.

The Commission rejected any possibility of input foreclosure for three reasons: (1) the market shares of both Deutsche Telekom and OTE were not significantly higher than those of major competitors in their respective countries, (2) competitors would be in a position to purchase wholesale roaming services from other wholesale service providers and (3) the Roaming Regulation recently introduced capped prices for wholesale roaming services thus eliminating the possibility of input foreclosure through price increases. The Commission found the risk of customer foreclosure equally unlikely because: (1) the merging parties were not considered an "important customer(s) with a significant degree of market power" relative to the total market of foreign mobile service providers purchasing wholesale roaming services, and (2) it was noted that it is commercial practice to obtain wholesale roaming services from a spread of suppliers and it was considered unlikely to change.

Commission Notices

Notice on Remedies

On October 22, 2008, the Commission published a new notice on remedies explaining the Commission's approach concerning remedies proposed by companies in the framework of the EU Merger Regulation as a condition for the Commission's authorization of notified mergers and acquisitions.[5] The notice replaces the previous 2001 Notice,[6] and reflects recent judgments of the European Courts, and the Commission's own merger remedy practice, both of which have clarified the legal framework for accepting or rejecting remedies. The notice strives for greater efficiency in dealing with competition concerns and more clarity for companies in addressing such concerns.

The notice introduces Form RM, which specifies the information and documents the parties must submit simultaneously with their offer of remedies, including (i) a description of the commitment; (ii) an explanation of the commitment's suitability to remove the competition concerns; (iii) identification of any deviation from the model texts; (iv) a non-confidential summary of the nature and scope of the commitments; and (v) detailed information on the business to be divested.

As regards divestitures, the notice sets out in detail the ways to identify a purchaser, by clarifying, for example, when the conclusion of a binding agreement for the sale of the divested assets will be required as a condition for authorizing the completion of the notified operation (a so-called up-front buyer remedy) or when the conclusion of such a binding agreement will be required as a condition for authorizing the notified operation (a so-called fix-it-first remedy), and stresses the need to include all the assets and personnel necessary to ensure the viability of the business divested. The notice indicates that the Commission would accept access remedies, such as giving access to infrastructure or networks, only if they are equivalent in their effectiveness and efficiency to divestitures. Given that the Commission considers that some access remedies have been of limited effectiveness in the past, this benchmark approach is intended to ensure that access remedies will be designed in a way that they will be used effectively.

Concerning trustees, the notice mandates that the parties appoint a monitoring trustee to guarantee the effectiveness of their commitments. The notice distinguishes five non-exhaustive tasks of the monitoring trustee, such as, for example, overseeing the safeguards for the business to be divested in the interim period. Similarly, the task of the divestiture trustee is to make the commitments effective. According to the Commission's experience, auditing firms are particularly well placed to fulfill the tasks of monitoring trustee, and investment banks are suitable for the position of divestiture trustee. Depending on the commitment, the monitoring and divestiture trustee may be the same person or institution.

The notice also explains in greater detail than before the general principles of offer and acceptance of merger remedies, the different types of remedies, the procedure for the submission of commitments in Phase I and Phase II proceedings, respectively, and the requirements for the implementation of the commitments.

The Commission also adopted amendments to the Merger Implementation Regulation in line with the notice.[7]

Guidelines On Non-Horizontal Mergers

On October 18, 2008, the Commission published the final version of the Guidelines on the assessment of non-horizontal mergers.[8] The publication of the final Guidelines marks the end of the process from long-awaited draft guidelines, published in February 2007, followed by more than thirty papers submitted in the course of the public consultation, and adoption of the guidelines in November 2007. The final guidelines – while not heralding a substantial change as compared to the draft guidelines – do provide clearer language.

Non-horizontal mergers involve companies active in vertical (*e.g.*, supplier and customer) or related (*e.g.*, manufacturers of complementary products) markets. The guidelines aim to provide clear and predictable guidance to businesses contemplating such mergers, and complement the existing guidelines on horizontal

5 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, O.J. C 267, 22.10.2008.

6 Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, O.J. C 68, 02.03.2001.

7 Commission Regulation (EC) No 1033/2008 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008 L 279.

8 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008 C 265.

mergers, which deal with mergers of companies, which compete on the same markets.[9]

The guidelines' underlying message is that non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers. In contrast to horizontal mergers, which lead to a loss of direct competition between the merging firms, non-horizontal mergers do not change the number of competitors on a given market. Furthermore, non-horizontal mergers may improve efficiency, for example by eliminating price mark-ups. The guidelines also indicate levels of market share and concentration below which the Commission is unlikely to identify competition concerns (so-called "safe harbours").

The guidelines, however, also identify circumstances in which non-horizontal mergers may significantly impede effective competition. The main concern regarding vertical mergers is input and customer foreclosure. Input foreclosure arises when, as a result of the merger, competing companies are being denied access to an important supplier or they are faced with increased prices for their inputs, ultimately leading to higher prices for consumers. Customer foreclosure occurs when, as a result of the merger, upstream rivals' access to a sufficient customer base is restricted.

The main concern about related market mergers (also referred to as conglomerate mergers) is foreclosure through tying or bundling or other exclusionary practices. However, the guidelines also acknowledge that companies may engage in tying and bundling in order to provide their customers with better products or offerings in cost-effective ways. In any event, the guidelines acknowledge that conglomerate mergers do not lead to any competition problems "in the majority of circumstances".

The Commission applies a three-step analysis in determining whether a non-horizontal merger may impede competition. First, the Commission analyzes whether the merged entity would have the *ability to foreclose* the relevant market. The Commission then considers whether the merged entity would have an *incentive to foreclose* the market that way. Thirdly, the Commission analyzes what the likely *impact* of the merger *on effective competition* would be. The Commission's assessment of competitive effects is based on the consumer welfare standard and on an assessment of efficiencies.

In addition to the above so-called unilateral effects, the guidelines also identify circumstances in which coordinated effects – *i.e.*, tacit collusion – brought about by the non-horizontal merger may impede competition. An example is refraining from undercutting high prices charged by competitors for fear of jeopardizing cooperation in the future.

The real value of the Guidelines emerges from their application in practice. The Commission's decisions in *TomTom/Tele Atlas*[10] and *Nokia/Navteq*[11] were among the first successful "test cases" for the Guidelines.

ABUSE OF DOMINANT POSITION

ECJ - Judgments

Case C-52/07 *Kanal 5 Ltd, TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM)*

On December 11, 2008, the European Court of Justice ruled on the compliance with Article 82 EC of the Swedish Copyright Management Organisation's (STIM) model for collecting royalties for the broadcast of copyrighted musical works, following a reference by the Swedish Market Court in the course of proceedings initiated by Kanal 5 Ltd ("Kanal 5") and TV4 AB ("TV 4"), two commercial broadcasting companies.

STIM collects payments from Kanal 5 and TV4 corresponding to a percentage of the revenue derived from television broadcasting (through advertisements and subscriptions). The percentage varies according to the amount of music broadcast. The public service company, Sveriges Television ("SVT"), on the other hand, pays a pre-negotiated lump sum.

In the Swedish court proceedings, the Swedish court agreed with the claim of Kanal 5 and TV4 that there is an insufficient link between STIM's service and the revenues of the broadcasting companies (which is used as the basis for the royalty calculation). Most advertising revenues are generated from prime time broadcasting, and from news and sports programmes for which the share of music is lower than average. Also, revenues may increase as a result of the development of the programme schedules and from investments in technology and customized solutions.

Recognizing that STIM enjoys a *de facto* monopoly on the Swedish market concerning the supply of copyrighted music for television broadcasts, the Swedish court asked the Court (i) whether a remuneration model under which royalties are calculated based on

9 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004 C 31.

10 Case No COMP/M.4854, *TomTom/Tele Atlas*, Commission Decision of 14.05.2008.

11 Case No COMP/M.4942, *Nokia/Navteq*, Commission Decision of 02.07.2008.

the revenue of the broadcasting companies and the amount of music broadcast constitutes an abuse of dominance under Article 82 EC; (ii) whether the fact that another method would enable the use of the copyrighted protected works and the audience to be identified and quantified more precisely may have an effect on that classification; and (iii) whether the fact that the collecting society calculates the royalty differently depending on whether the broadcasting company is commercial or public constitutes an abuse under Article 82.

Regarding the first two questions, the Court found that the application of the remuneration model at issue does not in itself constitute an abuse within the meaning of Article 82 EC. However, compatibility with Article 82 EC requires that the part of the royalties that correspond to the revenue of the television channel be proportionate overall to the quantity of the copyright protected musical works actually broadcast, or likely to be broadcast. Moreover, the Court found it conceivable that, in certain circumstances, the application of a remuneration model such as the one in this case, may amount to an abuse, when another method exists which enables the use of those works and the audience to be identified and quantified more precisely, without resulting in a disproportionate increase in the costs incurred for the management of the contracts and the supervision of the use of musical works protected by copyright.[12]

Concerning the third question relating to discrimination, the Court instructed the Swedish court to consider (1) whether the commercial broadcasters compete on the same market as the public service company; (2) whether STIM applies dissimilar conditions to equivalent services by calculating royalties in a different manner; (3) whether the commercial broadcasters thereby are placed at a competitive disadvantage; and (4) whether such a practice may be objectively justified, in particular considering the task and method of financing of public service undertakings. According to the Court, one should take account of the fact that SVT does not dispose of advertising revenue or revenue from subscriptions, and that the royalties paid by SVT are collected without taking into account the quantity of the copyrighted music actually broadcast.

Commission Decisions

E.ON

On November 26, 2008, the Commission issued a decision under Article 9 of Regulation 1/2003, accepting a number of commitments offered by the German electricity company E.ON and closing its investigation of suspected abusive conduct.[13]

The investigation started in 2006 as a result of the Commission's inquiry into the energy sector. In the course of its investigation, and following surprise inspections in December 2006, the Commission came to the preliminary view that E.ON might have infringed Article 82 EC in two ways.

First, the Commission contended that E.ON, as a wholesaler on the electricity market, had been withholding available electricity generation capacities. With a view to raising prices, E.ON had deliberately failed to offer for sale the production of certain power plants that was available and that it would have been economically rational to sell. Moreover, the Commission had concerns that E.ON devised and implemented a strategy to deter third parties from investing in electricity generation.

Second, the Commission contended that E.ON, as a transmission system operator, raised prices and thwarted competition on the electricity balancing market. Balancing energy consists of last minute electricity supply to maintain the frequency of the electrical current in the network. The Commission was concerned that E.ON favoured its own production affiliate, even if it charged higher prices, passed on the increased costs to the final customer, and prevented other power producers from selling balancing energy.

The commitments offered by E.ON include the divestiture of about 5000 MW of generation capacity in German power plants. This corresponds to approximately 20% of E.ON's capacity. According to the Commission, these divestitures prevent E.ON from withdrawing capacity in order to raise prices, and provide capacity to competitors and newcomers on the German market. The second part of the remedy package involves the divestiture of E.ON's transmission system business, consisting of an Extra-High-Voltage line network and system operations currently run by E.ON Netz. This will remove the incentive of the operator to favour a particular supplier of balancing energy.

12 Contrast with the Court's judgment in Case 359/87 *Tournier* ([1989] ECR 2521, paragraph 45), where the Court held that royalty rates corresponding to a percentage of the turnover of a discotheque could be criticized only if other methods might be capable of attaining the same legitimate aim "without thereby increasing the costs of managing contracts and monitoring the use of protected musical works". The test is now whether alternative remuneration models would allow for a more appropriate determination of the royalties, by measuring the use of the works and the audience in a more precise manner, without resulting in a disproportionate cost increase.

13 So-called Article 9 decisions do not contain a finding of infringement, but legally bind the addressee to the commitments offered. In this case, if E.ON were to break its commitments, the Commission could impose a fine of up to 10% of E.ON's total turnover, without having to prove any violation of the competition rules.

E.ON has already reached agreements with several buyers in order to execute the commitments. A considerable part of the committed power plants in Germany was part of a swap with the Norwegian energy producer Statkraft, under which E.ON obtains electricity generation assets in Sweden and shares in E.ON Sverige. 2200 MW generation capacity has also been exchanged with Gaz de France-Suez and its Belgian subsidiary Electrabel. E.ON has also stated that it intends to sell further 525 MW to the German electricity producer EnBW.

The planned sale of E.ON's transmission system business had a significant political impact in Germany. Large German electricity producers, supported by the German government, had so far successfully resisted the Commission's efforts to "unbundle" the production of electricity from distribution.

Finally, on a related note, on November 11, 2008, the German Supreme Court upheld the Federal Cartel Office's ("FCO") decision to block the acquisition by E.ON of a minority stake in Stadtwerke Eschwege, a local German energy distributor. According to the FCO and the Supreme Court, the acquisition would increase concentration in a market dominated by RWE and E.ON, which together have stakes in more than 200 local distributors. The FCO and the Supreme Court thereby sought to avoid increased vertical integration in this sector.

STATE AID

ECJ – Judgments

Case C-384/07 *Wienstrom v. Bundesminister für Wirtschaft und Arbeit*

On December 18, 2008, the European Court of Justice held that a Commission decision declaring state aid compatible with the common market enables the beneficiary to keep state aid received prior to such decision, even though it was given in violation of the prohibition contained in Article 88(3) EC on implementing aid prior to the adoption of a Commission compatibility decision. The Court explained that only aid that is declared incompatible with the common market must be recovered.

This judgment follows the Court's judgment in *CELF*[14], where the Court clarified that Community law does not require Member States to recover state aid granted in violation of Article 88(3) EC, where the Commission later declares such aid to be compatible with the common market.

Case C-334/07 P *Commission v. Freistaat Sachsen*

On December 11, 2008, the European Court of Justice set aside a judgment of the Court of First Instance in which the Commission was held to have breached the principle of non-retroactivity by applying Commission Regulation 70/2001 on the application of State aid rules to small and medium-sized enterprises (the "Regulation")[15] to aid measures notified before the Regulation came into force.

Between 1992 and 2000, the Land Saxony in Germany granted non-refundable subsidies to SMEs established in its territory, in accordance with an aid scheme that had been notified to, and authorized by, the Commission. In 2000, Germany notified to the Commission a new version of the aid scheme. Shortly thereafter, at the beginning of 2001, the Commission adopted the Regulation. After the Regulation came into force, the Commission adopted a decision stating that some parts of the amended aid scheme exceeded the scope of the Regulation and constituted unlawful aid.

The Court held that the notification by a Member State of a proposed aid scheme does not require the Commission to rule on the aid scheme's compatibility with the common market by applying the rules in force at the date on which that notification took place. On the contrary, according to the Court, the Commission must assess the legality of the aid based on the rules in force at the time when it adopts its final decision on the compatibility of such aid with the common market.

CFI Judgment

Case T-196/04 *Ryanair v. Commission*

On December 17, 2008, the Court of First Instance set aside a Commission decision ordering the recovery of illegal state aid granted by the Walloon region to Ryanair in its bid to persuade the airline to establish a base at Charleroi Airport.

On February 12, 2004, the Commission decided that a set of agreements entered into in 2000 between Ryanair, the Charleroi Airport, and the Walloon region, providing, *inter alia*, for the granting to Ryanair of a 50% landing charge reduction at the Charleroi airport, constituted unlawful State aid within the meaning of Article 87 EC and ordered the Belgian State to recover the aid.[16]

14 Case C-199/06 *CELF and Ministre de la Culture et de la Communication* (not yet reported).

15 Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises, (OJ 2001 L 10/33).

16 Commission decision of February 12, 2004 (OJ 2004 L 137, para 1).

The Commission took the view that the Walloon region, when granting Ryanair the above landing charges reduction, acted in its public authority capacity, and not as a private investor, and, consequently, refused to apply the "private investor principle" to assess the compatibility of such measures with State aid rules.

On appeal, the Court noted that, while the Walloon region is a State authority, it could also carry out activities of an "economic nature" and assessed whether the Walloon region's activities in relation to levying landing charges constituted economic activities. The Court held that the mere fact that an activity is carried out in the public sector does not mean that it must be categorized as the exercise of public authority powers. Equally, according to the Court, the fact that the Walloon Region has regulatory powers in relation to the fixing of airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the principle of a private investor in a market economy.

Against this background, the Court concluded that the fixing of the amount of landing charges is an activity directly connected to the management of the airport infrastructure, which constitutes, by reason of its nature, its purpose, and the rules to which it is subject, an economic activity. The Commission therefore erred in law in failing to apply the private investor principle to assess the compatibility with EU state aid rules of the landing charges reduction granted to Ryanair.

Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2/*Danmark A/S v. Commission*

On October 22, 2008, the Court of First Instance annulled a Commission decision ordering the Danish State to seek repayment from Danish public broadcaster TV2 of approximately EUR 84.4 million plus interest of unlawfully granted State aid.

Following complaints by commercial broadcasters, the Commission conducted an investigation into the financing of the Danish state broadcaster TV2, which was based partly on state resources and partly on advertising revenues. The Commission found that TV2 was the beneficiary of state aid, but that such aid was in principle compatible with the common market since it was aimed at covering TV2's cost of fulfilling its public service obligations, with the exception of an amount of EUR 84.4 million, which, according to the Commission, was unnecessary to accomplish TV2's public service mission and which therefore constituted unlawful State aid.[17]

The Court found that the Commission infringed an essential procedural requirement by not providing adequate reasons in its decision as to why, when carrying out its assessment, *inter alia*: (1) it did not distinguish adequately between advertising revenues and license fee revenues and, thus, *de facto*, considered advertising revenues as state resources; and (2) it concluded that the overcompensation that TV2 was found to have received was the result of an uncontrolled accumulation of capital, rather than the result of a build-up of reserves carried out in a transparent and carefully manner with the specific aim of guaranteeing the provision of the public service despite fluctuations in advertising revenue.

POLICY AND PROCEDURE

CFI - Judgments

Case T-68/04 *SGL Carbon v. Commission*, Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v. Commission* and Case T-73-04 *Le Carbone-Lorraine v. Commission*

On October 8, 2008, the Court of First Instance handed down judgments in the appeals of SGL Carbon ("SGL"), Schunk GmbH and its subsidiary Schunk Kohlenstoff-Technik GmbH ("Schunk"), and Le Carbone Lorraine ("LCL"), in which the three companies challenged the fines imposed by the European Commission's decision of December 3, 2003. In rejecting the appeals, the Court of First Instance reconfirmed the Commission's margin of discretion in determining the appropriate level of fines to be imposed on undertakings for an infringement of the competition rules. The Court also clarified the burden of proof borne by the Commission in establishing whether an infringement had an impact on the relevant markets.

The Commission's 2003 decision held that SGL, Schunk and LCL had, along with Morgan Crucible, Hoffmann & Co. Elektrokohle and Conradty Nürnberg, participated in a single and continuous infringement of Article 81(1) EC Treaty in the market for electrical and mechanical carbon and graphite products. The infringement, which lasted from October 1988 to December 1999, consisted of fixing, directly or indirectly, sales prices and other trading conditions applicable to customers, sharing markets, and engaging in coordinated actions (including quantity restrictions, price increases and boycotts) against competitors who were not party to the cartel. On appeal, SGL, Schunk and LCL all claimed that the Commission had erred in its calculation of the fines imposed and requested either that the decision should be annulled or the fines reduced. However, following a detailed consideration of the Commission's exercise of this discretion in its 2003 decision, the Court rejected all three appeals and upheld the Commission's fines.

17 Commission decision of May 19, 2004 (OJ 2006 L 85, para 1).

In dismissing the three appeals, the Court restated its settled case law that Regulation 17/62,[18] rather than the Commission's previous decisional practice, provides the legal framework for the calculation of fines, and confirmed that the margin of discretion granted by Regulation 17/62 means that the Commission must be able to impose a higher fine for a different infringement in a subsequent case, if it considers it necessary to ensure the proper enforcement of the Community competition rules. The Court therefore rejected SGL's claim that the fines imposed in the present case were disproportionate and discriminatory in comparison with those set under the same procedure for other undertakings in similar cases.

The Court similarly rejected Schunk's claim that the discretion granted to the Commission by Article 15(2) of Regulation 17/62 is *"almost unlimited"*[19] and therefore contrary to Article 7(1) of the European Convention on Human rights. Article 7(1) provides that any penalty imposed should not be heavier than was applicable at the time the criminal offence was committed. In dismissing the applicant's argument, the Court noted that the Commission's discretion is, in fact, not only limited by the specific provisions of Regulation 17/62, which state that the fine should not exceed 10% of the infringing undertaking's turnover, but also by the Commission's own fining guidelines, the principles of equal treatment and proportionality, and the scrutiny of the Community Courts. It therefore concluded that, whilst undertakings may not be able to predict the level of fines they are likely to incur for a given infringement with certainty, this does not undermine the legal basis of any penalties imposed. Rather, it is essential to the objectives of punishment and deterrence that undertakings should not be able to pre-determine the extent of their liability. The Court accordingly concluded that the Commission's ability to exercise its margin of discretion is vital to the Commission's ability to apply Articles 81 and 82 effectively.

Finally, the Court further confirmed that the Commission, in exercising its margin of discretion, is entitled to increase the level of any fine imposed in order to reinforce its deterrent effect.

The Court also clarified the burden of proof borne by the Commission in establishing whether an infringement of Article 81 has had an impact on the relevant market. In this case, both Schunk and LCL disputed the Commission's finding of a "very serious" infringement because the Commission had failed to prove the actual impact of the companies' conduct on the markets in question. In rejecting this claim, however, the Court held that the Commission is legitimately able to infer that an infringement has had an effect on the relevant markets where the measures agreed between cartel participants have been implemented, and that "*the Commission cannot be required, where the implementation of a cartel has been established, systematically to demonstrate that the agreements in fact enabled the undertakings concerned to achieve a higher level of transaction prices than that which would have prevailed in the absence of a cartel."*[20] Nor need the Commission show that the cartel had a significant impact for all the products and customers concerned. LCL's participation in all the agreements and/or concrete practices relating to carbon and graphite products was sufficient for the Commission to conclude that LCL had committed a very serious single complex infringement for which the Commission was entitled to impose a single fine.

These appeals follow a growing trend in recent years for cartel cases to be appealed to the CFI on the basis of the level of fines rather than the finding of the substantive infringement. The judgments are unlikely to change the Commission's willingness to impose substantial fines for participation in hard-core cartels, since they merely confirm the Commission's broad margin of discretion in assessing the appropriate level of fines to be imposed in such cases.

Case T-85/86 *General Química, SA and others v. Commission*

On December 18, 2008, the Court of First Instance dismissed an appeal against the Commission's decision fining four companies a total of EUR 75.86 million for participating in a price fixing and information sharing cartel in the rubber chemical industry.[21]

General Química, which participated in the cartel, its 100% parent, Repsol Química, and the latter's 100% parent , Repsol YPF, were together fined EUR 3.38 million. The applicants argued that the Commission wrongly imputed on Repsol Química and Repsol YPF liability for the conduct of General Química, that the Commission erred in the calculation of the fine, and that the Commission erred in the application of its 1996 Leniency Notice.

In rejecting the applicants' argument regarding the imputation of liability for General Química's conduct to its parents, the Court recalled its previous case law according to which a subsidiary's separate legal personality is insufficient to exclude such imputation, in particular where the subsidiary implements its parent's

18 Replaced by Regulation 1/2003 on 1 May 2004 (OJ 2003 L 1/1).

19 Case T-69/04 – *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v Commission of the European Communities*, Recital 27.

20 *Id*., Recital 167.

21 Case COMP/F/C.38.443 *Rubber Chemical Cartel*, decision of December 21, 2005.

instructions, instead of determining its own conduct on the market independently. When a parent holds 100% of the shares in a subsidiary, which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent actually exerted a decisive influence over its subsidiary's conduct. In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary determined its own conduct independently. The Court confirmed that the presumption applies not only to the relationship between a subsidiary and its direct parent but also to situations, as in this case, where the subsidiary and its ultimate parent are indirectly connected through an intermediate subsidiary of the ultimate parent.

In order to refute the rebuttable presumption, the parent must present evidence in relation to the organizational, economic and legal ties to its subsidiary that demonstrate that they are not one economic entity. The Court held that the applicants had failed to adduce evidence to refute the presumption of decisive influence, observing that the fact that the subsidiary's activities were different from those of its parents and that the parent had unsuccessfully attempted to sell the subsidiary are insufficient to rebut the presumption.

Note, however, that the Court's case law concerning the rebuttable presumption of a parent's decisive influence over its subsidiary seems not yet settled. At least in one earlier case the Court adopted the position that 100% control is not sufficient by itself to prove decisive influence and that the Commission must show that management power was actually exercised.[22]

Irrespective of the question of the presumption of decisive influence, the Court pointed to several factors demonstrating Repsol Química's effective influence over General Química:

- Following the inspection of General Química's premises, Repsol Química ordered it to cease all conduct that could be considered as violation of the competition rules. The Court commented that this fact alone proved that Repsol Química was exercising decisive control over General Química.
- The minutes of the meetings of the managing board of Repsol Química showed that it was involved in the management of General Química. It discussed the financial performance of General Química and reserved for itself the final say in the sale of General Química's holdings in Silquímica and of General Química's real estate.
- The president of General Química's managing board was at the same time a member of the managing board of Repsol Química.

In dismissing the applicants' argument concerning the calculation of the fine, the Court noted that the applicants admitted that General Química participated in meetings in which prices were fixed and confidential information was exchanged, and that these violations are by their nature particularly serious since they involve direct interference with the essential parameters of competition on the market in question. The Commission was therefore correct in qualifying the infringement as "very serious". With respect to the proportionality of the fine the Court considered that, in applying the fining guidelines, the Commission correctly took into consideration the effect of General Química's conduct on competition. The court noted that General Química's fine was calculated based of the lowest starting amount of all participants.

With respect to the application of the 1996 Leniency Notice, the Court observed that General Química was the third leniency applicant and therefore, irrespective of the added value of the evidence it provided, could not have benefited from a fine reduction of more than 20%. The Court held that, in setting the reduction at 10%, the Commission correctly took into consideration the fact that General Química made its contribution late in the investigation, namely only one and a half years after the inspections.

Opinions of the Advocate General

Case C-425/07 P *AEPI v. Commission*

On November 27, 2008, Advocate General Mengozzi recommended that the European Court of Justice overturn the Court of First Instance's judgment upholding the Commission's decision of April 18, 2005, rejecting on grounds of lack of sufficient Community interest AEPI's complaint against the Hellenic Republic and three Greek bodies that collectively manage rights relating to the copyright held by singers, performance musicians and producers in the recording and/or film industry.

According to the Commission, the complaint failed to demonstrate a sufficient level of Community interest to justify the Commission opening an investigation, because the alleged infringement was unlikely to impede seriously the proper functioning of the common market given that all the parties involved are established in Greece, operate in that county alone and are unlikely to start pursuing their activities in other countries in the near future. The Court of First Instance dismissed AEPI's appeal on the grounds that AEPI had failed

22 See Case T-325/01 *DaimlerChrysler v Commission* [2005] ECR II-3319, ¶¶ 218-219, referring to the elliptic statement of the European Court of Justice in Case C-286/98 P *Stora v Commission* [2000] ECR I-9925, ¶ 28; but compare to Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, ¶ 136 suggesting a contradictory interpretation of Stora along similar lines to the statement of Court in *General Química*.

to adduce sufficient evidence demonstrating actual or potential, and serious impediment to the proper functioning of the common market.

Advocate General Mengozzi concluded that the Court of First Instance's judgment should be annulled, because it was based on contradictory grounds. In particular, he found that the Court had confused the question of whether intra-Community trade is actually affected by the activities in question, which would lead to an infringement of Articles 81 or 82 EC, with the question of whether such effects may be sufficiently serious as to warrant an investigation by the Commission into a possible infringement.

With regard to the first question, Advocate General Mengozzi noted that Articles 81 and 82 EC are applicable to agreements restricting competition and abuses of dominance, which may affect trade between Member States. He explained that, under the settled case law, in order for an agreement between undertakings or an abuse of a dominant position to affect trade between Member States, the foreseen influence on trade between Member States must be significant. Most importantly, however, he also noted, with reference to previously settled case law, that an infringement of the competition rules of the European Community can occur even if the infringement is committed in the territory of just one Member State provided that the conduct at issue affects trade between Member States.

With regard to the question as to whether there are sufficient grounds to justify the Commission initiating an investigation into a possible infringement, however, Advocate General Mengozzi concluded that it is sufficient that the European Commission could not rule out the possibility that the practices complained of would have a serious impact on the Community market. In this regard, Advocate General Mengozzi noted that the European Commission had clearly not wished to exclude this possibility, since its decision had explicitly recommended that AEPI bring an identical claim under Articles 81 and 82 EC to the Greek authorities. He further noted the evidence produced by the applicant during the proceedings before the Court of First Instance. In light of these factors, Advocate General Mengozzi concluded that the European Commission's decision to dismiss the complaint on the ground of insufficient Community interest was unlawful.

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