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HORIZONTAL AGREEMENTS

ECJ – Judgments

Case T-432/05 *EMC Development AB v. Commission*

On May 12, 2010, the General Court dismissed EMC's appeal against the Commission's rejection of EMC's complaint alleging an infringement of Articles 81 and 82 EC by European Portland cement producers, the European Cement Association (Cembureau) and the European Committee for Standardization (CEN). EMC claimed that Portland cement producers had formed a cartel in order to create barriers to entry into the European cement market. The most significant barrier was the adoption of "the Standard," a cement rating system implemented by CEN that places a high premium on the percentage of Portland cement used in the final cement product. EMC's cement is based on a combination of Portland cement and other ingredients, which places EMC at a disadvantage to other cements composed solely of Portland cement with respect to the Standard.

First, EMC argued that the Standard should be considered discriminatory because Cembureau, a lobbying organization representing existing major cement producers, exercised undue influence over the adoption of the Standard and shaped it to favor the existing major cement producers. As an example, EMC argued that the chairman of CEN/TC 51, the CEN board that created the Standard, was also a senior executive in a major cement company, calling into question his impartiality. The General Court found that Cembureau's actions did not exceed normal lobbying activities, and that EMC did not provide any evidence showing that Cembureau controlled the creation and adoption of the Standard.

EMC then argued that while on its face the Standard is not mandatory, in reality, due to market perceptions, it is *de facto* binding on cement producers. EMC alleged that products that do not comply with the Standard face a severe disadvantage in the market; in some cases products that do not conform to the Standard are excluded from public contracts. EMC further argued that the existence of alternative procedures for obtaining approval to enter the European market does not mitigate the damage resulting from non-compliance with the Standard. The General Court found that EMC had failed to produce any evidence that the creation of the Standard had any significant effect on the market, and that cement is excluded from public procurement if it does not comply with the Standard. Finally, the General Court found it persuasive that other rating mechanisms for approval for entry into the European market existed, illustrating that compliance with the Standard is not mandatory.

Finally, EMC alleged that the Commission should have examined the Standard in light of Directive 89/106 on construction products, arguing that if the Standard is not incompliance with the Directive, it cannot possibly be in compliance with Articles 81 and 82 of the EC Treaty. Directive 89/106 is designed to remove barriers to the free movement of construction goods on the European market. The General Court rejected EMC's argument, given the fact that the Commission has the power to hear complaints only in relation to Articles 81 and 82, and may not examine the Standard's compliance with Directive 89/106.

VERTICAL RESTRAINTS

Commission decisions

The European Commission Adopts New Motor Vehicle Block Exemption Regulation.

On May 27, 2010, the Commission adopted Regulation 461/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices in the motor vehicle sector[1] and its accompanying notice.[2] This regulation replaces the previous sector-specific regulation,[3] which was scheduled to expire on May 31, 2010.

The motor vehicle regulation complements and must be read together with the recently adopted vertical restraints block exemption

1 Commission Regulation (EU) 461/2010 of May 27, 2010, on the application of Article 101 (3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices in the motor vehicle sector, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:129:0052:0057:EN:PDF.

2 Commission Notice, May 28, 2010, Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:138:0016:0027:EN:PDF.

3 Commission Regulation (EC) 1400/2002 of July 31, 2002, on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:203:0030:0041:EN:PDF.

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regulation[4] and its accompanying notice.[5] It distinguishes between vertical agreements for the purchase, sale, and resale of new motor vehicles (primary market) and, on the other hand, spare parts for motor vehicles or repair and maintenance services for motor vehicles (aftermarket).

While the motor vehicle regulation provides that the rules set forth in the vertical restraints regulation will apply to the primary market because it is highly competitive and does not therefore require sector-specific rules, the previous sector-specific regulation will continue to apply to the primary market for a transitional period that ends on June 1, 2013.

The motor vehicle regulation applies to the aftermarket from the date of its entry into force, and vertical arrangements in the aftermarket are therefore automatically exempted if they do not contain any of the hardcore restrictions detailed in the regulation and if they comply with the conditions set out in the vertical restraints regulation.

The motor vehicle regulation's block exemption does not cover agreements containing restrictions on members of a selective distribution system from selling spare parts for motor vehicles *". . . to independent repairers that use them for the repair and maintenance of motor vehicles"*; restrictions on a supplier of spare parts, repair tools, or diagnostic or other equipment from selling those goods to authorized or independent distributors, repairers or end users; or restrictions on a supplier of components for the initial assembly of motor vehicles from placing *" . . . its trademark or logo effectively and in an easily visible manner on the components supplied or on spare parts."*

The guidelines explain that single branding obligations on repairers or distributors are not hardcore restrictions and can benefit from the block exemption if the parties to the agreement have market shares of 30% or less on their respective markets and if the agreement does not exceed a 5-year term. The renewal of such an agreement requires explicit consent.

The guidelines indicate that a selective distribution system will generally fall outside the scope of Article 101(1) TFEU provided that the product being distributed requires selective distribution, repairers are chosen based on objective, qualitative criteria, and the selection criteria are proportionate.

The motor vehicle regulation exempts selective distribution agreements subject to the conditions set out in the vertical restraints regulation provided they contain no hardcore restrictions. The hardcore restrictions that refer specifically to selective distribution include territorial and customer restrictions on the sale of contract goods or services, restrictions on active and passive sales to end users by a member of a selective distribution system at the retail level of trade, and restrictions on cross-supplies between distributors within a selective distribution system.

According to the guidelines, quantitative selective distribution agreements in the motor vehicle sector will benefit from the block exemption, unless the parties' market shares exceed 40%.

Finally, the Commission may declare the regulation to be inapplicable where parallel selective distribution networks cover more than 50% of a relevant market. The motor vehicle regulation will expire on May 31, 2023.

The Commission Adopts New Vertical Restraints Block Exemption Regulation

On April 23, 2010, the European Commission published the revised block exemption regulation on vertical restraints (the "New BER"), and on May 19, 2010, the related guidelines on vertical restraints (the "New Guidelines") (together, the "New Rules"). The New Rules entered into force on June 1, 2010, though with a transitional period for some agreements. They will replace the previous block exemption regulation (the "Previous BER"), which expired on May 31, 2010, and the related guidelines (the "Previous Guidelines") (together, the "Previous Rules"). The New Rules result from a long consultation process, concerning in particular the much-debated issue of the treatment of online sales.

Scope and structure of the new rules. The New Rules, like the Previous Rules, apply to vertical agreements, i.e., agreements entered into between a supplier and a buyer.

Like the Previous BER, the New BER provides that a Block Exemption applies to agreements (i) where the market share threshold is met, and (ii) that do not contain hardcore restrictions. Agreements that are not covered by the Block Exemption must be assessed individually. In this regard, the New Guidelines are (like the Previous Guidelines) a helpful tool for companies to conduct a case-by-case assessment of the compatibility of distribution agreements with Article 101 TFEU.

4 Commission Regulation (EU) No 330/2010 of April 20, 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R0330:EN:NOT.

5 Commission notice, May 19, 2010, Guidelines on vertical restraints, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF.

Finally, the New Guidelines expressly provide for the possibility to rebut the presumption that hardcore restrictions infringe Article 101 TFEU. To rebut the presumption, a company must show convincing evidence that (i) the agreement generates likely efficiencies and (ii) the agreement meets the other criteria of Article 101(3) TFEU. Although this flexibility is welcome, it is doubtful whether this clarification will have much effect in practice, as it will likely be difficult for companies to rebut the presumption.

Market share threshold. The New Rules reduce the scope of the New BER by introducing a narrower safe harbor. The 30% market share threshold now applies to both the supplier and the buyer. Regarding the supplier's share, the relevant market is the market in which the supplier sells contract products to the buyer. For the buyer's share, the relevant market is the purchasing market, i.e., the market in which the buyer purchases the contract products from the supplier. This change reflects the increasing market power of large retailers.

Hardcore restrictions. The New Guidelines expressly provide that parties may rebut the presumption that hardcore restrictions infringe Article 101 TFEU. In addition, the New Guidelines specify that, within an exclusive distribution system, the supplier may be active in the same territory as an exclusive distributor. Moreover, the New BER provides that a supplier who sets up a selective distribution network may reserve territories for itself within selective distribution systems. Finally, although resale price maintenance ("RPM") remains a hardcore restriction, the Commission clarified its approach towards this practice, as further described below.

Resale restrictions as hardcore. The New BER does not substantially modify the list of resale restrictions that constitute hardcore restrictions. As a general rule, restrictions on passive sales remain hardcore, with some exceptions for selective distribution. Moreover, restrictions on active sales constitute hardcore restrictions unless they concern the operation of an exclusive distribution system. The first change brought by the New Guidelines is that restrictions on the buyer's place of establishment are no longer treated as hardcore restrictions. In addition, although suppliers could restrict sales by wholesalers to end users under the Previous Rules, the New Rules provide that suppliers can also allow wholesalers to sell to certain end users in that territory (for instance to "bigger end users, while not allowing sales to (all) other end users"). In addition, the New Rules make a number of changes concerning exclusive distribution and selective distribution.

Exclusive distribution. The New Guidelines provide that a territory or customer group may be considered as exclusively allocated to the buyer even if the supplier sells products in the same territory or to the same group of customers; this was not the case under the Previous Guidelines. Thus, a prohibition of active sales in another distributor's territory or to another distributor's customer group does not constitute a hardcore restriction, even if the supplier itself sells products in that territory or to that customer group.

Selective distribution. Under the New BER, a supplier can also restrict sales by its distributors to unauthorized distributors in territories that the supplier reserved for itself but where it does not yet sell products. In practice, suppliers who appoint selective distributors but reserve key countries to themselves on some territories were not covered under the Previous Rules. They would however be covered under the New Rules.

Hardcore restrictions outside Article 101 TFEU. The Commission also provides examples of situations in which otherwise hardcore restrictions fall outside of Article 101(1) TFEU or fulfill the conditions of Article 101(3) TFEU. For instance, a restriction of active sales to test a new product in a limited territory or customer group falls outside of the scope of Article 101(1) for the period necessary for testing. Moreover, the supplier's restriction of active and passive sales to protect market entry for a new brand or a new geographic market falls outside of the scope of Article 101(1) for up to two years.

Resale price maintenance. In the New Guidelines, the Commission also clarifies its views on RPM. In principle, RPM remains a hardcore restriction that gives rise to a presumption that such an agreement infringes Article 101 TFEU. The New Guidelines provide additional details on the ways in which RPM may restrict competition, for instance by (i) facilitating collusion, (ii) eliminating intra-brand price competition, and (iii) reducing pressure on the supplier's margin.

RPM may, however, also lead to positive effects, for example when (i) launching a new product, (ii) supporting short-term low-price advertisement campaigns or (iii) avoiding free-riding between distributors. These efficiencies will be assessed under Article 101(3) TFEU and weighed against the likely negative effects on competition. It will be for the parties to establish that the conditions for an exemption under Article 101(3) TFEU are met.

In practice, however, it is not clear how often the possibility to rebut the presumption that such practices infringe Article 101 TFEU will apply.

Online sales. The New BER does not make any reference to online sales. The New Guidelines, however, deal with the issue at length and attempt to strike a balance between enabling consumers to benefit from the Internet while allowing suppliers to regulate online sales to prevent possible free-riding by certain distributors or distribution channels. The distinction between active and passive sales, traditionally used to set the boundaries between "hardcore restrictions" and permissible restrictions, has been refined in the New Guidelines to specifically address online sales. "Active sales" include direct mail and targeted advertising such as ads directed at a particular territory or group of customers. "Passive sales" include non-targeted advertising, answering unsolicited requests by customers, or having a website (even if the website offers various language options). It follows that in most cases, the online activity of a distributor selling through its website will be considered "passive" selling that a supplier is generally not permitted to restrict.

More particularly, to ensure that distributors can operate a website and sell over the Internet, the following restrictions on passive selling constitute hardcore restrictions:

- Preventing distributors that operate a brick-and-mortar outlet from selling over the Internet;
- Requiring distributors to restrict access to the distributor website for customers outside of the distributor's territory, or to refuse payments by cards that were not issued in the distributor's territory;
- Limiting the proportion of sales distributors may make over the Internet; and
- Requiring that products be sold on the Internet at a higher price than products sold in brick-and-mortar shops.

On the other hand, suppliers are entitled to (i) protect an exclusive distribution system by restricting active sales and (ii) regulate online sales in order to preserve the quality of the distribution network and prevent free-riding, in particular in the context of selective distribution. As a result, suppliers may:

- Prevent distributors from selling only through the Internet and refuse to supply pure online players;
- Impose quality and service conditions, provided that these are equivalent to the conditions applicable to offline sales;
- Require that a "certain absolute amount" of the products be sold through a brick-and-mortar shops and agree on a fixed fee with the distributor "to support the latter's online or offline effort"; and
- Use third-party platforms only in accordance with standards and conditions agreed between the parties.

Upfront access payments and category management. In the New Guidelines, the Commission covers two new areas: upfront access payments and category management. The Guidelines discuss the possible anti-competitive and pro-competitive effects of each of these practices.

Upfront access payments may lead to anticompetitive foreclosure of (i) other distributors, if the payments "induce the supplier to channel its products through only one or a limited number of distributors," and (ii) other suppliers, if the extensive use of those payments increases barriers to entry. Such provisions may also facilitate collusion among distributors. The Commission, however, recognizes that possible efficiencies may arise from such payments, including "efficient allocation on shelf space for new products" and the reduction in "asymmetry of information between suppliers and distributors."

Category management agreements do not usually raise competition law concerns. Category management agreements may sometimes lead to anticompetitive foreclosure of other suppliers "if the category captain is able to limit or disadvantage the distribution of products of competing suppliers." Such agreements may sometimes also facilitate collusion. The Commission, however, accepts that "access to the supplier's marketing expertise for a certain group of products" may allow distributors to achieve pro-competitive economies of scale.

MERGERS & ACQUISITIONS

GC – Judgments

Case T-235/05 *Éditions Jacob v. Commission*

On June 9, 2010, the General Court rendered its judgment on an appeal by Editions Odile Jacob regarding the Commission's decision to reject Odile Jacob's request for access to certain documents during the Commission's investigation into Lagardere's acquisition of Editis. This case is significant as it holds that the Commission may not rely on general and vague justifications for refusing access to its internal documents, and confirms the importance given by the General Court to the principle of public access to European Institution documents, which, on the basis of this ruling, extends to documents collected during a merger investigation.

In January 2004, following an in-depth investigation, the Commission conditionally approved Lagardere's acquisition of Editis' publishing business. The approval of the transaction was conditioned

on the sale of certain of Editis assets to a third party (Wendel Investments). In July and November 2004, Odile Jacob brought actions before the General Court seeking the annulment of both the clearance of the transaction and the Commission's decision approving the divestiture of assets to Wendel Investments.

Subsequently, in January 2005, Odile Jacob requested that the Commission provide it with access to certain documents contained in its internal file relating to the Commission's investigation of Lagardere's acquisition of Editis. Odile Jacob's request was based on Regulation 1049/2001, which generally provides for the access by European citizens (legal or natural) to the documents of the European institutions.

The Commission rejected Odile Jacob's request on the basis of the exceptions to disclosure provided by the Regulation. For certain documents, the Commission argued that disclosure would jeopardize Commission investigations. In particular, the Commission's view was that, as the General Court had not yet ruled on the appeals brought by Odile Jacob regarding (1) its clearance of the Lagardere/Editis transaction; and (2) its approval of the divestment of certain of Editis assets, the protection of the Commission documents related to these matters remained justified. The General Court disagreed, and ruled that it would be contrary to the Regulation's objective of providing public access to the EU institutions' documents to make such access subject to an uncertain and possibly distant event that was dependant on the speed and diligence of the authorities.

With respect to the confidentiality of other documents, the Commission argued that access was refused on the grounds that such documents contained sensitive commercial information, and that the disclosure of these documents would be commercially harmful to the merged parties. The Commission considered that it could not explain the specific grounds for which access to these documents was denied without (indirectly) divulging their content. The General Court dismissed the Commission's reasoning and ruled that a general description of a document would not lead to the disclosure of commercial secrets.

In relation to a third category of documents, the Commission considered that their non-disclosure could be justified on the grounds that public access to these documents would seriously undermine the Commission's decision-making process. The documents in question were preparatory documents intended to assist the Commission in clearing the Lagardere/Editis transaction. Once again, the General Court rejected the Commission's reasoning. It held that, for this exception to be upheld, there would have to be a substantial impact on the Commission's decision-making process, and that the Commission's arguments were too vague and abstract to show such an impact.

Odile Jacob's request for documents included access to a legal opinion provided by the Commission's legal service regarding the legality of the Commission's approval of the Lagardere/Editis transaction. With respect to this document, the General Court ruled that the Commission could rely on the exception that providing access to this document would undermine court proceedings and legal advice. The General Court held that the legal service had to be free to provide frank, comprehensive, and objective advice, and that it should not be constrained with the possibility that its advice would be later made public.

Finally, Odile Jacob argued that, under the Regulation, the Commission should have provided it with partial access to certain documents. The Commission did not conduct an individual examination of each document to determine whether such partial access would be possible, citing the substantial administrative costs associated to such an exercise. The General Court ruled that it is only in exceptional cases that the administrative costs associated with the individual examination of each document can be invoked, and that the Commission should at least have provided an alternative solution to such an examination (such as, for example, asking the authors of the documents whether non-confidential versions of the documents existed). There was no evidence that the Commission had offered Odile Jacob such an alternative solution.

First-phase decisions with Undertakings

Case COMP/M.5669 *Cisco/Tandberg*

On March 29, 2010, the Commission cleared Cisco's acquisition of Tandberg subject to Cisco's divestment of a propriety protocol[6] (the Telepresence Interoperability Protocol, "*TIP*") used for high-end video-conferencing services. This divestment was required due to the Commission's concern that, post-transaction, the merged entity would have the ability and incentive to impede interoperability between products and services in this sector.

The transaction concerned the overall market for video-conferencing products and services. The Commission defined three antitrust markets covering: (1) dedicated-room solutions (high-end products);

6 In computing and telecommunications, the term "protocol" refers to certain message formats and rules used for the exchange of messages. In other words, protocols ensure the exchange and reception of messages between two or more points of communication.

(2) multi-purpose room-based solutions (mid-range products); and (3) executive office/desktop communications systems (lower-end products).

The Commission found that the transaction would adversely affect competition for the market for dedicated-room videoconferencing solutions. The Commission based its reasoning on (1) the parties high post-transaction market shares (representing between 60-70% of the EEA and worldwide markets); (2) the fact that the market investigation suggested that the Parties' were each others' closest competitors; and (3) the negative effects that the transaction potentially posed to the interpretability of high-end videoconferencing products.

The parties argued that, as the market for dedicated-room solutions was a bidding market, a market share analysis did not reveal the true extent of competition on the market.[7] The Commission conceded that this market appeared to display characteristics of a bidding market, but nevertheless found that the data demonstrated that the parties were each other's closest competitors in the vast majority of bids.

The Commission further found the transaction to pose a threat to the interoperability between products in this market. Interoperability is important in the market for dedicated-room solutions because different types of technologies must work in tandem for a videoconference to take place. The Commission was concerned that an incentive existed for the merged entity to increase investment in its proprietary protocols rather than protocols based on open standards. Such an initiative would reduce inexpensive interoperability between technologies, as well as increase the barriers to entry to the market. To address these concerns, Cisco agreed to divest its propriety TIP protocol to an independent industry body that would ensure its management and availability to interested parties.

This case is a further example of the Commission's careful analysis of transactions in the IT and telecommunications sector, as well as its focus in ensuring a high degree of (inexpensive) interoperability in markets where interoperability is an important parameter of competition.

First-phase decisions without Undertakings

Case COMP/M.5727 *Microsoft/Yahoo*
On February 18, 2010, the Commission unconditionally approved Microsoft's purchase of Yahoo's Internet search and search advertising businesses.

The transaction concerned Microsoft's acquisition of a 10-year exclusive license over Yahoo's search technologies. The Commission concluded that the 10-year term of the agreement constituted a "change of control on a lasting basis,, which qualified the transaction as a "concentration" as defined under EU merger control, thus requiring the transaction's appraisal by the Commission. In reaching this conclusion, the Commission considered that 10 years is a long time in an industry characterized by rapid technological developments.

Interestingly, the Commission conducted a fairly detailed analysis of the competitive effects of the transaction, even though in most of the affected markets the Parties' combined market shares were between 0-10%, *i.e.*, well below the usual threshold that would typically require the Commission to engage in a detailed antitrust appraisal of a transaction. This may be have been because the transaction reduced the number of competitors on many of the relevant markets to only two players *(i.e.* Google and Microsoft).

Ultimately, the Commission's investigation found that what it perceived as Google's strong position would prevent any potential anticompetitive effects resulting from the transaction. Indeed, the Commission found that the transaction could potentially increase competition as it would increase Microsoft's scale and, subsequently, its competitive strength vis-à-vis Google.

ABUSE OF DOMINANT POSITION

CJ – Judgments

Case C-441/07 P *Commission v. Alrosa Company Ltd.*
On June 29, 2010, the Court of Justice of the European Union set aside the General Court's judgement[8] and upheld the Commission's decision rendering legally binding commitments offered by De Beers to cease all purchases of rough diamonds from Alrosa as from January 1, 2009.

Following the notification of an agreement concluded between De Beers and Alrosa in 2002, under which Alrosa undertook to supply about half its annual rough diamond production to De Beers for a duration of five years, the EC initiated Article 101 TFEU proceedings against both parties, and separately, Article 102 TFEU proceedings against De Beers.

7 In a bidding market, demand is often irregular and driven on the basis of customer RFQs. It is therefore often argued that bidding markets should not be merely assessed on market shares, as such data will typically not reflect the degree of competition between companies engaged in trying to secure the tender.

8 Case T-170/06 *Alrosa v Commission*, [2007] 5 CMLR 7 (July 11, 2007).

Alrosa and De Beers proposed commitments to address the Commission's concerns, which provided for a progressive reduction in sales of rough diamonds by Alrosa to De Beers, from USD700 million in 2005 to USD275 million in 2010. Sales would then be capped at the 2010 level. Following the negative responses resulting from the market testing of these commitments, the Commission requested and De Beers committed unilaterally to reduce progressively its diamond purchases from Alrosa between 2006 and 2008, and to cease definitively all purchases of rough diamonds from Alrosa with effect from January 1, 2009. The Commission rendered these commitments legally binding on De Beers by a decision of February 22, 2006.[9]

On application by Alrosa, the General Court annulled the Commission's decision on the grounds that the Commission had failed to respect the principle of proportionality by failing to consider alternative commitments to that offered by De Beers that were more proportionate. It found that the complete prohibition of all commercial relations between the two parties on the basis of De Beers' dominant position was manifestly disproportionate, and was not justified by the existence of exceptional circumstances (*e.g.*, a collectively dominant position occupied by Alrosa and De Beers). The General Court also found that the Commission had failed to respect Alrosa's right to be heard on the individual commitments proposed by De Beers in the proceedings initiated against De Beers alone.

Following the Commission's appeal against the judgment of the General Court, the Court overturned the findings of the GC, holding that the Commission's assessment of remedies voluntarily proposed by an undertaking in the context of an Article 9 commitment proceeding and of remedies in the context of a formal infringement decision is different: undertakings that offer commitments consciously accept that the concessions they make may go beyond what the Commission could itself impose on them. The principle of proportionality is therefore applied differently in this context, and requires that the Commission assess only whether those commitments address the problems identified and communicated to the Parties. The Commission need not determine whether it would itself have imposed the commitments offered, or to consider disproportionate any commitments more exacting than those the Commission would itself have imposed. Conversely, in the context of a remedies decision following a formal infringement finding, the Commission is required to determine whether less restrictive measures might achieve the same result. The Court did not address Alrosa's argument that De Beer's unilateral commitment was effectively tantamount to a decision adopted in the context of an infringement proceeding prohibiting Alrosa from supplying rough diamonds to De Beers forevermore, and that the principle of proportionality should therefore apply in the normal manner in reviewing the legality of the Commission's decision to accept and render binding De Beers's unilateral commitment.

The Court also held that, although Alrosa was an interested party in respect of the Article 101 TFEU proceedings brought against both Alrosa and De Beers jointly, only De Beers (as the dominant undertaking) could be the addressee of the Commission's Statement of Objections and final decision in those proceedings. As a result, the Court held that the Commission's acceptance of De Beer's unilateral commitment did not depend on the position of Alrosa or of any other undertaking. The fact that Alrosa had received only a summary of the conclusions drawn by the Commission from third party observations at a late stage of the proceedings therefore did not affect the validity of the Commission's decision.

GC – Judgments

Case T-66/01 *Imperial Chemical Industries v. Commission*

On June 25, 2010, the General Court confirmed the Commission's finding that Imperial Chemical Industries ("ICI") had abused its dominant position on the soda ash market.

On December 19, 1990, the Commission found that ICI had abused its dominant position on the EU soda ash market by granting loyalty rebates and other financial incentives to customers buying most or all of their requirements from ICI and to limit their purchase of competitors' materials to a specific tonnage.[10] The Commission also found that ICI had infringed Article 101 TFEU by concluding a market-sharing agreement with its competitor, Solvay. The Court annulled the Commission's decision on a narrow procedural ground, holding that, consistent with the Commission's rules of procedure and applicable case law, the Commission's decision should have been authenticated prior to its notification to the parties in order to ensure that it was identical to the text adopted by the college of Commissioners in the event of a dispute.[11] On appeal, the Court of Justice of the European Union upheld the Court's decision.

9 Case COMP/B-2/38.381 *De Beers*, Commission Decision of February 22, 2006 (2006/520/EC).

10 COMP/IV/33.133D *Soda Ash – ICI*, OJ 1991 L 152, p. 40.

11 Case T – 37/91 *ICI v. Commission* [1995] ECR II – 1901. See also, art. 12, EC's Rules of Procedure; see also Case C-137/92 P, *Commission v BASF*, paras 73-76.

In December 2000, the Commission readopted its December 1990 decision, thereby curing the lack of authentication of the original decision. In its appeal against this decision, ICI argued that (i) the decision was time-barred since it exceeded the five year limitation period set out in Regulation 2988/74; (ii) the Commission had violated the principle established in Regulation 17/62 that action leading to the imposition of penalties under that Regulation must be taken within a reasonable period; and (iii) the Commission had committed various other procedural infringements in readopting its December 1990 decision, including breach of the defendant's right of access to file. ICI added (i) that the Commission had erred in finding that ICI had abused its dominant position, (ii) that the EC had incorrectly assessed the relevant market and ICI's position on that market, (iii) that ICI's pricing system represented normal competitive practice, and (iv) that the fine imposed on ICI should be reduced or cancelled.

The Court held that the five-year limitation period for competition law infringements is suspended when the Commission has taken interruptive action,[12] and when the Commission decision is the subject of appeals before the European Courts.[13] In the present case, the limitation period had been suspended for the duration of the proceedings before the European courts for a period of at least eight years and eight months. The Commission's decision was therefore not time barred.

The Court added that Regulation 17/62 distinguishes between administrative and judicial proceedings, and that the period during which the European courts were reviewing the legality of the Commission's decision should not be taken into account in assessing the reasonableness of the time taken to act. The period taken by the Commission to adopt its first decision in 1990 was reasonable. In any event, the Court noted that infringement of this principle could only constitute grounds for annulment of a Commission decision if it affected the undertaking's ability to defend itself, which was not the case here.

The Court dismissed ICI's other procedural grounds of appeal, which the Court held were *res judicata* since the Commission had not carried out any further investigative measures prior to readopting its decision, and the parties, purpose and legal basis of the new decision were identical to the first decision.

Concerning ICI's substantive arguments, the Court held that the Commission need not carry out a new assessment of the relevant market and dominance if its previous decision was annulled on purely procedural grounds. The Court noted in any event that there were no exceptional circumstances suggesting that ICI's 90% share of the soda ash market should not be interpreted as conferring dominance upon ICI. In particular, there was no evidence that ICI was constrained by competition from other producers of soda or countervailing buyer power.

The Court also confirmed that ICI's marginal tonnage rebate system constituted an anticompetitive loyalty rebate scheme intended to foreclose customers from obtaining their supplies from ICI's competitors. The system was not objectively justified by efficiencies or economies of scale. Indeed, ICI's own internal strategy documents indicated that the company's pricing arrangements were equivalent to an exclusive supply arrangement and were intended to foreclose competing suppliers by restricting customers' ability to choose alternative sources of supply. Other evidence indicated that ICI's other financial inducements offered to customers (*e.g.*, support packages) were conditional upon a commitment by the customer to purchase 100% of its requirements from ICI, and were therefore intended, at least in respect of some customers, to foreclose competing suppliers.

With respect to ICI's request that its fine be reduced, the Court agreed with ICI (i) that the Commission's fine calculations for violating Article 102 TFEU should not have taken into account ICI's prior infringements of Article 101 TFEU, and (ii) that the Commission had failed to produce evidence that the infringement had started before 1984. The Court therefore reduced ICI's fine under these two heads by 5% and 15%, respectively.

Case T-321/05 *AstraZeneca v. Commission*

On July 1, 2010, the General Court mostly confirmed the Commission's decision fining AstraZeneca ("AZ") for abusing its dominant position on the market for anti-ulcer medicines.

At issue was AZ's behavior in relation to an omeprazole-based medicine (Losec), which is a proton pump inhibitor ("PPI"), a medicine used to cure gastrointestinal acid-related diseases and conditions. H2 Blockers are also used to cure such diseases and conditions. The Commission had found that AZ had committed two

12 Regulation 2988/74 EC identifies the following as "interruptive action": (i) a written request for information by the Commission or a competent national competition authority acting at the request of the Commission, or a Commission decision requiring the requested information; (ii) a Commission decision or authorization to carry out an investigation of undertaking's premises for suspected breach of the competition rules; (iii) the commencement of proceedings for infringement of the rules on competition by the Commission; and (iv) notification by the Commission of a statement of objections.

13 Regulation 2988/74 EC, article 3.

different abuses with the objective of preventing or delaying the entry of generic medicines, or of preventing parallel imports of Losec. The first abuse involved the submission of deliberately misleading representations to patent agents, national patent offices, and national courts in order to acquire or preserve Supplementary Protection Certificates ("SPCs") to which it was not entitled. The second abuse concerned the selective deregistration of marketing authorizations for a presentation of its patented drug Losec in order to prevent producers of a generic version of that particular presentation from using an accelerated approval procedure for their own product.

AZ challenged the Commission's conclusion that the relevant product market was that of PPIs. The Court noted that AZ's challenge hinged on whether H2 blockers exerted a competitive constraint on PPIs. The Court confirmed the Commission's market definition, dismissing the argument that H2 blockers exerted a competitive constraint on PPIs. The Court relied on, *inter alia*, the actual therapeutic use of these products and their ATC classification as well as on price indicators.

In addition, the Court confirmed the Commission's finding that AZ enjoyed a dominant position on the market for PPIs in several EEA countries. AZ had called into question the relevance of the factors relied on by the Commission to find dominance, but the Court found that AZ had not explained how the characteristics of the pharmaceutical sector could affect the relevance attached to its very high shares on the market. Moreover, concerning intellectual property rights, the Court found that *"the patent protection enjoyed by Losec enabled AZ to exert significant pressure on its competitors, which was, in itself, a relevant indicator of its dominant position."*

With regard to AZ's abusive behavior, the Court found that AZ had indeed made misleading representations to the relevant national patent offices in order to be granted a SPC for the Losec and obtain an extension of the patent protection to which it was not entitled or to which it was entitled for a shorter period. In particular, the Court noted that this practice was based exclusively on methods falling outside the scope of competition on the merits. It found that this conduct only served to prevent the entry of manufacturers of generic products on the market.

Concerning AZ's deregistration practice, the Court stated that the request by pharmaceutical companies for deregistration of marketing authorizations could constitute an abuse of a dominant position. In particular, the Court stated that in the absence of *"legitimate interests of an undertaking engaged in competition on the merits"* or of an objective justification, *"an undertaking in a dominant position cannot use regulatory procedure in such a way as to prevent or make more difficult the entry of competitors in the market."* However, the Court held that the Commission had failed to prove that the deregistration of marketing authorizations in Denmark and Norway was capable of restricting parallel imports of Losec in those two countries. More specifically, based on the principle that *"doubt must operate to the advantage of the addressee of the decision finding the infringement,"* the Court held that the Commission could not rely on the presumption of a causal link between deregistration and the cessation of parallel imports.

The Court thus annulled the part of the decision relating to the impact on parallel imports of the deregistration of the marketing authorizations of Losec and reduced the fine imposed on AZ correspondingly.

Commission decisions

Swedish electricity inter-connectors' market (Svenska Kraftnat)

On April 14, 2010, the Commission adopted a decision under Article 9 of Regulation 1/2003 rendering legally binding commitments offered by Svenska Kraftnat ("SvK") to address the EC's concerns relating to the Swedish electricity transmission market.[14] Such a decision ends the Commission's investigation and requires the undertaking to comply with its commitments. However, the Commission does not make a final finding that there has been an infringement of EU competition law. The Commission has previously relied on Article 9 decisions in a number of cases relating to the liberalisation of energy markets.[15]

On June 25, 2009, the Commission issued a statement of objections to SvK, reaching the preliminary conclusion that SvK had abused its dominant position on the Swedish electricity transmission market. The Commission found that SvK may have limited export transmission capacity available on electricity interconnectors situated along Sweden's borders in order to relieve congestion within SvK's network on the Swedish domestic market. The Commission reached the initial conclusion that this practice had the effect of segmenting the internal market by reserving domestically produced electricity for consumers in Sweden, denying access to the Swedish electricity network to users located in neighbouring Member States. The

14 Case COMP/39.351.

15 See, e.g., Cases COMP/39.388 – German electricity wholesale market; Case COMP/39.389 – German electricity balancing market; Case COMP/39.316 – GDF foreclosure; Case COMP 39.402 – RWE Gas Foreclosure; Case COMP/39.386 EDF – Long-term contracts France.

Commission found that SvK's export restrictions could eliminate congestion and bottlenecks in the domestic distribution network, but were unlikely to be the least restrictive means of doing so.

To address the EC's concerns, SvK undertook, before November 1, 2011, to sub-divide the Swedish transmission system into two or more bidding zones that could be reconfigured in case of changes in the flow of electricity within the network. Within these bidding zones there would be no limitation on interconnector trading capacity, with the exception of a narrow section of the electricity transmission system in Western Sweden near Gothenburg and between two 400 kV transmission lines, the so-called "West Coast Corridor," since insufficient suitable generation resources to sustain a separate bidding zone existed in this zone.

SvK also undertook to reinforce the domestic transmission network before November 30, 2011, by building and operating a new 400 kV transmission line in the West-Coast-Corridor.

Finally, SvK undertook to increase the use of counter-trade in the period prior to the implementation of the undertakings just described. Counter-trade is a congestion-avoidance technique, by which a transmission service operator pays generators or consumers in order to adjust their production or consumption schedules, hence the transmission flows are adjusted to the capacity that is efffectively available.

The commitments are binding upon SvK for a period of ten years from the notification of the decision. This regulatory intervention in the Swedish electricity transmission market is consistent with the findings of the Commission's 2007 inquiry into the EU energy sector. The final report in that inquiry identified a number of structural weaknesses in the EU energy sector, including a lack of inter-connector capacity. The Commission indicated that it would investigate possible anticompetitive restrictions on access to interconnector capacity between Member States.[16]

E.ON Commitment Decision

On May 4, 2010, the Commission adopted a decision under Article 9 of Regulation 1/2003 rendering legally binding commitments offered by the German energy company E.ON relating to the German gas markets.

On December 22, 2009, the Commission adopted a preliminary assessment concerning alleged infringements by E.ON on the German gas markets. It found that E.ON was a dominant player: (i) on the market(s) for gas transmission within its low-calorific gas ("L-gas") network and the H-gas market area (NetConnect Germany network); and (ii) on the downstream gas markets for the supply of regional and local wholesalers and for the supply of large industrial customers. The Commission's concerns related to E.ON's booking, on a long-term basis, of the largest part of the transport capacity at the entry points into its gas transmission networks in Germany. Access to gas pipelines is necessary for new market entrants as insufficient access limits their ability to acquire customers. These bookings could thus have prevented other gas suppliers from accessing the German gas market, thereby depriving them of the opportunity to compete with E.ON. The Commission found that E.ON might have abused its dominant position by way of a refusal to supply through the long-term bookings on E.ON's gas transmission system, contrary to Article 102 TFEU. This practice would have led to a foreclosure of competitors trying to transport and sell gas to customers connected to the E.ON grid and would therefore have restricted competition on the downstream markets for gas supply.

E.ON offered a number of commitments intended to address the Commission's concerns. They are organized in two steps, designed to alleviate quickly at least parts of the difficulties in accessing E.ON's transmission grid.

In a first step, E.ON undertook to release 15% of the pipeline capacity at the entry points to its gas networks by October 2010. This immediate capacity release covers all the main entry points into E.ON's networks and includes pipelines from all main gas sources (i.e., Russia, the Netherlands and Norway).

In a second step, E.ON also committed to reduce, by October 2015, its bookings of entry capacity in the H-gas market area (NetConnect Germany grid) to 50%, and to 64% in E.ON's grid for L-gas. The commitments will apply until 2025. In order to reach these thresholds, E.ON could either (i) return capacities to the Transmission System Operator ("TSO"), (ii) increase capacity in the grid, or (iii) enter into market area co-operations which increase the total volume of capacities into E.ON's grid.

The Commission published a summary of these commitments on January 22, 2010, inviting comments from interested parties. The market test confirmed that the commitments were suitable to address the concerns identified. In addition, Commission reviewed the commitments in close cooperation with the German energy regulator (Bundesnetzagentur) and the German competition authority (Bundeskartellamt). Furthermore, E.ON will appoint a

16 See DG Competition Report on energy sector inquiry, January 10, 2007, paras. 545-560, available at http://ec.europa.eu/competition/sectors/energy/inquiry/full_report_part2.pdf, and paras. 1029 and 1051, available at http://ec.europa.eu/competition/sectors/energy/inquiry/full_report_part3.pdf.

monitoring trustee, subject to the Commission's approval. The latter will examine if E.ON has complied with its commitments.

STATE AID

GC – Judgments

Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others (FT) v. Commission*

On May 21, 2010, the General Court annulled a Commission decision declaring that certain measures implemented by the French State in favor of France Telecom constituted state aid that was incompatible with the common market.[17] The Commission found that the measure notified to it by the French State, namely a proposal for a shareholder loan of €9 billion in favor of France Telecom from December 2002, in which the French State held a 56.45% stake, constituted incompatible State aid. In reaching this conclusion the Commission examined both the proposed shareholder loan and the declarations by the French Government, which, between July and December 2002, publicly announced its intention to intervene in favor of France Telecom with a view to resolving the company's financial difficulties. The Commission found that the measures at stake involved a transfer of State resources in the form of a shareholder loan and that the French Government's public declarations conferred an economic advantage upon France Telecom by strengthening its position in the eyes of the market.

The Court found that in order to determine whether the Commission correctly qualified the measures at hand as state aid, it was first necessary to verify whether the French Government's public statements announcing its intervention in favor of France Telecom and/or the shareholder loan proposal conferred an economic advantage upon France Telecom and, in the affirmative, whether this advantage was conferred through State resources.

As to the first question, the General Court held that the French Government's declarations conferred an advantage upon France Telecom as they allowed France Telecom to regain the market's confidence, led to the improvement of the company's rating, and allowed France Telecom to have access to cheaper credit to finance its debts. As regards the proposed shareholder loan, however, the Court took the view that the measure did not confer an economic advantage upon France Telecom because it was never executed.

As to the second question, the Court considered whether each of the French Government's declarations and the shareholder loan proposal entailed a transfer of state resources. The Court agreed with the Commission that the French Government's declarations, in light of their open, imprecise, and conditional character in relation to a hypothetical future State intervention, were incapable of being qualified as measures involving the transfer of State resources. As to the shareholder loan proposal, the Court found that the Commission did not prove that the proposal entailed a transfer of state resources and that, in any event, the Commission failed to establish that the advantage conferred upon the beneficiary of the measures by the French Government's declarations was a consequence of the alleged transfer of state resources deriving from the proposed shareholder loan. In other words, the Court held that the Commission had failed to establish the existence of a link between the measure allegedly entailing a transfer of state resources (the proposed loan) and the separate measure resulting in an economic advantage for the beneficiary (the public statements).

In light of the above, the Court concluded that the Commission had failed to demonstrate that the measures adopted by the French State constituted state aid and annulled the decision.

Case T-177/07 *Mediaset v. Commission*

On June 15, 2010, the General Court dismissed Mediaset's appeal by against the Commission decision finding that the subsidy granted by the Italian State to TV users for the purchase or rental of digital terrestrial decoders constituted state aid that was incompatible with the common market.[18] Following complaints filed by satellite broadcasters (including Centro Europa 7 Srl and Sky Italia Srl), the Commission initiated a formal investigation procedure and found that the subsidy constituted state aid to digital terrestrial broadcasters offering pay-TV services and digital cable pay-TV operators. The Commission considered that the subsidy was disproportionate and did not prevent unnecessary distortions of competition since it was not technologically neutral, as it did not apply to digital satellite decoders. As a result, the Commission ordered Italy to recover the aid from the beneficiaries, together with interest.

The Court held that the Commission was correct in finding that the measure had enabled cable operators and digital terrestrial broadcasters to benefit from an advantage as compared with satellite broadcasters. In order to be entitled to the subsidy it was necessary to purchase or rent equipment for the reception of digital terrestrial TV signals, with the result that a consumer who opted for equipment exclusively for the reception of digital satellite TV signals could not

17 Commission Decision 2006/621/EC of August 2, 2004 in OJ L 257/11.

18 Commission Decision 2007/374/EC of January 24, 2007 in OJ 2007 L 147/1. Mediaset is a digital terrestrial broadcaster.

benefit from it. Consequently, the subsidy did not meet the requirement of technological neutrality. Furthermore, the measure created an incentive for consumers to switch from the analogue to the digital terrestrial mode and, at the same time, enabled digital terrestrial broadcasters to consolidate their position on the market in terms of brand image and customer retention. The automatic price reduction prompted by the subsidy was therefore also liable to affect consumer choice.

The Court also held that the Commission rightfully categorized Mediaset as an indirect beneficiary of the measure, stating, *inter alia*, that the Treaty on the Functioning of the European Union prohibits state aid without drawing a distinction as to whether the related advantages are granted directly or indirectly. In addition, the Court held that the selective nature of the measure resulted in a distortion of competition between digital terrestrial broadcasters and satellite broadcasters because, although all the satellite broadcasters could have benefited from the measure by offering 'hybrid' decoders (which are both terrestrial and satellite), that would have exposed them to extra costs to pass on to consumers in the selling price.

Finally, the Court found that no provision requires the Commission, when ordering the recovery of aid, to fix the exact amount to be recovered. The recovery of aid which has been declared incompatible with the common market is to be carried out in accordance with the rules and procedures laid down by national law and it is for the national court, if a case is brought before it, to rule on the amount.

FINING POLICY

ECJ – Judgments

Case C-413/08P *Lafarge SA v. Commission*

On June 17, 2010, the Court of Justice rejected Lafarge's appeal against the General Court's judgment[19] upholding the European Commission's decision to fine Lafarge for cartel activities in the plasterboard industry.[20]

The Court rejected Lafarge's argument that the General Court distorted the clear sense of the evidence because it made reference to the 'overall context' of case in order to establish individual actions as infringements. The Court explained that its jurisdiction did not extend to the examination of the evidence which the General Court accepted as fact, and that it could only assess whether the General Court's assessment of the evidence was manifestly incorrect. The Court noted that Lafarge did not allege with sufficient specificity which evidence was distorted. Moreover, the Court explained that in cartel cases, given their illegality and clandestine, conspiratorial nature, individual pieces of evidence showing unlawful interactions between various actors are rare. Instead, the Court supported an inferential approach based on coincidences and indicia, which, in combination constitute evidence of violations of competition rules.

The Court also rejected Lafarge's claim that the General Court had infringed the rules on the burden of proof, confirming that the Commission's evidence may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the rules on the burden of proof have been satisfied. In order to establish the start of Lafarge's participation in the information exchange with BPB, the Commission had relied on a number of statements made by BPB and on tables held by BPB containing Lafarge's market shares by value from that date. The General Court considered this evidence sufficient because Lafarge's response was limited to noting the lack of detail in BPB's statements, as opposed to providing evidence on the exact date or circumstances that led it to engage in such an exchange of information.

Concerning Lafarge's argument that the General Court had not addressed its argument alleging unequal treatment between Lafarge and another member of the cartel, Gyproc, the Court held that Lafarge had not expressly pleaded the principle of equal treatment in its case before the General Court and thus rejected the argument as inadmissible because it was not raised prior to the appeal to the Court. The Court also confirmed that the Commission is in any event not required to calculate fines from amounts based on the turnover of the undertakings concerned nor to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their relevant turnover.

Concerning the increase in Lafarge's fine on grounds of recidivism, the Court confirmed that Article 15(2) of Regulation 17 allows the Commission to impose fines based on the duration and gravity of the infringement, that repeated infringement is an aggravating circumstance, and that there is no maximum period outside which repeated infringement cannot be taken into account. Interestingly, the Court nevertheless noted that the principle of proportionality requires that the time elapsed between the infringement in question and a previous breach of the competition rules be taken into account

19 Case T-54/03, *Lafarge v Commission* [2008] ECR II-120.

20 Case No COMP/E-1/37.152 – *Plasterboard*, Commission decision of November 27, 2002.

in assessing the undertaking's tendency to infringe those rules. For the purposes of judicial review of the Commission's measures in matters of competition law, the General Court and, where appropriate, the Court may therefore be called upon to scrutinize whether the Commission has complied with that principle when it increased, for repeated infringement, the fine imposed, and, in particular, whether such increase was imposed in the light of, among other things, the time elapsed between the infringement in question and the previous breach of the competition rules.

The Court also confirmed that it is sufficient (for the Commission to be entitled to take account of repeated infringement) that the undertaking has previously been found guilty of an infringement of the same type, even if the decision concerned is still subject to review by the courts.

Finally, concerning the increase in Lafarge's fine to ensure deterrence, the Court noted that the Commission may take into account, *inter alia*, the size and the economic power of the undertaking concerned. With respect to Lafarge's complaint regarding the stage at which that consideration took place, the Court noted that, in this case, since the fine was calculated by applying multipliers, the order in which those multipliers were applied had no effect on the final amount of the fine, irrespective of the stage at which the multiplier in question was applied.

GC – Judgments

Joined Cases T-446/05, T 452/05, T448/05, T 456/05 and T 457/05 *Amann & Söhne GmbH & Co and others v. Commission*

On April 28, 2010, the General Court upheld Belgium Sewing Threads's claim for an increased reduction under the Leniency Notice, and rejected all of the applicants' other claims, including arguments regarding the Commission's finding of an infringement, the characterization of the infringement as very serious, and alleged breaches of the principles of proportionality and equal treatment in setting the fines.

Two appellants, BST and Zicky, claimed that the Commission had erred in finding them liable for an infringement in the Benelux and Nordic industrial thread markets. In particular, BST argued that it was not involved in the conception or organization of the cartel arrangements. Zwicky argued that the Commission failed to take account of the fact that it was not present on the market for industrial thread in the Nordic countries during the period in which the single and continuous infringement was committed. In rejecting these claims, the General Court noted that the mere fact that each undertaking takes part in an infringement in ways that are peculiar to it does not exclude its liability for the entire infringement, including conduct that is put into effect by other undertakings but that has the same anti-competitive object. The General Court recalled that the Commission need only show that an undertaking participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel.

Amman, which was fined for it participation in both the of the industrial thread and automotive cartels, raised a number of arguments regarding the Commission's characterization of the cartels as two separate infringements. First, Amman claimed that the industrial thread cartel and the automotive cartel constituted a single infringement on a single market, in respect of which the Commission should have imposed a single fine. The General Court rejected this claim, holding that the Commission was justified in finding two separate markets and thus two separate infringements. Far from constituting a manifest error of assessment, the General Court found that the Commission's decision was well supported by evidence, including the different geographic scope of the markets for automotive thread (EEA-wide) and industrial thread (regional), and the absence of demand substitutability and supply substitutability between the two types of thread. Second, Amman argued that the two cartels should have been treated as a single infringement because they shared a common "overall plan." The General Court rejected this claim on the grounds that Amman had failed to show a *"link of complementarity"* between the two cartels sufficient to establish a single and continuous infringement. In particular, the General Court observed that there was no coordination between the two cartels, which exchanged different types of information, were organized differently, and had different participants. In these circumstances, the General Court held that the Commission was entitled to find two separate infringements in respect of which it was moreover entitled to impose separate fines.

Several applicants further claimed that the Commission had erred in characterizing the infringements as *"very serious."* In particular, the applicants argued that the Commission had failed to demonstrate the cartel had any actual impact on the relevant markets. The General Court held that the Commission could legitimately infer that the infringement had effects on the market from the fact that the participants took measures to apply agreed prices – the Commission is not required to demonstrate that these measures in fact enabled the undertakings to raise prices above the competitive level. The General Court moreover agreed with the Commission that the duration of the cartel for more than 11 years suggested that the participants believed it had some effect. The General Court therefore

concluded that the Commission did not make any manifest error of assessment in finding the infringements to be *"very serious."*

With regard to the level of fines, several applicants claimed that the Commission had breached the principles of proportionality and equal treatment. First, Amman, Cousin, and BST claimed that the fines imposed by the Commission were disproportionate to the size of the relevant markets and the turnover of the undertakings concerned. In rejecting this claim, the General Court emphasized that the size of the market is just one factor that the Commission takes into account in determining the starting point for the fine; the Commission may also consider factors such as the gravity of the infringements, which in this case were *"very serious."* It further held that the Commission is entitled to consider an undertaking's turnover on the relevant market in order that it might assess the scale of the infringement, the undertaking's liability for the infringement, and ensure that the fine has a deterrent effect. Finally, it noted that, provided that the fine does not exceed 10% of an undertaking's total turnover, the Commission is not required to take into account either the undertaking's overall size or its particular financial situation in determining the level of fines.

Second, Amman, Cousin, BST and Oxley claimed that the Commission had breached the principle of equal treatment in setting the starting amount of the fine. In particular, Amman and Oxley claimed that the Commission erred in dividing cartel members into a number of categories. The General Court noted that the consistent case law confirms that dividing participants into a number of categories for the purpose of setting fines is legitimate, provided that the principles of proportionality and equal treatment are respected. As the Commission's treatment of the undertakings was both consistent and objectively justified, the General Court rejected also rejected this claim.

Finally, BST claimed that the 20% reduction in the fine that the Commission granted it under the Leniency notice was insufficient in light of the level of its cooperation and the importance of the evidence and data it provided. In particular, BST claimed that its reduction was too low compared to the 15% granted to Amman, Güterman, and Zwicky, whose information the Commission described as *"useless."* The General Court noted that the Commission enjoys a broad discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, especially in comparison with the contributions of other undertakings. The General Court will therefore only intervene where the Commission has made a manifest error of assessment. In the present case, however, the General Court noted that the Commission expressly admitted that BST had not only provided factual data but had actually provided important evidence of the infringement at issue. In these circumstances, the General Court agreed with BST that the difference in reduction granted to BST compared to those other undertakings was unreasonably narrow. The General Court therefore upheld BST's claim and increased the reduction of its fine from 20% to 30%.

Cases T-11/05, T-18/05, T-19/05, T-20/05, T-21/05, T-25/05 *Wieland-Werke AG and Others v. Commission*

On May 19, 2010, the General Court issued six separate judgments[21] in response to appeals against the Commission's decision[22] in the copper plumbing tubes cartel case. The General Court reduced the fines imposed on IMI and Chalkor by 10% and dismissed the Commission's counterclaims for a fines increase.

The General Court dismissed IMI's arguments alleging that the Commission had infringed IMI's rights of defence, had violated the principle of proportionality, and conducted its investigation in a discriminatory way. The General Court also rejected Chalkor's arguments that the Commission failed to take into account the coercion to which Chalkor was subjected, the actual duration of Chalkor's participation in the cartel, and that the Commission wrongly assessed the relevant geographic market. The General Court, however, reduced the fine imposed on both Chalkor and IMI on the grounds that the Commission had infringed the principle of equal treatment by treating IMI and Chalkor in the same way as the other cartel participants, even though IMI and Chalkor had only participated in one of the cartel's branches. The General Court separately reduced the fine on IMI by finding that the Commission erred in holding that there was manifest continuity in IMI's participation in the cartel.[23]

The General Court, on the other hand, dismissed KME's, Wieland's, and Boliden's arguments alleging that the Commission exaggerated the size of the sector affected by the cartel, failed to consider the cartel's actual impact on the market, and failed to prove that their participation in the cartel was uninterrupted. The General Court further rejected Wieland's and Boliden's argument alleging that the

21 Cases T-11/05 *Wieland-Werke AG and Others v. Commission*; T-18/05 *IMI plc and Others v. Commission;* T-19/05 *Boliden AB and Others v. Commission*; T-20/05 *Outokumpu Oyj and Others v. Commission*, T-21/05, *Chalkor AE v. Commission*; T-25/05 *KME Germany AG and Others v Commission*, judgments of May 19, 2010.

22 Case COMP/E-1/38.069 *Copper Plumbing Tubes*, Commission Decision of September 3, 2004; http://ec.europa.eu/competition/antitrust/cases/decisions/38069/en.pdf.

23 In particular, there was no evidence of collusive behavior or contacts with other cartel members between December 1, 1994 and April 11, 1996. In contrast, cartel members met several times a year between 1988 and 1994.

Commission infringed the principle of proportionality in setting the fines. The General Court also dismissed KME's and Wieland's argument as to the duration of their involvement in the cartel, Wieland's arguments alleging the that Article 23(2) of Regulation 1/2003 was unlawful and that the Commission infringed of the principle of equal treatment.

The Court dismissed Outkumpu's argument that its participation in the cartel was not a repeat infringement due to an earlier infringement decision[24] under the European Coal and Steel Treaty ("*ECSC Treaty*"),[25] on the grounds that the ECSC Treaty and the Treaty on the Functioning of the European Union contained similar provisions (Article 101 TFEU and 65 ECSC) inspired by identical legal concepts.

The General Court rejected all arguments alleging that the Commission failed to take account of attenuating circumstances. Rejecting the argument for KME and Wieland, the Court held that the Commission need not consider the poor financial health of an economic sector or its low percentage return on sales as an attenuating circumstance. Furthermore, the General Court rejected KME's argument that the Commission had failed to take into account its ability to pay in setting the fine. Consistent with its case law, the General Court held that to do so would have amounted to conferring KME and unfair competitive advantage. The General Court also rejected KME's argument that the Commission failed to reduce KME's fine in view of the fine's detrimental effect on the company's workforce. The General Court held that there was no causal link between the two.

POLICY AND PROCEDURE

ECJ – Judgments

Case C-550/07P *Akzo Nobel Chemicals Ld v. Commission*

On April 29, 2010, Advocate General Kokott advised the Court of Justice of the European Union to uphold the General Court's judgment of September 17, 2007, which rejected Akzo Nobel's claim that emails between company management and in-house counsel should be protected under the "legal professional privilege."

In February 2003, the Commission dawn-raided the premises of Akzo Nobel and Akcros Chemicals Ltd ("Akcros") in the United Kingdom. In the course of the search, the Commission officials took photocopies of various documents that Akzo Nobel and Akcros claimed were covered by the legal professional privilege, including two emails between management and in-house counsel. Based on its investigation, the Commission issued fines totaling EUR 173,860,400 on 24 plastic additive producers, including Akros and also several companies in the Akzo Nobel group, but not Akzo Nobel itself. The Commission submitted that it did not rely on the two emails in levying the fines.

First, the Advocate General rejected the Commission's claim that Akzo Nobel and Akros lacked standing to bring the complaint because the Commission had not actually relied on the two emails in imposing fines. The Advocate General found that any breach of legal professional privilege during an investigation represents the violation of a fundamental right, regardless of whether the Commission ultimately decides to use that document at a later date. This breach continues as long as the Commission has the document in its possession.

On the question of legal privilege, the Advocate General found that the Court in its AM&S judgment explicitly excluded in-house counsel communications from legal professional privilege because in-house counsel lack independence from their employer and are less able to deal effectively with any conflicts of interest between their professional obligations and the aims and wishes of their "client" than an external lawyer.[26]

The Advocate General added that only a small minority of Member States affords legal professional privilege to in-house counsel. Furthermore, a significant number of Member States do not even permit in-house counsel to become members of their national Bar. The Advocate General rejected the view that the increasingly complicated world of antitrust proceedings necessitated the extension of legal professional privilege to in-house counsel.

Finally, the Advocate General rejected the argument that the European Union does not have the competence to define the scope of legal professional privilege, explaining that the competence of the European Union to lay down the Commission's powers of investigation and the limitations imposed on them (such as legal privilege) stem from Article 103 TFEU.

24 Case 90/417/ECSC *Cold-rolled Stainless Steel Flat Products*, Commission decision of July 18, 1990.

25 Case T-20/05, para. 59 (*"The Commission had never, prior to the contested decision, sought to establish a repeat infringement in a case covered by the EC Treaty on the basis of an earlier infringement covered by the CS Treaty."*) http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79899480T19050020&doc=T&ouvert=T&seance=ARRET.

26 Case 155/79 *AM&S v Commission* [1982] ECR 1575.

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