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HORIZONTAL AGREEMENTS

Commission decisions

DRAM Cartel

On May 19, 2010, the European Commission issued its long-awaited first cartel settlement decision (the first since the Commission introduced the settlement procedure in June 2008).[1] The settlement decision imposed a total of €331,273,800 in fines on ten producers of Dynamic Random Access Memory ("DRAM") chips that were found to have participated in cartel conduct in violation of Article 101 TFEU. Between July 1, 1998, and June 15, 2002, the cartel participants engaged in a network of mostly bilateral contacts through which they exchanged pricing information and coordinated prices and quotations for DRAM sold to major PC or server manufacturers in the EEA. All participants agreed to follow the settlement procedure and received a 10% settlement discount as provided by the Settlement Notice.[2]

The Commission investigation began in 2002 and proceeded slowly for a number of years. During this time, the five largest DRAM producers all cooperated with the Commission, in accordance with the Leniency Notice. In early 2009, the Commission informally contacted cartel participants to gauge their interest in engaging in settlement discussions. After receiving a positive response, the Commission initiated proceedings pursuant to Article 11(6) of Regulation 1/2003 and invited the parties to express formally their interest in engaging in settlement discussions.

The settlement discussions were structured as three sets of bilateral meetings between the Commission and each of the parties. These meetings took place between May and November 2009 and included the following key elements:

- During the first meeting the Commission presented the key features of its case against each of the parties (*e.g.*, the nature of the infringement, the duration of that company's involvement in the cartel, and the attribution of liability among the various companies of the same group), together with supporting evidence. Immediately afterwards, the Commission granted each party access (at the Commission's premises) to a selection of key documents from the case file, including all leniency statements. Parties were also invited to comment on the Commission's allegations at this stage.
- During the second meeting the Commission provided parties with feedback on their arguments and observations submitted following the first meeting and partial file access.
- Finally, during a third meeting the Commission disclosed to each party the range within which its fine would ultimately fall, without disclosing methodology that the Commission intended to use to calculate the actual fine.

Following the third settlement meeting, the Commission set a time limit for the parties to present formal settlement submissions, including: (1) an acknowledgement of the facts of the infringement and their legal qualification; (2) an indication of the maximum fine level that the company would be willing to pay (*i.e.*, the upper limit of the range disclosed by the Commission during the third settlement meeting); (3) a confirmation that the company had been sufficiently informed of the Commission's objections and had been given sufficient opportunity to make its views known; (4) a confirmation that the company did not envisage requesting full access to the file or requesting to be heard in an oral hearing; and (5) an agreement to receive the statement of objections ("SO") and the final decision in English.[3] All of the parties introduced formal settlement submissions meeting these criteria by late 2009 and the Commission subsequently issued an SO in early 2010. On May 19, 2010, once all of the parties had confirmed that the SO accurately reflected their earlier submissions and that they remained interested in following the settlement procedure, the Commission adopted its settlement decision.

1 On June 30, 2008, the Commission published the legislative package introducing a "settlement procedure" in cartel cases consisting of the Settlement Notice (Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 2008 167/1) and of a Commission Regulation (Commission Regulation (EC) No 622/2008 of 30 June 2008, amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ 2008 L 171/3).

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

3 Settlement Notice, para. 20.

The Commission's settlement decision imposed a total fine of €331,273,800 on the ten DRAM producers, which is notably lower than the total fine imposed in the US case.[4] Contrary to the trend in recent cartel cases, the settlement decision also offered Hynix, Toshiba, and Mitsubishi reductions for mitigating factors, a possible indication that the Commission is prepared to be more flexible in settlement proceedings. All the companies involved (other than Micron, which received full immunity) received the full 10% fine reduction permitted under the Settlement Notice. Finally, the Commission granted each of Infineon, Hynix, Samsung, Elpida, and NEC 90% of the maximum available fine reductions for which they qualified under the Leniency Notice.[5]

As the first settlement decision under the Commission's new settlement procedure, the DRAM decision represents a success for both the Commission and the settling companies. It shows that the settlement procedure can be made to work in practice, including in complex cases with a large number of companies involved. It also suggests that the settlement procedure might allow companies to obtain greater benefits in terms of fine reduction than the mere 10% discount provided for by the Settlement Notice.

OneWorld Alliance

On July 14, 2010, the European Commission closed its investigation into the transatlantic joint venture between British Airways ("BA"), American Airlines ("AA"), and Iberia ("IB") (together the "Parties") after accepting legally binding commitments from the Parties under Article 9(1) of Regulation 1/2003 (the "Commitments"). The Commitments are intended to address the Commission's concerns that the proposed cooperation between the Parties was in breach of Article 101 TFEU.

In August 2008, BA, AA, and IB announced their renewed intention to create a revenue-sharing joint venture to operate all their transatlantic passenger air transport services between Europe and North America. Under the joint venture agreement, the JV will coordinate all of the parties' commercial, operational, and marketing activities in respect of these routes, including scheduling, capacity, price, and marketing decisions.

On October 2, 2008, the Commission sent the Parties a statement of objections setting out its competition concerns with respect to six routes, including London-Dallas, London-Boston, London-Miami, London-Chicago, London-New York, and Madrid-Miami. In particular, the Commission noted that the alliance would eliminate the competitive constraint the Parties previously exercised on one another, that there are high entry and expansion barriers (*e.g.*, limited slots at London Heathrow, hub dominance, and network effects created by Frequent Flyer Programs), and that the alliance could restrict competitors' access to the Parties' interline inventory (*i.e.*, connecting traffic).

The Parties made a number of commitments. First, they will make landing and take-off slots available to competitors at London Heathrow or London Gatwick airports for flights to Boston, New York, Dallas, and Miami (as well as at New York JFK for the London-New York route, if necessary).[6] Second, the Parties will conclude so-called *fare-combinability agreements* with competitors in order to enable competitors to offer potential customers higher frequencies on the routes in question. Third, the Parties will offer competitors *pro-rate agreements* enabling competitors to offer tickets on the Parties' flights, thus increasing access to connecting flights. Finally, competitors that do not have their own frequent flyer program will be able to offer members flying with them the ability to earn miles on the Parties' frequent flyer programs. A trustee will be appointed to monitor compliance with these Commitments, which are legally binding on the Parties for ten years.

MERGERS & ACQUISITIONS

GC – Judgments

Case T-342/07 Ryanair Holdings plc v. Commission

On July 6, 2010, the General Court upheld the Commission's decision to block Ryanair's hostile takeover of Aer Lingus, the Commission's first prohibition decision under the current Merger Regulation.

The Commission found that the parties overlapped on 35 routes between Ireland and the rest of Europe. In particular, the Commission concluded that the transaction would create a monopoly on 22 of these routes and a very strong position on the remaining routes. Furthermore, the Commission found that the transaction eliminated the most likely new entrant on the 15 routes where one of the parties was the only active player.

Ryanair contested the Commission's decision on a number of grounds. A summary of Ryanair's primary arguments is below.

4 This may in part be explained by the fact that the EU DRAM market is only approximately 60% of the size of the U.S. market.

5 Micron received a 100% fine reduction under the Leniency Notice. Infineon, which was in the first leniency band, received a 45% leniency discount. Hynix, which was in the second leniency band, received a 27% fine reduction. Each of Samsung, Elpida, and NEC, all of which were in the third leniency band, received an 18% fine reduction.

6 Competitors will be able to operate as many as seven new return flights per day or 49 per week between London and the four US destinations.

- **Reliance on market share data.** Ryanair argued the Commission's decision relied too heavily on market share data. However, the Court found that the Commission's decision clearly stated that market shares provided useful "first indications." The Court noted that the Commission had carefully analyzed other factors in assessing the effects of the transaction, such as customer reactions and the competitive effect of the transaction on the affected markets.

- **Closeness of competition between the parties.** The Court also held that the Commission had been correct to conclude the parties were each other's closes competitors. Ryanair had argued that there were "fundamental differences" between the two operators that prevented such a finding. However, the Court found that the Commission had considered all differentiating factors between the two operators, namely the fact that Ryanair had a lower cost base due to flying to secondary airports and also charged lower prices than Aer Lingus, and that the Commission had correctly concluded that Aer Lingus was, despite such differences, Ryanair's closest competitor. It noted the Commission's (uncontested) finding that Aer Lingus was restructuring its business towards the "no frills" model championed by Ryanair and other low-cost carriers.

- **Use of "non-technical" evidence.** The Court further ruled that the Commission was entitled to use "non-technical" evidence to demonstrate the degree of competition between merging parties. Ryanair claimed that the Commission's reference to evidence such as the fact that parties used similar booking and revenue management systems or the mutual monitoring of advertising campaigns was not sufficiently conclusive to show competition between the operators (as opposed to, for example, econometric studies). The Court held that there was no need to establish a hierarchy of evidence and that the Commission was perfectly entitled to rely on a wide range of evidence to show how and to what extent the merging parties competed with each other.

- **Assessment of barriers to entry.** Ryanair also claimed that the Commission had wrongly assessed the barriers to entry into the markets affected by the transaction. The Court rejected all of Ryanair's arguments. At the outset, the Court noted that competitors had informed the Commission during its review of the transaction that they did not plan to compete with the merged party on a large scale (which tended to support the Commission's view that barriers to entry are high).

  The Court upheld the Commission's finding that having a base airport in Ireland was a significant advantage, as this finding was based on actual situations of two other competitors. The Court also upheld the Commission's view that, post-transaction, Ryanair would have the incentive and ability to raise prices, despite its assertion that it did not plan to do so. In addition, the Court concluded the Commission was correct to consider that Ryanair's reputation for aggressively competing also exacerbated barriers to entry. Finally, the Court ruled that the Commission could consider that entry would have to take place in under three months in order to competition to be maintained despite the fact that the Horizontal Merger Guidelines specified that timely entry could take place up to two years following a merger. The Court held that the Horizontal Merger Guidelines merely provided an analytical framework that can be adapted on a case-by-case basis.

- **Efficiency gains.** Ryanair also argued that the Commission had erred by rejecting its arguments that sought to persuade the Commission to clear the transaction on efficiency grounds. The Commission concluded that the efficiencies associated to the transaction were not "verifiable," as required by the Horizontal Merger Guidelines, as they relied on assumptions that could not be independently verified. Furthermore, the Commission considered that the claimed efficiencies were merely based on the general claim that Ryanair would be able to transfer its low-cost model to the Aer Lingus business.

  The Court rejected the Commission's view that, for efficiencies to be verifiable, they had to be independently demonstrable. The Court held that Ryanair was entitled to submit its own data in order to make such a showing. However, the Court found that the Commission had, as required by the Guidelines, analyzed whether the efficiencies expected from the merger were verifiable and correctly concluded that any such efficiencies did not outweigh the competitive harm that could result from the merger. Furthermore, the Court held that the Commission was right to have considered that the efficiencies were not merger-specific, as Aer Lingus could adopt certain aspects of the low-cost model absent the transaction.

- **Rejection of commitments.** In order to address the Commission's concerns, Ryanair provided a number of commitment packages throughout the procedure. The final set of commitments included making slots available on the basis of a leasing arrangement at London-Heathrow, and to release routes to and from Dublin, Cork, and Shannon to an up-front buyer. In addition, Ryanair committed to retain the Aer Lingus brand, to manage the two brands separately, to not increase flight frequencies, and to reduce Aer Lingus' fares by at least 10% immediately.

The Court upheld the Commission's decision to reject this commitment package. The Court underlined the Commission's concerns that Ryanair could not guarantee that Aer Lingus' remaining shareholders would agree to the proposed commitments as well as the fact that the there may be certain practical difficulties associated to the divestment of Aer Lingus' slots at Heathrow airport.

Contrary to other airline mergers, the Commission did not consider that the disposal of slots was proportionate to remove the anticompetitive risks associated to the transaction. The Commission noted that the parties were based at the same home airport, unlike prior cases where the merging parties were based at different home airports and where slot disposals were considered appropriate to remedy the potential anticompetitive effects of a transaction. This factor gave them a unique competitive advantage that would be difficult for competitors to match. In addition, the Commission's market tests had shown that competitors were not ready to compete with the merged entity on the routes affected by the transaction.

Case T-411/07 Aer Lingus Group plc v. Commission

On July 6, 2010, and separately from the General Court's judgment concerning Ryanair's hostile takeover bid, the Court ruled that Ryanair's minority shareholding in Aer Lingus was not reportable under the EU Merger Regulation, as Ryanair could not be deemed to exercise control over Aer Lingus.

In 2006, the Irish Government privatized Aer Lingus. On October 5, 2006, Ryanair acquired a 19.21% stake in Aer Lingus and launched a public bid for the entire share capital of the company, notifying the (future) acquisition of Aer Lingus to the European Commission.[7] In June 2007, the Commission prohibited Ryanair's acquisition of Aer Lingus. Ryanair appealed this decision and acquired a further 4.3% of the share capital of Aer Lingus, increasing its shareholding to 29.30%.

Aer Lingus argued to the Commission that Ryanair's shareholding amounted to a reportable concentration under EU Merger Control rules. The Commission rejected Aer Lingus's contention. The Commission found that Ryanair's shareholding did not give it control over Ryanair as required by the Merger Regulation for the notification of a transaction. Aer Lingus appealed the Commission's decision.

The Court considered that the Commission had rightly rejected Aer Lingus's claim. As Ryanair had not acquired "decisive influence" (the test for defining "control" under the Merger Regulation) over Aer Lingus, a reportable transaction could not be deemed to have taken place. The Court dismissed Aer Lingus' application for interim measures ordering Ryanair to divest the acquired shareholding on the same grounds.

The Court also held that Aer Lingus had failed to prove abusive and disruptive conduct on the part of Ryanair in its involvement in the management of Aer Lingus. The General Court found that the conduct in question was simply a result of the "tense" relationship between a company and one of its shareholders. Such conduct did not result from Ryanair's alleged decisive influence over Aer Lingus and was therefore not relevant under EU merger control rules.

Aer Lingus also argued that the minority shareholding of Ryanair would create a duopoly that would distort competition. The Court found that this allegation was not supported by the facts, and that a theoretical argument was insufficient to show that Ryanair exercised a decisive influence over Aer Lingus.

The General Court added that even though there was no reportable transaction under EU merger control rules, Member States could still examine Ryanair's acquisition under national competition rules. It has subsequently been reported that the UK Office of Fair Trading is investigating whether Ryanair's shareholding in Aer Lingus constitutes a merger under UK law.

Cases T-452/04 Éditions Odile Jacob SAS v. Commission and Case T-279/04, Éditions Odile Jacob SAS v. Commission

On September 13, 2010, the General Court rendered two judgments regarding the Commission's review of the Lagardère / Viviendi ("VUP") transaction. The Court upheld the European Commission's approval of the transaction, but annulled the Commission's decision approving the divestiture of certain assets covered by the transaction.

In January 2004, the Commission approved Lagardère's acquisition of VUP. The parties agreed to divest around 60% of VUP's assets to address the Commission's concerns that the transaction would risk giving the merged entity post-transaction dominance.

A competitor of the merging parties, Editions Odile Jacob ("EOJ"), appealed the Commission's decision. EOJ claimed that the Commission's decision was tainted by certain manifest errors of assessment. In particular, EOJ argued that (1) the Commission had incorrectly concluded that the temporary holding of the divested assets covered by the transaction by Natexis bank was not reportable

7 Ryaniar notified the transaction on the basis of its public announcement of the intention to make a public bid for the whole share capital of Aer Lingus (which, under EU merger control rules, is a basis for notification of a reportable transaction).

under the former Merger Regulation; (2) the Commission should not have accepted notification of a transaction four months after it had been implemented; (3) the Commission had incorrectly assessed the competitive effects of the transaction; and (4) the Commission's approval of the divestiture commitment did not preserve post-transaction competition.

The Court upheld the Commission's conclusion that the temporary holding of the divested assets was not a reportable transaction. EOJ had claimed that Natexis' holding of the assets gave Lagardère legal "control" over those assets (thereby triggering notification requirements under merger control rules).[8] The Court ruled that EOJ had not provided any evidence showing Lagardère's control over the assets. Furthermore, the Court held that the contract that gave Natexis the mandate to hold the assets made it clear that Natexis was independent vis-à-vis Lagardère.

The Court also rejected EOJ's argument that the Commission should not have accepted the notification of the transaction where it had been implemented four months previously (under the old Merger Regulation, parties had to notify transactions within a week). The Court held that the Commission could decide to sanction companies for failing to notify reportable transactions, but failing to do so did not vitiate the clearance of the transaction.

With respect to the Commission's alleged misappraisal of the transaction's competitive effects, the Court found that the Commission had properly examined the various markets affected by the transaction and was satisfied that the Commission had not committed a manifest error assessment. In particular, the Court found that, contrary to EOJ's allegations, the Commission had assessed the relationship between Lagardère and a competitor, Albin Martin, and been correct to conclude that Albin Martin was sufficiently independent for its market shares not be included in Lagardère's.

The Court also rejected EOJ's argument that the Commission had been incorrect to accept the divestiture commitments proposed by the parties. EOJ claimed that the Commission had erred by not obliging that the commitments explicitly state that the divested assets should be sold to a competitor. The Court held that it was sufficient that the commitments stated that the purchaser have the "necessary competence" to maintain effective competition. The Court further ruled that there is no requirement under EU competition law that a purchaser of divested assets must be from the same economic sector as the seller, as long as the purchaser is, in the Commission's view, suitable to maintain post-transaction competition.

Separately, EOJ challenged the Commission's approval of the sale of the divested assets to Wendel. The Court agreed with EOJ and ruled that the trustee appointed to oversee the divesture was not sufficiently independent from the merging parties, as he was a member of the board of Editis (the divested business). As a result, the Court annulled the Commission's decision approving Wendel as a purchaser of the divested assets. The Commission will now have to re-assess the divestiture.

Commission decisions

Sky Italia

On July 20, 2010, the European Commission announced its decision to relieve Sky Italia, the Italian subsidiary of News Corporation International ("News Corp"), of a commitment given in 2003 preventing it from participating in a public tender for the allocation of digital terrestrial television ("DTT") frequencies. The commitment not to operate as a DTT network operator in Italy was given in connection with the Commission's 2003 decision to allow News Corp to acquire Telepiù Spa and Stream Spa, which created a new digital satellite television company named Sky Italia. This decision is significant because it raises the possibility of enhanced competition with incumbent broadcasters in the Italian TV sector, which is dominated by RAI, the state-owned broadcaster, and the Mediaset group.

The Commission cleared the creation of Sky Italia in 2003 with several commitments preventing Sky Italia from offering Pay TV services on platforms other than satellite, as the transaction gave the new company a very strong position on the Pay TV market. Additionally, Sky Italia was prevented from keeping or acquiring DTT frequencies. The overall commitments, valid until December 31, 2011, were designed to limit the market power of Sky Italia in the Pay TV market and to facilitate new entry in that market.

In November 2009, Sky Italia asked the Commission to be relieved of the commitment regarding the DTT frequencies so as to be able to participate in the future tender for five new DTT frequencies. Under EU law, the Commission can modify commitments if market circumstances have changed significantly. The Commission believed "exceptional circumstances" existed in the case of the Italian TV

8 The notion of "control" under (former and current) EU merger control rules is that the acquirer has the power to exercise "decisive influence" over certain strategic aspects of the target's business.

market, for two reasons. First, new competitors (Mediaset and Telecom Italia/Dahlia) had entered the Italian Pay-TV market through the DTT medium since the adoption of the 2003 decision. DTT frequencies (where available) had become the leading platform for digital TV in Italy, and are likely to remain so, particularly due to the phasing out of analogue broadcasting by 2012. Second, the Commission regarded the upcoming tender as a unique opportunity – and the last one in years to come – for operators like Sky Italia to enter the DTT platform. Some respondents to the Commission's market test expressed concerns that Sky Italia's significant market power on Pay TV would be strengthened by its entrance on DTT. To address this concern, News Corp committed that Sky Italia would bid only for one of the five DTT frequencies to be tendered and also that, if it should win that frequency, it would operate free-to-air channels for a period of five years.

ABUSE OF DOMINANT POSITION

ECJ – Judgments

Case C-280/08 Deutsche Telekom AG v. Commission

On October 14, 2010, the Court of Justice upheld the General Court's judgment of April 10, 2008, in which the General Court confirmed the Commission's decision of May 2003, which found that Deutsche Telekom ("DT") had abused its dominant position on the German wholesale and retail telecoms access markets and imposed a €12.6 million fine on the company.

DT provides (i) wholesale access services to its competitors by renting connections to its telecommunications infrastructure (local loop); and (ii) retail access services to customers that use its infrastructure for narrowband (analogue and ISDN) and broadband connections. At the time of the Commission's decision, wholesale access charges were approved by the National Regulatory Authority ("NRA"), while retail access charges were subject to a price cap that applied to a basket of services. The Commission found that between 1998 and 2001, wholesale prices charged to competitors exceeded the retail charges paid by customers and that, in 2002, DT's competitors could not cover the costs of providing retail services (a "margin squeeze"). The Commission concluded that DT's pricing policy amounted to an abuse of its dominant position on the wholesale and retail access markets. This decision was subsequently upheld by the General Court. DT appealed the ruling of the General Court to the Court of Justice.

DT contested the ruling of the General Court on a number of grounds:

- **Liability.** DT argued that the responsibility should have been imputed to the NRA, which was in charge of approving the setting of its retail prices and had not challenged its conduct, thus infringing Article 102. The Court of Justice, however, considered that the fact that the NRA had encouraged the practice at issue did not absolve DT of its responsibility, and that the General Court was entitled to find DT liable, on the (sole) ground that it had scope to adjust its retail prices for access services to end-users and thus that the NRA regulation did not prevent it from putting an end to the margin squeeze. Moreover, the Court of Justice added that DT's scope to adjust its retail prices was not affected by the possible infringement of Article 102 by the NRA itself.
- **Unfair spread between wholesale and retail prices.** DT then argued that the margin squeeze test could not be applied to the practices at issue because the NRA set wholesale prices for local loop access services. The Court of Justice, however, considered that the General Court was correct in holding that a margin squeeze was capable of constituting an abuse under Article 102, without having to establish that wholesale and retail prices are abusive in themselves, and that the General Court was right to find that DT's abuse resulted from the "unfairness" of the spread, i.e., the difference between wholesale and retail charges, and its exclusionary effect on competitors as efficient as DT.
- **"As efficient competitor" test.** As regards the method used to determine whether a margin squeeze is abusive, the Court of Justice confirmed that the Commission should rely on the costs of the dominant undertaking and not that of its competitors. Such a test determines whether DT (and thus equally efficient competitors) would have been able to offer the same prices for its retail services without incurring losses if it had to pay its own wholesale charges. The Court of Justice held that the General Court was entitled to find that the test was suitable to determine whether DT's pricing practices had an exclusionary effect on competitors by squeezing their margins. The Court of Justice considered that this test is consistent with the principle of legal certainty as it allows a dominant undertaking to assess the lawfulness of its own activities, which would not be the case if its competitors' costs were to be used as a reference.
- **The need to show anti-competitive effects in margin squeeze cases.** The Court of Justice considered that the General Court had rightfully held that the Commission should establish that margin squeeze renders market entry more difficult for competitors, thus reducing the degree of competition on the market. The Court of Justice confirmed the General Court's finding that wholesale local

loop access services were indispensable for a competitor seeking to enter the downstream market in retail services. It thus held that the General Court was right to consider that a margin squeeze between wholesale and retail charges would, in principle, impede the development of competition in the downstream market, since the existing spread would not enable a competitor as efficient as DT to compete on the market for retail services without incurring losses.

GC – Judgments

Case T-155/06 Tomra v. Commission

On September 9, 2010, the General Court upheld the Commission's decision of March 29, 2006, imposing a fine of €24 million on various companies within the Tomra group (collectively "Tomra") for abuse of a dominant position.[9] The Commission had found that Tomra had implemented a strategy designed to exclude competitors in five national markets in the EEA for the supply of reverse vending machines ("RVMs") using a combination of exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes. The General Court's judgment reaffirms the established principle that no anticompetitive effects need be shown in order to establish an abuse under Article 102.

Tomra is a supplier of RVMs to supermarkets. RVMs collect and sort empty drinks containers and calculate and dispense the refund due to a customer in return. Following a complaint by a competing producer of RVMs, Prokent AG, the Commission launched an investigation into Tomra's conduct within the EEA, finding that Tomra had abused its dominant position on five national markets, namely the Netherlands, Sweden, Norway, Austria and Germany. Tomra appealed the decision to the General Court on a number of grounds. The General Court dismissed each of these grounds of appeal, upholding the Commission's decision in its entirety:

- **Exclusive nature of supply agreements.** Tomra argued that certain of its supply agreements could not be characterised as exclusive because they were too vague to give rise to an enforceable obligation under any applicable national contract law and therefore did not prevent customers from purchasing RVMs from competitors. However, consistent with EU case law,[10] the General Court confirmed that a formal obligation to purchase solely from a particular supplier is not required for an agreement to be considered exclusive under EU competition rules. It is sufficient that the dominant firm's practices, as in the present case, gave customers an incentive not to turn to competing suppliers and to obtain all or most of their requirements exclusively from the dominant undertaking. In the present case, in addition to describing Tomra as the "*preferred, main or primary supplier,*" the agreements contained individualised quantity commitments and retroactive rebates based on volume targets. Evidence on file indicated that Tomra closely monitored compliance with these agreements and had exerted pressure on individual retailers to meet the obligations set out in the agreements.
- **Individualized nature of supply agreements.** Tomra argued that its agreements could not be considered individualized agreements because it could not be established that Tomra was able to estimate its customers' requirements. The General Court rejected Tomra's plea, referring to the Commission's finding that, in addition to customers' providing it with expected future requirements, Tomra had access to information concerning previous purchases and other relevant factors (*e.g.*, the number and size of customers' outlets).
- **Minimum viability threshold.** Tomra alleged that the Commission had made manifest errors in assessing whether the agreements were capable of foreclosing competition. In particular, Tomra argued that the Commission should have determined the "*minimum viability threshold*" and analysed whether a competitor could still profitably remain on the RVM market by supplying customers not bound by Tomra's agreements, *i.e.*, the contestable part of the market. The General Court declined this invitation to consider the relevance of an effects-based approach to Article 102 violations and upheld the Commission's conclusion that Tomra's agreements, by foreclosing a "*substantial*" or not "*insubstantial*" part of the market, had restricted entry to a few competitors and had thus limited the "*intensity of competition*" on the market. Moreover, the Court held that "*foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable share part of the market is still sufficient to accommodate a limited number of competitors.*"[11] In that regard, it stated that it would be "artificial" to determine the non-contestable portion (*i.e.*, the part of demand tied to Tomra's practices) without a prior analysis of the circumstances of the case,

9 Case COMP/E-1/38.113 - *Prokent-Tomra*, Commission decision of March 29, 2006.

10 Case 85/76, *Hoffmann-La Roche v. Commission*, [1979] ECR 461.

11 Case T-155/06, *Tomra v. Commission*, paras. 239-241.

as carried out by the Commission in its decision. The Court found that the two fifths of total demand that had been foreclosed by Tomra's restrictive practices during the period and in the countries under consideration was sufficient to constitute a "*significant proportion of the market.*"

- **Positive price of goods subject to retroactive rebates.** Tomra argued that the Commission had failed to show that as a result of the retroactive rebates, Tomra had effectively charged a negative price for the discounted goods and that the rebates were therefore not capable of foreclosing competition. The General Court dismissed Tomra's arguments, holding that the Commission's decision was not based solely on the price of the goods subject to the rebate but reflected a number of other considerations (*e.g.*, the fact that once a customer achieved the bonus threshold of the rebate scheme, the resulting discount applied across all the purchases made by the customer during the reference period and not only the purchasing volume exceeding the threshold). The Court also affirmed that: "*the exclusionary mechanism created by retroactive rebates does not require the dominant undertaking to sacrifice profits, since the cost of the rebate can be spread across a large number of units.*"[12]

- **Effect of the restrictive agreements.** In line with established case law,[13] the General Court affirmed, contrary to Tomra's argument, that, to establish an infringement of Article 102, it was sufficient to show that the conduct at issue was capable of restricting, or tended to restrict, competition. It was therefore not necessary to consider whether the Commission had established that the agreements in question had actually eliminated competition.

Some observers hoped that the General Court would take this opportunity to endorse the effects-based approach to abuse cases set out in the Commission's Article 102 Guidance Paper[14] and subsequently applied by the Commission in the landmark *Intel* decision,[15] and to move away from the form-based jurisprudence of the European Courts, which has been heavily criticized, particularly as applied to rebates. Instead, the General Court reiterated the traditional form-based approach to Article 102 violations and held that the Commission had no duty to conduct an economic analysis of Tomra's conduct before finding an abuse. The difference in approach is likely attributable to the date of the original Commission decision, which was issued three years prior to the publication of the Guidance Paper.

AG Opinions

Case C-52/09 TeliaSonera

On September 2, 2010, Advocate General Mazák issued an opinion on a reference for a preliminary ruling by the Stockholm District Court (*Stockholms tinsgrätt*) concerning an alleged abuse of a dominant position by TeliaSonera Sverige AB ("TeliaSonera") on the wholesale market for input ADSL products. In 2004, the Swedish Competition Authority ("SCA") found that TeliaSonera had abused its dominant position as the operator of the national fixed telephone network, by setting the wholesale price for input ADSL products and retail price for DSL services at a level that would not have been sufficient to cover its incremental costs on the retail market. The SCA requested that the Stockholm District Court order TeliaSonera to pay an administrative fine of SEK 144 million (approximately €15.1 million) for infringing Article 102 and the Swedish competition rules on the abuse of a dominant position. The Stockholm District Court subsequently referred a number of questions to the ECJ concerning the application of Article 102 in margin squeeze cases.

The Advocate General observed that a number of crucial factual elements, including the definition of the relevant market and the determination of whether TeliaSonera held a dominant position on the market in question, remained unresolved. The Advocate General nevertheless opined on the following points:

- **Conditions required for an abusive margin squeeze.** Margin squeeze cases should be analysed in the same way as refusal to supply cases: a margin squeeze should be deemed potentially abusive only where the dominant undertaking is under a regulatory obligation to supply the input in question or where the input in question is indispensable. Subject to these conditions, in the case of the provision by a vertically integrated dominant undertaking of access to the fixed telephone network, the price for access set by the dominant incumbent should be deemed to be anti-competitive where the spread between the wholesale and retail prices is so small that that an equally efficient competitor could not effectively compete on the retail market without making losses.

12 Case T-155/06, *Tomra v. Commission*, para. 267.

13 Case T-203/01, *Michelin v. Commission* ("Michelin II"), [2003] ECR II-4071, para. 239; Case T-219/99, *British Airways v. Commission*, [2003] ECR II-5917, para. 293; Case T-155/06, *Tomra v. Commission*, para. 289.

14 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings issued in December 2008 (OJ 2009 C 45/7).

15 Case COMP/37.990, *Intel*, Commission Decision of 13 May 2009, OJ 2009 C 227/13.

- **Absence of regulatory obligation to provide a non-indispensable input.** Where regulations do not require a dominant undertaking to provide a non-indispensable input, the dominant undertaking cannot, in principle, be found guilty of an anticompetitive margin squeeze. The undertaking could, however, be found guilty of foreclosing competition by predatory or excessive pricing, subject to satisfaction of the conditions for finding these abuses. The Advocate General added that there is no reason to treat TeliaSonera differently because it was a former statutory monopolist.
- **Indispensability, or otherwise, of the product subject to the alleged margin squeeze.** Having analysed margin squeeze cases as refusal to supply cases, the Advocate General concluded that a margin squeeze could only be abusive where the product supplied by the dominant undertaking is indispensable for competition.

Against this background, Advocate General Mazak observed that the Swedish regulator had not imposed any regulatory obligation on TeliaSonera to supply access to the network to its wholesale competitors, and that the SCA itself had noted the existence of alternative telephone technologies and the possibility of replicating the network owned by TeliaSonera, indicating that access to the fixed network was not indispensable. On this basis, TeliaSonera could not be found to have engaged in abusive margin squeeze practices.

STATE AID

ECJ – Judgments

Case C-399/08 P Commission v Deutsche Post AG

On September 2, 2010, the Court of Justice dismissed an appeal brought by the Commission seeking the annulment of a judgment of the General Court setting aside a Commission decision declaring that certain transfers of financial resources from the Federal Republic of Germany to Deutsche Post amounted to unlawful State aid and were incompatible with the common market.

In its decision, the Commission had found that Deutsche Post used state resources originally granted to it to finance its public service obligations in the door-to-door parcel delivery service sector to subsidize its below cost pricing policy in that sector. The Commission had concluded that Deutsche Post derived an unjustified advantage within the meaning of Article 87 EC (now Article 107 TFEU) from the transfer of such resources (approximately €570 million) and that, since all other conditions provided for by Article 107 TFEU were met, such transfer constituted State aid that was incompatible with the common market.[16] On appeal, the General Court held that the Commission had not shown to the requisite legal standard that, for the purposes of Article 107(1) TFEU, such transfer of public resources conferred an unjustified advantage upon Deutsche Post, because it had not checked whether the relevant state resources transferred to Deutsche Post actually exceeded the costs incurred by the company to meet its public service obligations.[17]

Before the Court of Justice, the Commission claimed that the General Court: (1) unlawfully held that the method used by the Commission to establish that there was an advantage was incorrect; and (2) exceeded its powers by substituting its own method for calculating the additional costs associated with the public service for that used by the Commission. The Court rejected both grounds of appeal and affirmed the General Court's judgment.

More specifically, the Court considered that the General Court correctly concluded that the method used by the Commission was defective, since the Commission must check whether the compensation exceeds what is necessary to cover the costs incurred in the discharge of public service obligations when examining the validity of a system for financing a public service. The Court rejected the Commission's argument that the existence of State aid followed inevitably from the fact that Deutsche Post was selling at a loss and that it was not making profits in other sectors which it could have allocated to the door-to-door parcel delivery sector. The Court also considered that the General Court correctly limited its assessment to the judicial review of the decision's legality, and, notably, to analyzing the defective elements in the Commission's calculation.

GC – Judgments

Joined Cases T-415/05, T-416/05, and T-423/05 Greece, Olympic Airways and Olympic Airlines v Commission

On September 13, 2010, the General Court partially set aside a Commission decision finding that Greece had been granting, between 2002 and 2005, unlawful and incompatible State aid to Olympic Airways and Olympic Airlines. In December 2003, the two companies had taken over, respectively, the ground handling activities and flight operations of Greece's State-owned flag carrier Olympic Airways.

16 Case C61/1999, *Aid to business parcel activities of Deutsche Post AG*, Commission decision of June 19, 2002, OJ 2002, L 247, p. 27.

17 Case T-266/02 *Deutsche Post v Commission*, [2008] ECR II-1233.

The Greek State, Olympic Airways, and Olympic Airlines challenged the Commission's decision before the General Court. In its judgment, the Court addressed the issue of economic continuity between the two companies for the purpose of recovering unlawful aid. The Court considered that aid granted to Olympic Airways before Olympic Airlines was set up could be recovered from the latter, since the assets attached to Olympic Airways' flying activities were transferred to Olympic Airlines, which therefore was an effective recipient of that aid. To the contrary, according to the Court, aid paid to Olympic Airways after Olympic Airlines took over its flying activities could not be recovered from the latter solely on the ground that it might derive an indirect benefit from it, as this circumstance cannot, by itself, lead to the conclusion that Olympic Airlines was the effective recipient of the aid granted to Olympic Airways.

The Court then examined the pleas concerning the specific aid measures at issue. With respect to the aid measures granted to Olympic Airlines the Court found that the Commission had made an incorrect application of the private investor principle in assessing whether they conferred an economic advantage on that company. Indeed, the Commission had limited itself to examining the difference between, on the one hand, the rents paid by Greece and by Olympic Airways for the leasing of aircraft under contracts with private lessors, and, on the other, the (lower) rents paid by Olympic Airlines for the sub-leasing of these aircraft. However, a correct application of this principle would, instead, have required the Commission to compare the rents paid by Olympic Airlines with those available in normal competitive conditions on the market. As a consequence, the Court held that the Commission had committed a manifest error of assessment and annulled the relevant provisions of the Commission's decision.

As regards the aid measures granted to Olympic Airways, and, notably, the alleged over-valuation of the assets transferred to Olympic Airlines, the Court found that the Commission had failed to: (i) examine whether various intangible assets, such as slots, had been attributed proper market value; (ii) state the reasons why it had not taken into account revenue expected from the sale of two aircraft; and (iii) state the reasons why it had considered only the net book value of the aircraft transferred, rather than their current market value. The Court therefore annulled the decision in so far as it was vitiated by those irregularities.

POLICY AND PROCEDURE

Commission developments

Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v. European Commission

On September 14, 2010, the European Court of Justice issued judgment in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v. European Commission* relating to legal professional privilege ("LPP") under European Union law.[18] In the much-awaited ruling, the Court confirms that written communications between a company-client and its employed in-house lawyer do not benefit from LPP and are thus not protected against disclosure in the context of EU competition law investigations. Crucially, the Court found that this holds true even where the employed lawyer is a member of a national Bar and where both applicable Bar rules and the in-house lawyer's employment agreement aim to guarantee independence from the employer.

The key issue in Akzo's appeal before the Court was whether written communications between a Dutch employed lawyer (Advocaat) who is member of the Bar (Nederlandse Orde van Advocaten) and his employer-client are protected by the EU rule on the confidentiality of lawyer-client communications. In a 2007 ruling, the General Court reiterated the Court's finding in the 1982 *AM&S* case, which reserved LPP to outside legal counsel who have "*full independence*" and are members of a Bar. The Court's judgment centers on whether employed lawyers can satisfy this requirement.

The Court held that employed lawyers do not enjoy the same degree of independence as external lawyers working in law firms, and thus communications with the former cannot, and do not, benefit from LPP. According to the Court "*(…) the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.*"[19]

Referring to the Advocate-General's Opinion,[20] the Court explained that "*(…) the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship.*" The Court found that it is therefore not sufficient to ensure the independence of employed lawyers that the employed

18 In *AM&S*, the Court established a criterion of "*full independence*," explaining that LPP applies only where legal advice is provided by a lawyer "*who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.*"

19 Case C-550/07 P *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd v. European Commission*, judgment of September 14, 2010 (not yet reported), at para. 44.

20 Opinion of Advocate-General Kokott in Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission*, at paras. 61-62.

lawyer may be subject to ethical and disciplinary rules. In particular, it noted that the role of an employed lawyer "*(…) by its very nature, does not allow [the lawyer] to ignore the commercial strategies pursued by his employed, and thereby affects his ability to exercise professional independence.*" It further held that the close ties between an employed lawyer and his employer are reinforced by the fact that the employed lawyer "*(…) may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the policy of the undertaking.*" The Court therefore concluded that "*(…) both from the in-house lawyer's economic dependence and the close ties with his employer, [an in-house lawyer] does not enjoy a level of professional independence comparable to that of an external lawyer.*"

The Court further rejected the claim that the evolution of the Member States' legal system supports a departure from the AM&S rule.[21] It similarly, rejected the argument that developments in EU law, most notably the modernization of EU competition law enforcement pursuant to Council Regulation 1/2003, warrant a re-interpretation of the AM&S rule. The Court noted that LPP is not "*at all the subject-matter of the regulation*" and thus it does not "*aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege.*"

The Court also rejected arguments based on breaches of equal treatment, the rights of defense, and the principle of legal certainty. As regards the principle of equal treatment, the Court concluded that the Commission's failure to recognize LPP for employed lawyers does not breach the EU Charter of Fundamental Rights. With respect to the alleged breach of rights of defense, the Court found that the Commission's failure to recognize LPP for communications with employed lawyers does not breach the principle of freedom to choose one's lawyer. Finally, regarding the principle of legal certainty, the Court found that the principle of legal certainty does not require that the same LPP standard be applied in both EU and national enforcement of EU competition rules.

The Court also rejected arguments based on the principles of national procedural autonomy and conferral. The Court underlined that the "*uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally.*" The Court rejected claims under the principle of conferral, noting that this principle could not be invoked in the present case, since the matter fell within the exclusive competence of the EU, *i.e.*, ensuring the proper functioning of the internal market (which includes the power to adopt rules of procedure with respect to EU competition law).

Finally, the Court rejected the Commission's argument that Akzo had no interest in bringing the proceedings because the Commission had not relied on the contested documents in its final decision. Followed the General Court's ruling, it held that a "*breach of legal professional privilege in the course of investigations does not take place when the Commission relies on a privileged document in a decision on the merits, but when such a document is seized by one of its officials.*"

Despite years of advocacy to extend LPP to in-house counsel, the Court has confirmed the narrow scope of LPP in EU competition law investigations. The Court's ruling excludes LPP for any employed lawyers, whether or not they are subject to ethical and disciplinary rules. This will have important ongoing implications for companies with in-house legal departments. They will need to continue to consider carefully what precautions to take in light of the absence of LPP for in-house counsel.

While the *Akzo* ruling does not affect national rules on legal privilege, there is some risk that the *Akzo* ruling may encourage national competition authorities to align their procedures to the more restrictive EU standard on LPP as articulated by the Court. For example, following the General Court's 2007 ruling in *Akzo*, the Belgian Competition Authority ceased to recognize LPP for members of the Belgian *Institut des juristes d'entreprise*, a national association for employed in-house lawyers that is set up by law.

21 Adopting the General Court's findings in this regard, the Court noted that "*(…) the legal situation in the Member States of the European Union has not evolved, since the judgment in AM & S Europe v Commission was delivered, to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege.*"

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