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HORIZONTAL AGREEMENTS

GC – Judgments

Case T-24/05 Alliance One International Inc., and Others v. Commission

On October 27, 2010, the General Court rendered its judgment in response to the appeal of Alliance One International (formerly Standard Commercial Corp. ("SCC")), Standard Commercial Tobacco ("SCT") and Trans-Continental Leaf Tobacco ("TCLT") (together the "Standard Group") against the European Commission's decision fining the participants in a cartel concerning Spanish raw tobacco.[1] In essence, the judgment concerns the interpretation of the concept "single economic unit."

Wold Wide Tobacco España ("WWTE"), established in Spain, is one of four undertakings engaged in the processing of raw tobacco. The companies of the Standard Group are the parent companies of WWTE. The Commission decision found that WWTE was engaged in a cartel from 1996 to 2001, which, *inter alia*, fixed prices for raw tobacco. The Commission imposed a fine of €1.82 million on WWTE and held the parent companies jointly and severally liable for the payment of this fine.

The Standard Group argued that the Commission was wrong in holding them liable for the infringement committed by WWTE. The Court noted that the conduct of a subsidiary may be attributed to its parent where it is established that the latter is in a position to exercise decisive influence over this conduct and where such influence has actually been exercised. Furthermore, where a parent controls 100% of the shares in a subsidiary, there is a rebuttable presumption that it does in fact exercise decisive influence over the conduct of its subsidiary, regardless of whether the parent and its subsidiary are in a direct or indirect relationship. In this case, the Commission did not merely rely on the presumption of decisive influence, but it also relied on evidence that those parent companies did *in fact* exercise decisive influence over their subsidiary. In principle, the Court accepted this approach, but it emphasized that the Commission must, save in specific circumstances, apply the same criteria to all undertakings involved.

The Court further examined whether the Commission had correctly determined that each of the applicants exercised decisive influence. To this end, the decision and the judgment distinguished two periods: from 1995 to May 5, 1998, during which two-thirds of the capital of WWTE was held by TCLT, a wholly-owned subsidiary of SCT, which, in turn, was a wholly-owned subsidiary of SCC. The remaining third was held by the chairman of WWTE and two of his family members; (ii) from May 5, 1998 onwards, during which TCLT increased its holding in WWTE so that the Standard Group held almost all of WWTE's capital.

The Court upheld the Commission's assessment of the evidence in finding that certain of the parents exercised decisive influence. In particular:

- With respect to the first period, the Commission had relied on the following evidence to prove the *de facto* exercise of decisive influence: one of the members of WWTE's board of directors was, at the same time, part of the Standard Groups' management; the minutes of a WWTE board meeting indicated not only that WWTE could not and was not allowed to act independently of SCT, but also that the WWTE board members appointed by the Standard Group were informed of the practices of the tobacco cartel; and, lastly, several faxes from the chairman of WWTE to a manager of the Standard Group, informing him about certain details of the cartel.
- With respect to the second period, the Commission had relied on the following evidence to prove de facto exercise of decisive influence: a memo indicating that the same manager of Standard Group had a role in the conclusion of WWTE's contracts with the producer groups; the WWTE manual providing that SCT was required to approve the budget for purchasing raw tobacco before the chairman of WWTE could start the contracting process; and board minutes indicating that the business plan for the relevant year was approved subject to the amendments suggested by the parent company.

As a result, the Court concluded that SCC and SCT had indeed *de facto* exercised decisive influence over WWTE's conduct, and therefore dismissed the action as of SCC and SCT. However, since the evidence related exclusively to SCC and SCT (and not TCLT), the Court annulled the decision of the Commission in so far as it related to TCLT.

1 Case COMP/C.38.238/B.2, *Raw Tobacco – Spain*, Commission Decision of October 20, 2004.

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Commission Developments

New Guidelines on Horizontal Co-operation Agreements

On December 14, 2010, the European Commission adopted new Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements (the "Guidelines"). The Guidelines, which replace the corresponding guidelines from 2001 (the "2001 Guidelines"), cover cooperation in the area of exchange of information, research and development, production, purchasing, commercialization, standardization, and standard terms. The two most important changes since the 2001 Guidelines are the sections on standardization and information exchange.

Standardization Agreements*.* The Guidelines substantially expand on the 2001 Guidelines on standardization agreements. The main focus of the standardization section is on effective access to standard-setting procedures and adopted standards. In an attempt to address the risk of standard "hold up" by IPR owners, special attention is given to IPRs covering technology essential for standard essential IPRs, including issues surrounding ex ante disclosure and maximum royalty fees.[2]

The Guidelines also provide more detailed guidance on issues relevant to the assessment of standardization agreements under Article 101. In particular, they provide for (1) a "safe harbor" exception for standardization agreements within Article 101(1); and (2) an effects-based assessment of standardization agreements that fall outside of the safe harbor. According to the Guidelines, certain standardization agreements that risk creating market power may not be subject to Article 101(1) where there is: (i) unrestricted participation in a transparent standard-setting procedure; (ii) no obligation to comply with the adopted standard; (iii) good faith disclosure of standard-essential IPRs; and (iv) access to the standard on fair, reasonable and non-discriminatory (FRAND) terms. The Guidelines also provide detailed criteria for parties to agreements that fall outside of the safe harbor to assess whether their agreement falls under Article 101(1) using an effects-based approach.

Information exchange*.* In the Guidelines' new section on information exchange, the Commission recognizes possible efficiencies arising from information exchange, *e.g.*, to rectify information asymmetries, increasing consumer choice, and reducing consumer search costs.[3] The Commission nonetheless also highlights the possible risks for competition arising from information exchanges, including increased market transparency that may facilitate anti-competitive coordination by competitors.[4] In particular, the Commission notes that information exchanges may foreclose companies that are not participating in the exchanges where the information exchanged is commercially sensitive information of competitors and covers a significant part of the relevant market.[5]

In assessing information exchanges under Article 101(1) the Commission differentiates between information exchanges that have an anti-competitive object and those that have an anti-competitive effect. According to the Guidelines, exchanges of information between competitors of individualized data regarding intended future prices or quantities will be assessed as restrictions of competition by object.[6] Such agreements will be presumed to fall under Article 101(1). Where exchanges do not have an anticompetitive object, the Commission will analyze their actual or potential anti-competitive effect. Cases will be assessed individually based on the characteristics of the relevant market (*e.g.*, transparency, concentration, complexity, stability, informational asymmetries) and the nature of the information exchanged (*e.g.* strategic vs. non-strategic, level of aggregation, accessibility (whether it is "genuinely public"), age, and frequency of exchanges).

The Guidelines allow for exemption under Article 101(3) where information exchanges do not restrict competition beyond what is necessary to achieve proven efficiency gains. However, to qualify for exemption, parties will have to demonstrate that the nature of the information exchanged, including its substance, level of aggregation, age, confidentiality, as well as the frequency of the exchanges, carries the lowest risk indispensable to achieving the claimed efficiency gains.[7]

2 Guidelines, ¶ 269.

3 Guidelines, ¶ 57.

4 Guidelines, ¶ 69 *et seq*.

5 Guidelines, ¶ 69 *et seq*.

6 Guidelines, ¶ 74.

7 Guidelines, ¶ 101.

MERGERS & ACQUISITIONS

Second-Phase Decisions With Undertakings

Case COMP/M.5675 Syngenta/Monsanto

On November 17, 2010, the European Commission conditionally cleared Syngenta's acquisition of Monsanto's sunflower seed business.

In defining the relevant market, the Commission divided the sunflower industry into two antitrust markets: (1) the breeding of seeds, and (2) the commercialization of seeds. The Commission found that the most significant aspect of the upstream breeding market was the exchange and licensing of types of sunflower varieties between firms. The purpose of these exchanges and licenses is to allow firms to fill gaps in their seed portfolio (technically known as a company's "germplasm portfolio"), thereby increasing their ability to compete on the downstream market.

These two segments have different market players and, according to the Commission, unique competitive characteristics. Syngenta and Monsanto were active on both markets, though to different degrees. The Commission found that larger seed companies, such as Syngenta, tend to be more active on the downstream commercialization of seeds market, while smaller- and medium-sized producers, such as Monsanto, tend to have a stronger presence on the upstream market for the breeding of seeds. This can be explained as follows: large manufacturers with a strong presence in the downstream market will usually have a broad seed portfolio, and therefore have a smaller need to engage in upstream exchange and licensing agreements. Conversely, smaller firms have a greater need to avail themselves of the upstream licensing and exchange of seeds to broaden their seed portfolio and thereby compete more effectively downstream.

The Commission's concerns related to the Spanish and Hungarian markets for the commercialization of sunflower seeds, where Syngenta was found to be the largest market player. The Commission considered that the combination of Monsanto's leading position on the upstream exchange and licensing market and Syngenta's market power in the downstream commercialization market would significantly strengthen the merged entity's position on the downstream market, allowing it to foreclose access to Monsanto's germplasm portfolio, thereby reducing other firms' capacity to compete downstream.

To address the Commission's concerns, the parties agreed to divest all of Monsanto's commercialized hybrid seeds in Spain in 2009 and 2010. In addition, the parties also agreed to divest all of Monsanto's commercialized seeds in Hungary in 2009 and all of the hybrid seeds commercialized by Syngenta originating from the germplasm of Monsanto. The proposed remedy directly addressed the Commission's principal concern that, post-transaction, Monsanto's germplasm would "disappear" from the upstream exchange and licensing market. Following a market investigation, the Commission found the proposed divestiture allowed an acquirer to ensure both short- and longer-term competition on the Spanish and Hungarian markets for the commercialization of seeds, and therefore cleared the transaction.

First-Phase Decisions Without Undertakings

Case COMP/M.5932 News Corp/BSKYB

On December 21, 2010, the European Commission unconditionally cleared News Corporation's ("News Corp") acquisition of the outstanding share capital of BSkyB. News Corp is a diversified media company active in a number of sectors including the production of films, television shows, and newspapers. BSkyB is the leading satellite pay-TV operator in the UK and Ireland.

The principal antitrust question raised by the transaction was whether the merged entity would have the ability to foreclose competitors through the bundling of television and print media content. However, following its market investigation, the Commission found that there was no evidence that such foreclosure would take place. The market investigation showed that (a) print subscriptions were not generally regarded as being complementary to TV subscriptions; (b) no such bundling had been attempted before; (c) price was only one factor in a decision to purchase a newspaper; and (d) print subscriptions are uncommon in the U.K. and, in particular, News Corp's flagship newspaper, *The Sun*, does not offer a subscription service.

With respect to the bundling of online services, the Commission found that most of these services are free of charge. Therefore the bundling of online services with other media offerings was not likely to allow the merged entity to engage in successful anticompetitive foreclosure.

The Commission's decision did not address any issues of media plurality that the transaction might raise. Although the Merger Regulation gives the Commission exclusive jurisdiction to review transactions with a Union dimension, it also allows Member States to protect "legitimate interests," such as media plurality. On that basis, the question as to whether the transaction could lead to too much

concentration of media ownership in the U.K. was reviewed at the national level. The U.K. communications regulator, Ofcom, recommended to the U.K. Secretary of State for Culture, Media, and Sport (Jeremy Hunt) that the transaction be referred for an in-depth investigation by the UK Competition Commission. Following proposed remedies by News Corp (including the divestiture of its Sky News division), Hunt recommended regulatory approval. A final decision is still pending.

Abuse of Dominant Position

GC – Judgments

Case T-427/08 Confédération Europeenne Des Associations D'Horloger-Reparateurs (CEAHR) v. Commission

On December 15, 2010, the General Court annulled the European Commission's decision of July 10, 2008,[8] dismissing the complaint of the Confédération Européenne Des Associations D'Horloger-Réparateurs ("CEAHR") regarding anticompetitive practices in the European watch repair markets. The case provides additional clarity on the discretion of the Commission in assessing whether or not to take up complaints of anticompetitive behavior, including those alleging conduct affecting competition in more than one Member State.

CEAHR is a non-profit making "association of associations," bringing together national association of independent watch repairers in six different Member States. In July 2004, CEAHR lodged a complaint with the Commission alleging: (i) the existence of an anti-competitive agreement or concerted practice between several luxury watch manufacturers and (ii) abuse of dominance by those suppliers, consisting of a refusal to supply spare parts to independent watch repairers in order to foreclose these competitors from the EU market. The Commission Decision dismissed CEAHR's complaint for insufficient Community interest, confirming the findings set out in an April 2008 provisional position document.

The Commission's Decision was based on four principal grounds:

- Insufficient Market Size/Importance. The complaint concerned a market (or segment) of limited size and economic importance.
- No Agreement Or Concerted Practice. The complaint did not establish the existence of an agreement or concerted practice between the luxury watch manufacturers. Moreover, the practice of selective distribution of spare parts would likely be covered by the Commission's block exemption for vertical agreements.
- No Separate Aftermarket. The aftermarkets (for spare parts and repair and maintenance for luxury watches) were not distinct from the primary market for luxury watches. As a result, no dominant position could be established.
- Insufficient EU Interest In Continuing The Investigation. There was a low probability that an infringement finding could be made even by dedicating greater resources to the investigation and, in any event, to the extent that an infringement could be established, such an infringement could be addressed at the Member State level.

The Court annulled the decision, finding that the Commission was wrong to find that there was insufficient EU interest in examining the complaint further, and that the grounds relating to market size/importance, the existence of an agreement or concerted practice, and market definition were vitiated by manifest errors of assessment and insufficient reasoning.

- Size And Economic Importance Of The Market. The Court observed that the Commission has discretion as to how it deals with complaints concerning alleged breaches of competition rules, but that this discretion is not unfettered. In particular, the Commission must take into account all relevant considerations of fact and law brought to its attention by the complainant and give reasons for its final decision. On the contrary, in the present case, in assessing the size and economic importance of market(s) concerned by the complaint, the Commission had failed to consider that the alleged behavior concerned markets involving at least five Member States and potentially the whole of the EU. Furthermore, the Commission had failed to adequately give reasons, since it was not clear from the decision whether the Commission had based its assessment of the size and importance of the market on the market for luxury/prestige watches, the aftermarket for watch repair and maintenance services, or both.
- Market Definition. The Court found that the Commission had not erred in finding that the market concerned by the complaint was the market for luxury/prestige watches, since, as a result of the high price of luxury/prestige watches, there was only demand for spare parts and repairs for expensive watches. However, the Court found that the Commission had erred in its assessment that the aftermarkets for repair and maintenance should be examined together with the primary market. The Commission had concluded that consumers could, in response to an increase in the price of spare parts, switch either to spare parts manufactured by another

8 Commission decision C (2008) 3600 of July 10, 2008.

supplier or to a (new) primary product. However, the Court found that the Commission had merely established that this was a theoretical possibility and had not produced any data to support its conclusion. In doing so, the Commission had failed to take into account the fact that, compared with the initial outlay on the primary product, the cost of repairs to a luxury/prestige watch was modest. The Commission had also failed to show to what extent an increase in the price of repairs might impact sales on the primary market. Finally, the Commission's determination was based on its assessment of irrelevant evidence, specifically the fact that watch suppliers considered repairs and maintenance to be largely ancillary to the distribution of luxury/prestige watches. The Commission should, instead, have examined the impact of service market price increases on demand in the primary market.

- Alleged Infringements Of Articles 101 And 102 TFEU. The Court found that the Commission's manifest errors in respect of market definition had vitiated its conclusions with respect to the assessment of the existence of a possible Article 102 infringement. In particular, absent the errors in relation to market definition, the Commission could have concluded that spare parts specific to a particular brand constituted a separate market, which in turn would have affected the Commission's assessment of the availability of the block exemption. Similarly, with respect to the alleged infringement of Article 102, the Court found that, had the Commission examined the position of the manufacturers on the markets for brand-specific spare parts, it might have concluded that luxury watch manufacturers held a dominant position on those markets, at the very least "*in respect of certain ranges of their spare parts which constitute relevant markets.*"
- EU Interest In Continuing The Investigation. In assessing a given complaint, the Commission is required to weigh the significance of the alleged infringement with respect to the internal market, the cost and resources required for an investigation, and the probability of an infringement finding. The Court observed that each of the factors relied upon by the Commission was vitiated by errors of assessment or lack of reasoning, and that therefore the Commission could not, on that basis, determine that there was no EU interest in pursuing the investigation. Moreover, the Commission's assessment that the national competition authorities were well-placed to investigate any infringement was not alone sufficient to justify the finding that there was no EU interest in continuing the investigation. As the Commission itself had acknowledged, the conduct at issue involved at least five Member States (and potentially the whole territory of the EU). The Court found that, in this light, and given that the undertakings concerned had their head offices and production sites located outside the EU, "*action at the European Union level could be more effective than various actions at national level.*"

Commission Decisions

Case COMP/39.315 ENI

On September 29, 2010, the European Commission adopted a decision rendering legally binding commitments offered by ENI relating to the transmission of gas in and into Italy. The Decision was adopted under Article 9 of Regulation 1/2003, according to which the Commission may accept, prior to issuing, and in place of, a formal infringement Decision, commitments offered by the company investigated to remedy concerns identified by the Commission in a preliminary assessment.

ENI is the Italian national gas champion, controlled by the Italian state through a golden share. The company is active, *inter alia*, in oil and gas exploration, production and transportation, both in Italy and outside the EU. The Commission's investigation, which was launched in 2007, focused on the management and operation of ENI transmission pipelines facilitating the import of natural gas into Italy from Russia (the "TAG pipeline") and Germany and Switzerland (the "TENP/Transitgas pipelines"). In March 2009, the Commission issued a statement of objections, setting out its initial conclusion that ENI's management and operation of natural gas transmission pipelines breached Article 102 TFEU. The Commission identified a number of forms of conduct that ENI had implemented, taking the view that these amounted to a considered, constructive refusal to supply campaign that reduced the opportunities of ENI competitors to transport gas into Italy via ENI's international network. In particular:

- Capacity Hoarding. The Commission found that although there had been "*steady and significant demand*," on both a short and long term basis, from third party shippers for capacity on the three pipelines, ENI had refused to offer these third parties any existing available or unused capacity. The statement of objections found that ENI may have failed, or even obstructed attempts, to increase the efficiency of capacity management in order to relieve capacity congestion problems. Finally the statement of objections considered that ENI may have deliberately understated the capacity that was technically available to third parties in order to deter entry.
- Capacity Degradation. The Commission identified evidence that ENI had intentionally delayed the allocation of new available capacity, or offered such capacity on only a short-term basis (even though it was available on a longer term basis) in order to reduce

the value of that access to competitors. Furthermore, the Commission found that ENI may have designed allocation procedures in such a way that capacity sales took place on a separate and uncoordinated basis and/or that lower value capacity was sold, thereby preventing shippers from acquiring a critical mass of capacity necessary to make bidding for capacity commercially attractive.

- **Strategic Underinvestment**. Finally, the Commission took the preliminary view that ENI had over time strategically capped investment in its international gas transmission pipeline system, despite the existence of significant and credible long term capacity demand from third party shippers. The Commission pointed to internal documentation evidencing ENI's awareness that, as a dominant incumbent owning an essential facility, ENI had an obligation to provide third parties with access to its network and to assess in good faith capacity expansions that third parties could not duplicate at similar cost. Nevertheless, the Commission noted, ENI's investments in maintenance of the transmission system were based purely on ENI's commercial interest in controlling capacity in order to restrict the ability of third parties to compete with ENI on downstream markets.

The Commission noted that ENI, like all dominant entities present at both the transmission and supply levels of the energy supply chain, had an incentive to protect its supply margins by neglecting transportation revenues. The Commission therefore considered that structural undertakings were necessary to address the competition concerns identified in the statement of objections, since behavioral undertakings would not dissuade ENI, as a vertically integrated company, from adopting the impugned conduct. The Decision therefore requires ENI to divest to an independent third party its 89% stake in the TAG pipeline, its 49% stake in the TENP pipeline, and its 46% stake in the Transitgas pipeline.

The ENI decision is the latest example of the Commission's willingness to rely on Article 9 of Regulation 1/2003 to extract commitments from companies to address foreclosure concerns in national and regional energy markets as a result of long term supply contracts.[9] The Commission is likely to continue to make use of the Article 9 route in complicated cases involving national and regional energy markets. In such cases, the violations are typically not pernicious, hardcore infringements of the competition rules (that would preclude the use of the Article 9 mechanism) but result from anachronistic, pre-liberalization market structures and/or infrastructure problems. Furthermore, the companies concerned have frequently shown themselves willing to grant concessions in return for avoiding lengthy administrative (and possibly, litigation) proceedings and a substantial fine (given the length of the supply contracts usually at issue in such cases).

STATE AID

ECJ – Judgments

Case C-362/09 P Athinaïki Techniki AE v. Commission

On December 16, 2010, the Court of Justice set aside the order of the General Court of June 29, 2009, in Case T-94/05 *Athinaïki Techniki v. Commission*, finding that the General Court misinterpreted the case law relating to the legal conditions for the withdrawal of a Commission measure in the context of State aid proceedings.

Following the award in 2001 by the Greek authorities of a public contract to a competitor, Athinaïki lodged a complaint with the Commission claiming that State aid had been granted. By letter of December 2, 2004, the Commission informed Athinaïki that there were insufficient grounds for continuing to examine the case and that it had closed the file. Athinaïki brought an action seeking the annulment of the Commission's decision, but the General Court considered the action to be inadmissible on the ground that, in deciding to refrain from taking further action, the Commission did not adopt a definitive position, so that the letter in dispute did not constitute an act open to challenge. On appeal, the Court of Justice set aside the General Court's order and referred the case back to the General Court.

Following the Court of Justice's judgement, the Commission sent a second letter to Athinaïki informing it that the originally contested letter had been withdrawn and the file had been reopened, and subsequently lodged an application with the General Court asking for an order stating there was no longer any need to adjudicate on the case pending before it following the Court of Justice's referral. In its order of June 29, 2009, the General Court found there was no need to adjudicate as the reopening of the preliminary examination procedure had entailed the withdrawal of the contested decision and there was thus no longer any act definitively establishing the Commission's position open to challenge.

On appeal however, the Court of Justice held that the General Court had misinterpreted the caselaw relating to the legal conditions for the withdrawal of an administrative act, namely that withdrawal is

9 See, *e.g.*, concerning electricity markets (Case COMP/39.386 – Long Term Electricity Contracts France; Case COMP/39.388 – German electricity wholesale market; Case COMP/39.389 – German electricity balancing market; Case COMP/39.351 –– Swedish Interconnectors), and concerning gas markets (Case COMP/39.316 – GDF foreclosure; Case COMP/39.402 – RWE Gas Foreclosure).

lawful provided the act retracted is unlawful and the withdrawal occurs within a reasonable period. The Commission had adopted a definitive position that had prevented Athinaïki from submitting its comments during the formal investigation procedure and produced binding legal effects. Athinaïki was thus entitled to challenge its lawfulness and have it reviewed by the courts. Furthermore, if the Commission were entitled to withdraw the contested act, it could perpetuate an unlawful state of inaction during the preliminary examination stage. The Commission would merely need to decide to take no further action on a complaint lodged by an interested party and then, after that party brought an action, to reopen the preliminary examination stage and repeat those operations as many times as necessary in order to avoid judicial review of its actions. Finally, according to the Court, the Commission may withdraw a decision to take no further action on a complaint only to remedy its illegality, which was not the case at hand, and cannot, after such withdrawal, restart the procedure at a stage earlier than the exact point at which the identified illegality occurred.

GC – Judgments

Cases T-494/08 to 500/08 and T-508/08 Ryanair Ltd. v. Commission

On December 10, 2010, the General Court ruled on Ryanair's application requesting the annulment of a series of Commission decisions refusing to grant it access to documents relating to state aid proceedings. In its judgment, the Court dismissed part of Ryanair's actions and declared the remainder inadmissible.

Between 2002 and 2006 the Commission had received several complaints concerning alleged state aid granted to Ryanair by the operators of several European airports and in all cases had initiated proceedings to investigate the matter. Ryanair subsequently requested access (under Regulation No. 1049/2001) to the documents contained in the case files.[10] After the Commission's first refusal, Ryanair submitted new applications requesting that the Commission reconsider the matter, to which the Commission answered that it would extend the initial time-limit for the adoption of a final decision by 15 working days. At the expiry of this time-limit, the Commission indicated that it was still unable to decide but that it would have do so shortly. Between September 2008 and February 2009, the Commission informed Ryanair that it refused to grant access to the documents requested with only a few exceptions. The Commission took the view that the documents were covered by several of the exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 (protection of the purpose of inspections, of the decision-making process before and after the adoption of a decision, protection of commercial interests and of legal advice).

Following Ryanair's application, the Court found that the letters extending the initial time-limit by 15 working days met the requirements laid down in Reg. 1049/2001. However, given that the Commission is entitled to extend the initial time-limit only once, the letters that provided for a further extension could not be considered valid. The Commission's failure to reply by the expiry of the first extended period had thus to be considered as an implied decision to refuse access. However, given that the Commission subsequently adopted express decisions on the requests for access, it considered that these express decisions had withdrawn the implied refusal decisions and that Ryanair had therefore lost any legal interest in bringing proceedings against the implied decisions. As to Ryanair's claim that the Commission's subsequent express decisions should have been considered nonexistent (given their adoption after the expiry of the period laid down in Reg. 1049/2001), the Court held that such a finding is reserved for extreme situations where measures exhibit particularly serious and manifest defects. The Court found that the expiry of the time-limit could not in any event deprive the Commission of the power to adopt a decision.

Ryanair alternatively claimed that the express decisions refusing access should have been annulled. In this regard, the Court first recalled that interested parties other than the Member States concerned do not have the right, in State aid procedures, to consult the documents in the Commission's file. There is a general presumption that disclosure of such documents undermines the protection of the objectives of investigation activities and the Commission is thus entitled to refuse access to them without having to first make a concrete and individual examination. The right, however, remains for interested parties to adduce evidence capable of rebutting this general presumption, or to demonstrate that there is a higher public interest justifying the disclosure of the document concerned. According to the Court, Ryanair could not criticize the Commission's finding that the documents were covered by such presumption in their entirety, since Ryanair had not identified the specific documents, which it claimed should have been disclosed because of their purely administrative content, nor had it shown which specific parts of certain documents were not covered by the general presumption. The Court also held that there was not an overriding public interest justifying disclosure of the documents, as Ryanair had not demonstrated how the principles of openness and

10 Regulation No. 1049/2001 of the European Parliament and of the Council of May 30, 2001, regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p.43).

transparency and the interests of air transport consumers should prevail over the public interest in the protection of the purpose of investigations.

POLICY AND PROCEDURE

GC – Judgments

Case T-141/08 E.ON Energie AG v. Commission

On December 15, 2010 the General Court dismissed an appeal by E.ON Energie AG ("E.ON") against the of the European Commission's decision[11] fining E.ON for breaching a seal during an inspection. In rejecting E.ON's claims, the Court clarified the standard of proof required for the Commission to establish a breach of seal, and stressed that the Commission has a margin of discretion in determining the level of the fine. Shortly after the Court's judgment, the Commission sent a statement of objections to two energy companies alleging obstruction of a Commission inspection.

Article 20 of Regulation 1/2003 empowers the Commission to inspect an undertaking's premises. This includes the right to inspect and make copies of any "*books and other records...irrespective of the medium on which they are stored*" (Article 23(1)(b) and (c)). The Commission also has the right to seal any business premises and books or records to the extent required for the inspection (Article 23(1)(d)). In the event that a company obstructs the Commission's access to such documents, or breaches a seal affixed during the course of the investigation, the Commission may impose a fine of 1% of the company's group turnover (Article 23(1)(e)).

In spring 2006, Commission officials carrying out an inspection of E.ON sealed the door of an E.ON office. On returning to the office the following day, they discovered that the seal had been breached. In 2008, the Commission fined E.ON €38 million for the breach of the seal. E.ON, which denied breaking the seal, appealed the Commission's decision to the Court on the following grounds.

First, E.ON claimed that the Commission had failed to prove to the requisite standard that E.ON had in fact broken the seal. E.ON argued not only that the Commission had insufficient evidence, but also that it had not taken into account alternative explanations for the breach of the seal. The Court rejected this claim. It held that the Commission had provided sufficient proof that the seal had been breached, including, amongst other things, the statements of the Commission officials involved and the minute of the seal signed by E.ON officials. The Court also stressed it was not sufficient for E.ON to merely submit an alternative explanation for the breach, but that E.ON bore the burden of proving that the evidence relied on by the Commission was insufficient. The Court further held that, in imposing a fine under Article 23(1)(e), the Commission need not prove how the seal was broken; it need only prove that the seal was intentionally or negligently breached. Finally, the Court held that E.ON could not rely on external factors, such as the cleaning of the building, to absolve itself of responsibility for the breach of the seal. The Court held that it was E.ON's responsibility to inform its employees and other visitors to the building that the seal was not to be broken.

Second, E.ON claimed that the Commission had failed to provide sufficient reasons for its decision, in particular with respect to the calculation of the fine, which E.ON also argued was disproportionate. The Court rejected both of these claims. It held that the Commission's arguments with respect to the level of the fine were both sufficiently reasoned and convincing. In particular, the Court noted that the Commission had determined that the breach of a seal constitutes a serious infringement and that a fine should therefore have a deterrent effect. In this regard, the Court confirmed, in line with past case law, that the Commission has a margin of appreciation in determining the gravity of an infringement. The Court also noted that E.ON, as a large company with in-house lawyers, was adequately informed of the consequences of a breach. For similar reasons, the Court also concluded that the fine was proportionate.

The Commission welcomed the Court's decision as confirmation "*that the Commission is entitled to impose appropriate and deterrent sanctions for companies' attempts to destroy evidence in order to escape fines for antitrust infringements.*"[12] Notably, just five days after the Court's judgment, the Commission sent a statement of objections to two Czech energy companies, Energetický a pr myslový and J&T Investment Advisors, alleging obstruction of the Commission's inspections of their respective premises. According to the statement of objections, the companies failed to bock an e-mail account, failed to open encrypted e-mails, and diverted a number of incoming e-mails.

AG Opinions

Case C-360/09 Pfleiderer AG v. Bundeskartellamt

On December 16, 2010, Advocate General Mazák issued an opinion in an application for a preliminary ruling from the Amstgericht Bonn (the "Amstgericht"). Advocate General Mazák advised the European Court of Justice to rule that national competition authorities should

11 Case COMP/B-1/39.326, *E.ON Energie (AG)*, Commission Decision of January 30, 2008.

12 Commission Press Release, MEMO/10/686.

not allow parties pursuing civil law claims against cartel participants to access self-incriminating statements by leniency applicants in the context of a national leniency program. However, Advocate General Mazák also indicated that this protection should not apply to all other pre-existing documents submitted by a leniency applicant in the course of the leniency procedure.

In January 2008, the Bundeskartellamt ("FCO") of the Federal Republic of Germany, imposed fines of €62 million on the three largest European décor paper producers. Following this decision, Pfleiderer AG ("Pfleiderer"), a purchaser of décor paper, applied for comprehensive access to the FCO's files in the décor paper cartel proceedings in order to prepare for civil proceedings. The FCO responded that it would limit access to the file to a version from which confidential business information, internal documents, and documents covered by the FCO's leniency application had been removed. Pfleiderer appealed the FCO's decision to the Amstgericht Bonn.

Having initially ruled in favor of Pfleiderer and then reversed its decision, the Amstgericht faced a dilemma between granting access to the files in accordance with the German Code on Criminal Procedure, on the one hand, and, on the other, the risk that this could dissuade undertakings from cooperating with the authorities in the future. Thus, on September 9, 2009, the Amtsgericht stayed the proceedings and applied to Court of Justice for a preliminary ruling as to whether parties adversely affected by a cartel may, for the purpose of bringing claims for damages, be given access to leniency applications or to information and documents voluntarily provided in that connection by applicants for leniency which the national competition authority of a Member State has received pursuant to a national leniency program.

With respect to the "apparent tension" between the effective operation of a leniency program and the right of a third party to access the files, Advocate General Mazák held that, although there was no de jure hierarchy or order of priority, in his view the "*role of the Commission and national competition authorities is of far greater importance (…) than private actions for damages.*" He also concluded that the tension was more apparent than real given that private parties also benefit from leniency programs. In particular, since many cartels may never be discovered absent effective leniency programs, and decisions in cartel proceedings moreover may assist third parties in bringing civil actions. Thus, he concluded that, while denying access to leniency submissions may arguably hinder an injured party's fundamental right to an effective remedy, interference with that right is justified by "*the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities*."

However, Advocate General Mazák, considered that this applied only to self-incriminating statements made by a leniency applicant. By contrast, allegedly injured parties should have access to all pre-existing documents submitted by a leniency applicant. Since these documents were not developed for the purpose of the leniency application, they could, "*at least in theory, be discovered elsewhere.*"

In sum, Advocate General Mazák distinguished between documents specifically created for the leniency application and pre-existing documents. While the former should be protected against disclosure, the latter should be accessible to any party allegedly injured by a cartel. Should the European Court of Justice follow Advocate General's opinion, this could impact how leniency applications are drafted in future.

Other Developments

Ombudsman Rejection of Request For Documents Regarding Commission Investigation Into E.On/Ruhrgas Merger

On November 4, 2010, the European Ombudsman closed an inquiry regarding a complaint by Spanish citizen who sought information on why the European Commission closed its investigation into conditions imposed by Germany on the merger between E.On and Ruhrgas.[13] The Ombudsman's decision is relevant as there have been a number of recent cases regarding the access to Commission documents under the Transparency Regulation (applicable here), under which all EU institution documents should be made accessible to EU citizens.

By way of background, the Commission opened an investigation in 2002 into conditions imposed to the E.On/Ruhrgas merger by the German authorities. The Commission's investigation sought to establish whether these conditions complied with the provisions in the EU Treaty that prohibit unjustifiable restrictions on the free movement of capital. The Commission closed proceedings in the German case after receiving a letter from the German authorities that enumerated commitments that addressed the Commission's concerns (the "German letter"). However, the Commission reserved the right to re-open its investigation if it considered the German authorities were not complying with their commitments.

13 The European Ombudsman investigates complaints made by any EU citizen or entity of instances of alleged maladministration by the EU institutions and bodies.

In November 2006, the complainant wrote to the Commission requesting the details of these commitments. The Commission denied the complainant access to the German letter since the German authorities objected to its disclosure, on the basis of certain exceptions under the Transparency Regulation (namely that the disclosure of the commitments would be harmful to Germany's economic policy, would disclose commercial secrets of the companies concerned, and would prejudice the Commission's ongoing monitoring of whether Germany complied with its commitments). The complainant was not satisfied and brought his complaint before the Ombudsman.

The Ombudsman recalled prior case law under which it is the obligation of the institution (here, the Commission) to make sure that "proper reasons" actually exist not to disclose information. The Ombudsman considered that the Commission had not ensured the existence of such reasons, and asked the Commission to re-assess its decision, and to confirm whether there was an overriding public interest that nonetheless required disclosure, even if an exception to disclosure existed.

In its re-assessment, the Commission considered that certain of the exceptions invoked by the German authorities did in fact exist, namely the protection of the commercial interests of the companies concerned and the protection of its ongoing monitoring of Germany's commitments. The Commission also found that there was no overriding public interest in nonetheless disclosing the requested information. It considered that if it disclosed the information sought by the applicant, this would risk the full implementation of the agreed commitments.

The Ombudsman agreed with the Commission's decision, though on narrower grounds. The Ombudsman was not convinced that there was a *per se* investigation in this case: he considered that the monitoring of commitments was not the same to an administrative investigation, which he believed to have been closed when the Commission decided not pursue its investigation. Nevertheless, the Ombudsman considered that the Commission was right to find that the commercial interests of the companies concerned would be harmed by disclosure of the commitments in the German letter. Finally, the Ombudsman also considered there was no overriding reason for disclosure, especially in light of the fact that the Commission had agreed to review its decision on February 1, 2003 (ten years following the merger in question).

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