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HORIZONTAL AGREEMENTS

GC – Judgments

Case T-461/07 Visa Europe and Visa International Service v Commission

On April 14, 2011, the General Court upheld the European Commission's decision imposing a fine of €10.2 million on Visa Europe and Visa International Service for breach of Article 101 TFEU.[1] Morgan Stanley had complained against Visa's refusal to allow Morgan Stanley to join the EU Visa network between 2000 and 2006, on the pretext that Morgan Stanley's ownership of a competing card network (Discover) violated the Visa network's by-laws.[2] The Commission had found that the rules governing the functioning of the Visa network could be regarded either as an anticompetitive agreement between undertakings or as a decision of an association of undertakings.

Visa argued that its conduct did not produce an exclusionary effect, as Morgan Stanley could have entered the relevant market by means of a "fronting arrangement," *i.e.* an agreement with a Visa member financial institution, which would act as a mere interface between Visa and Morgan Stanley. The Court, however, sided with the Commission and found that such a possibility was theoretical and speculative due to Morgan Stanley's difficulty in finding a fronting partner, as well as the costs and complexities of entering into a fronting arrangement. Hence, such an arrangement did not represent a real and concrete alternative.

Visa also claimed that the Commission applied a wrong legal test, as it aimed at securing a level of competition over and above "effective competition," which is the level of competitiveness demanded by the Treaty. The Court rejected the argument, noting that the established case law requires that the examination of conditions of competition on a given market be based not only on the existing competition between undertakings already present in the market, but also on potential competition. The Court upheld the Commission's finding that Visa's refusal prevented the entry of a new player in a market characterized by a high degree of concentration and a trend towards consolidation, stifling the development of further competition.

Lastly, Visa claimed that the Commission had failed to establish that Morgan Stanley was a potential competitor. The Court explained that, while the intention to enter a given market may be a relevant element, whether an undertaking has the ability to enter a market is the essential factor on which the notion of potential competitor must be based. Since Morgan Stanley's ability to enter the relevant market had not been challenged by Visa and its entry was not merely theoretical, the Court found that the Commission had rightly described it as a potential competitor. The Court further noted that the Commission was not required to demonstrate that Morgan Stanley was in any way superior to the existing market players in order to conclude that its entry would constitute an improvement of the competitive situation in the market.

Commission Decisions

Case COMP/39510 LABCO v. ONP

On December 8, 2010, the European Commission fined the Ordre National des Pharmaciens for (i) setting minimum prices, through the prohibition of discounts of over 10% on the public prices that pharmacists could charge in the French market for clinical laboratory tests and for (ii) hindering the formation of groups of laboratories in this market by imposing additional administrative requirements and disciplinary action for non-compliance.[3] The ONP is a professional association whose members include all the pharmacists active in the French market for clinical laboratory tests and whose mission is to ensure that pharmacists comply with their professional duties. The French government entrusted the ONP with certain public powers over pharmacies such as the power to keep a list of all pharmacists licensed to practice.

The Commission held that the ONP's practices were decisions by an association of undertakings within the scope of Article 101 TFEU. The Commission found that this was neither affected by the non-binding nature of those decisions, nor by the fact that the ONP was entrusted

1 Case COMP/D1/37860, *Morgan Stanley/Visa International and Visa Europe*, Commission Decision of October 3, 2007.

2 In September 2006, Morgan Stanley reached an agreement with Visa, became a member of Visa Europe, and withdrew its complaint. However, the Commission took the view that it retained a legitimate interest in penalizing an anti-competitive practice that had effectively prevented Morgan Stanley from entering the relevant market for six and a half years.

3 In France, groups of laboratories are composed of several companies called "societés d'exercice liberal," created for the joint cooperation between one or several laboratories, and as such they represented increased competition for stand-alone pharmacists.

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with certain public powers. According to the Commission, these practices were unrelated to the powers delegated by the French government to the ONP. Both types of practices aimed at the same objective: the defense of the economic interests of the majority of the ONP's members, in particular against competition from groups of laboratories.

The Commission concluded that the behavior of the ONP constituted a single and continuous infringement and had the object of restricting competition within the meaning of Article 101, as it prevented competition from laboratories. The Commission rejected ONP's argument that its decisions fell under the "Wouters" exception, which provides that certain restrictions of competition can be justified in the general interest, such as the good exercise of the profession. The Commission found that the ONP did not in fact act in the interest of the good exercise of the profession generally, but only in the economic interest of its members.

In calculating the fine, the Commission invoked paragraph 37 of its Fining Guidelines and departed from its set methodology in light of the particular facts of the case.[4] In particular, the Commission held that, given that ONP did not generate any revenues, any fines would entail a financial risk for its members at large and ultimately the members of its governing body, pursuant to Article 23(4) of Regulation No 1/2003.[5] The Commission decided to impose a small fine of €5 million, given that this provision had not been applied previously, and that the members of ONP were possibly not aware of its existence and of their potential exposure.

UNILATERAL CONDUCT

ECJ – Judgments

Case C-375/09 Tele 2 Polska

On May 3, 2011, the Court of Justice held that only the European Commission is entitled to adopt a decision, finding that an undertaking has not breached Article 102 TFEU (a so-called negative decision) and that Article 5 of Regulation 1/2003 does not grant this power to national competition authorities (NCAs).[6] On the contrary, NCAs may only adopt decisions that there are no grounds for action. As a result, the Court held, that EU law precludes provisions of domestic law that empower an NCA to close a procedure related to Article 102 by issuing a decision finding that an undertaking has not breached Article 102 TFEU.

The reference for a preliminary ruling made by the Polish Supreme Court concerned the Polish NCA's investigation into Telekomunikacja Polska SA ("TP"). The Polish NCA had initiated proceedings against TP for the suspected infringement of Article 102, and Article 8 of the national competition rules on competition and consumer protection. The Polish NCA, having determined that TP's conduct did not constitute an abuse for the purposes of EU or national competition rules, adopted a decision finding that: (i) the conduct did not constitute an infringement under national competition rules and (ii) that there were no grounds for action under Article 102. The decision was challenged by a competitor of TP, the Polish fixed line operator Tele2 Polska (now Netia SA). The Court for Competition and Consumer Protection upheld Tele2 Polska's challenge, finding that the Polish NCA should have adopted a negative decision declaring explicitly that TP's conduct did not infringe on Article 102. This judgment was upheld by the Warsaw Court of Appeal. The Polish NCA appealed the ruling of the Warsaw Court, claiming that the Regulation precluded it from issuing a negative decision.

The Court noted that Article 5 of the Regulation sets out the actions that an NCA may take when applying EU competition rules, *i.e., "require that an infringement be brought to an end; order interim measures; accept commitments; and impose fines, periodic penalty payments or any other penalty provided for [under national law]."* Article 5 further provides that, where an NCA determines that the criteria for an infringement finding have not been met, it may decide that there are no grounds for action. The Court noted that, pursuant to Article 10 of the Regulation, the Commission may adopt a decision finding that Articles 101 and 102 TFEU are inapplicable in a particular case only in exceptional circumstances. The Court found that it would undermine the Commission's powers and call into question the system of cooperation established by Regulation 1/2003 if NCAs were permitted to issue such negative decisions, since the Commission might subsequently be prevented from finding that the practice breached Article 101 or 102.

4 "*Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21." Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, para. 37.

5 Article 23, paragraph 4 of Regulation No 1/2003 provides that if the association cannot cover the fine, "*it is obliged to call for contributions from its members*" to cover the fine and if these are not collected within the time limit specified, the members of the governing body are liable.

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

The Court further held that Article 5 of the Regulation was directly applicable by virtue of Article 288 TFEU. Any rule of national law to the contrary, such as the Polish law provision requiring the Polish NCA to close an Article 102 TFEU proceeding by way of a negative decision, must therefore be set aside.

ECJ – Advocate General Opinions

Case C-109/10 P Solvay v. Commission

On April 14, 2011, Advocate General Kokott issued an opinion proposing that the Court of Justice set aside the General Court's ruling in Case T-58/01 *Solvay v Commission*, affirming a €19 million fine imposed by the Commission on Solvay for abusing its dominant position in the mid-1980s, on the grounds that the Commission had failed to uphold various procedural rights of Solvay. The opinion is the latest stage in the long-running soda ash proceedings, which began more than two decades ago.

After conducting investigations in 1989, the Commission fined Solvay €20 million for practices including the use of loyalty rebates in the supply of soda ash to glass manufacturers and the conclusion of various cartel agreements with other European soda ash suppliers, including a market-sharing agreement with the German supplier, CFK. The fine imposed on Solvay was annulled in 1995 on procedural grounds. In 2000, having been unsuccessful in its appeal against the annulment ruling, the Commission subsequently re-adopted its decision and imposed the same fine on Solvay. In December 2009, the General Court upheld in part Solvay's action for annulment of the Commission's later decision, reducing the fine imposed by 25%, to €2.25 million. Solvay subsequently appealed the ruling of the General Court, arguing that the fine should be cancelled in its entirety.

The Advocate General found that although the substantive grounds of Solvay's appeal should be rejected, the General Court's ruling should be annulled on the grounds of procedural irregularities. In particular, the Advocate General queried the excessive length of the proceedings, Solvay's restricted access to the file, and the failure to respect Solvay's right to an oral hearing.

First, with respect to the length of the proceedings, the Advocate General found that Solvay's right to have its case adjudicated within a reasonable time had been violated. Reasonableness had to be assessed by reference to both the overall length of the proceedings and the piecemeal nature of the examination of Solvay's case. In particular, the Advocate General criticized the Commission for remaining completely inactive between 1995 and 2000 while Solvay's first appeal was pending, rather than preparing a decision subject to the outcome of the pending appeal. The Advocate General considered that, over time, Solvay's ability to defend itself had been compromised by the departure of staff employed by the company at the time of the alleged infringement and the naturally fading memories of those still with the company.

With respect the access to the file, Advocate General considered the Commission had infringed Solvay's rights of defense by losing certain evidence in the case file. The Advocate General took the view that in such circumstances the proper standard was whether the documents to which the defendant had been denied access could have contained evidence casting doubt on the Commission's case. Contrary to the view of the General Court, it was not incumbent upon Solvay to show to precisely what extent the missing parts of the file might contain evidence in its favor.

Concerning Solvay's right to an oral hearing, the Advocate General found that, when a procedural irregularity forces the Commission to re-initiate proceedings, it must resume proceedings from the point at which the error occurred. In the present case, the Commission should therefore have resumed proceedings just after the notification to Solvay of the statement of objections. Solvay was therefore entitled to a further hearing on the evidence.

Concerning the consequences of the excessively long administrative and judicial proceedings, the Advocate General drew an analogy with the conduct and procedural guarantees of criminal proceedings, and considered that the relatively small reduction in the fine applied by the General Court was not appropriate. The Advocate General therefore recommended that the General Court's ruling be set aside and the Commission's decision annulled, or in the alternative, that the fine imposed on Solvay be reduced at least by 50%.

Case C-209/10 Post Danmark A/S vs. Konkurrenceradet

On May 24, 2011, Advocate General Mengozzi issued an opinion following a reference for a preliminary ruling from the Supreme Court of Denmark (*Hojesteret*) on when selective price cuts by a dominant undertaking with a universal service obligation may constitute an exclusionary abuse.

The Danish court's request arose out of a dispute between Post Danmark and TK, competitors in relation to the supply of postal services in Denmark. Post Danmark was a regulated monopoly on the market for certain regular mail, and was also active in the market for the weekly delivery of bulk mail. TK was active in the weekend delivery of bulk mail. In 2003, Post Danmark targeted a number of

TK's main clients, offering them preferential pricing that it did not offer to its other customers. The prices were more competitive than those offered by TK. TK submitted a complaint to the Danish authorities, arguing that the selective price cuts constituted an abuse of Post Danmark's dominant position on the regulated mail market which was used to cross-subsidize selective discounting and predatory pricing on the bulk mail market.

Advocate General Mengozzi confirmed that, traditionally, selective pricing below average total cost ("ATC") but above average variable cost ("AVC") was not anti-competitive without proof of intent to exclude a competitor. Since prices remained above AVC, absent exceptional circumstances, a similarly-placed competitor should be able to match the price cuts. Reviewing the case law on selective price cuts in *Akzo, Compagnie Maritime Belge*, and *Irish Sugar*, the Advoate General noted that the case law had become more exacting in requiring proof of intent to exclude. While in *Akzo* the Court had inferred intent to exclude from the mere fact of selective pricing, in *Compagnie Maritime Belge* and *Irish Sugar* internal documents were used to establish evidence of exclusionary intent.

The Advocate General determined that, absent proof of exclusionary intent on the part of the dominant undertaking, the lawfulness of a selective pricing practice should instead be examined by reference to the dominant company's costs. Given that, where price cuts remained above ATC, an equally efficient competitor would not be eliminated, the only ground for abuse would be secondary line price discrimination, contrary to Article 102(c).

The Advocate General therefore concluded that selective price cuts by the dominant provider operating under a universal service obligation could only be abusive where the undertaking's price cuts in the second market (*i.e.*, the market that was fully open to competition) were below AVC but above average incremental cost and had been cross-subsidized by the activity in the regulated monopoly market. This was a matter for assessment by the national court.

MERGERS AND ACQUISITIONS

First-Phase Decisions With Undertakings

Case COMP/M.6095 Ericsson/Nortel Group (MSS & Global Services)

On March 2, 2011, the European Commission conditionally approved Ericsson's acquisition of Nortel Networks Corporation's Multi-Service Switching (Nortel MSS) business. Ericsson is a telecommunications services and equipment provider. Nortel MSS sells switches that operate as devices used to route data transferred between networks, and as inputs for fixed line and mobile telecommunications network equipment. The Commission was concerned that the combined entity could engage in input foreclosure by refusing to supply switches to Ericsson's downstream competitors in different network infrastructure markets.

The Commission considered Ericsson's incentives to sacrifice upstream sales for downstream market share in these different network infrastructure markets and ultimately concluded that input foreclosure was unlikely. In the market for mobile network equipment, the Commission found that Nortel already had an existing supply agreement with Ericsson's only competitor that uses switches and that Ericsson's existing relationships with that competitor in other markets would prevent input foreclosure. The Commission also found that the market has many competitors that do not use switches at all, meaning that input foreclosure would not ultimately affect the overall competitiveness of the market.

The Commission was, however, concerned that Ericsson might have an incentive to engage in input foreclosure in the market for 3G mobile network equipment. The Commission found that Ericsson was a leading player in the market and that Alcatel-Lucent, the sole competitor that used Nortel MSS's switches, had a small share of that market. As such, Ericsson could expect to engage profitably in an input foreclosure strategy. The Commission was also concerned that because Nortel MSS switches are proprietary, Alcatel-Lucent would not be able to find a third party substitute or have enough time to develop its own product.

To address the Commission's concerns, Ericsson extended the existing supply agreement between Nortel MSS and Alcatel-Lucent to give Alcatel-Lucent enough time to develop an alternative input solution.

First-Phase Decisions Without Undertakings

Case COMP/M.6164 Barclays Bank/Egg Credit Card Assets

On April 18, 2011, the European Commission approved the acquisition of Egg Banking (Egg) by Barclays Bank PLC (Barclays). Barclays is a global financial services provider engaged in a variety of businesses including issuing and operating credit cards. Egg's primary business is issuing and operating credit cards in the United Kingdom. The Commission found that the transaction did not raise competition concerns in the market for issuing and operating credit cards in the U.K.

The Commission considered credit cards and charge cards to be part of the same relevant market and limited the geographic market to the U.K. (the only market affected by the transaction). Although the

parties argued that personal loans and other forms of short-term credit should be considered substitutes for credit cards, the Commission did not address these issues directly because the transaction did not raise competition concerns, even on the narrowest market definition.

Barclays' share of the markets for personal credit cards, universal credit card issuance, and all card-based consumer debt in the U.K. is 10-20%. Egg's share of the same markets is 0-5%. In addition to these moderate market shares and the low increment arising from the transaction, the Commission noted the presence of a number of competitors on the market for card-based credit in the U.K., including HSBC, Lloyds, and the Royal Bank of Scotland, each with market shares close to that of the merged entity. The Commission also considered that credit card customers in the U.K. tend to change providers frequently and to have multiple cards from different providers at the same time. Therefore, the Commission was satisfied that, post-merger, the market would remain competitive.

Case COMP/M.6097 Caterpillar/Bucyrus

On May 4, 2011, the European Commission unconditionally cleared Caterpillar's acquisition of Bucyrus International. Caterpillar is a global manufacturing company that produces machinery, engines, and parts for large-scale machinery, including mining equipment. Bucyrus is a global company which manufactures mining equipment and provides parts and after-sale services. The principal antitrust issue raised by the transaction was whether the merged entity would have the incentive to foreclose competition in the market for mining equipment.

Following its market investigation, the Commission found that in the surface mining trucks ("SMTs") sub-market, Caterpillar's closest competitor was Komatsu, which had gained significant market share over the last several years from the market leader, Caterpillar. Moreover, in the category of SMTs with a payload of over 290 metric tons, Komatsu is the market leader. After these two largest competitors, there are four smaller players including Bucyrus. The decision also noted that these market shares could not reflect the seventh supplier on the market, a Chinese company, which did not provide sales data.

The Commission found that the transaction would not significantly alter Caterpillar's market position because it would only create a small increment in market share and because Caterpillar and Bucyrus are not close competitors. Potential segmentation of the market for SMTs included a segmentation by payload and/or by drive system. Regardless, Bucyrus would add less than 10% to Caterpillar's market share in any segment or as a whole. Caterpillar traditionally focuses on mechanical drive trains, while all of Bucyrus's models are electric. In terms of brand differentiation, Caterpillar uses breaking power, high traction control, and the familiarity of the brand name, while Bucyrus's selling point is its technologically less complex electric drive systems, which require lower maintenance and repair expense. Finally, the two entities have different regional strengths, Caterpillar being mainly present in North and Latin America, and Bucyrus in China and Australia.

The decision also briefly discusses the sub-markets for underground mining equipment, hydraulic excavators, and diesel engines for mining equipment. In the first of these, the market investigation largely confirmed that Hard Rock Load Haul Dumpers ("LHDs"), Soft Rock LHDs, Hard Rock Underground Mining Trucks ("UMTs") and Soft Rock Underground Haulage Vehicles could be considered separate product markets in which there is no overlap between Caterpillar and Bucyrus. In the second of these, the market is intensively competitive with three other companies besides Bucyrus, which, the Commission found, will continue to provide a competitive constraint on the merged entity post-transaction. Finally, the Commission found that Caterpillar's market share for the supply of diesel engines was insufficient to influence competition in the market and that even if Bucyrus were to replace its current external purchases with internal production, it would be unlikely to foreclose competitors' access given that Bucyrus is not a significant consumer of diesel engines.

STATE AID

ECJ – Judgments

Case C-83/09 P Commission v. Kronoply GmbH & Co. KG and Kronotex GmbH & Co. KG

On May 24, 2011, the Court of Justice dismissed an appeal brought by the European Commission against the judgment rendered by the General Court on December 10, 2008, in Case T-388/02, *Kronoply and Kronotex v. Commission*. The judgment under appeal had declared admissible the action brought by Kronoply and Kronotex against the Commission's decision not to open an in-depth investigation into German aid granted to Zellstoff Stendal GmbH (ZSG).

On April 9, 2002, the German authorities notified the Commission of their plan to grant state aid to ZSG. Following a preliminary examination, the Commission found that the planned aid was compatible with the internal market and decided not to open a formal investigation under Article 108(2) TFEU. Kronoply and Kronotex challenged this decision before the General Court. The General Court dismissed as inadmissible the part of the action

challenging the merits of the decision, as the two companies had not proven that they were individually concerned by the latter. The General Court did, however, find that the applicants had standing to ensure the respect of their procedural rights, as parties concerned for purposes of Article 108(2). The General Court ultimately rejected the appeal on the grounds that the Commission made no manifest error of assessment in its decision to refrain from opening a formal investigation. The Commission appealed the judgment insofar as it declared the action by Kronoply and Kronotex admissible.

The Commission argued that the General Court had erred in finding that the appeal was admissible. The Court dismissed this argument on the grounds that, in the case of decisions not to raise objections to the grant of aid, any interested party must be considered directly and individually concerned by the decision to the extent that it affects the procedural guarantees the interested party enjoys under the state aid rules, in particular the possibility to participate in a formal investigation.

The Commission also claimed that, given that the applicants had standing only to bring an appeal based on the breach of procedural rights, the General Court had erred and altered the subject matter of the action by also examining the arguments raised by them on the merits of the case. The Court dismissed this plea as it considered that the General Court was entitled to examine the pleas relating to the merits in order to verify whether any argument in the context of those pleas could be linked to the pleas alleging violation of procedural guarantees.

Finally, the Commission claimed that the General Court had erred in finding that undertakings which are not competitors of the aid recipient on the same market can be covered by the notion of "interested party" for the purposes of a State aid investigation. The Court also rejected this argument and noted that under Article 1(h) of Regulation 659/1999,[7] "interested party" means "*any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular, the beneficiary of the aid.*" This provision thus does not exclude the possibility that undertakings which are not direct competitors of the beneficiary, but that require the same raw material for their production processes, as was the case for Kronoply and Kronotex, can qualify as interested parties. The General Court had, therefore, correctly held that the two companies could be considered rivals to the beneficiary of the aid and could have negatively been impacted by the granting of the aid in question.

Joined Cases C-465/09 P to C-470/09 P Diputación Foral de Vizcaya, Álava, Guipúzcoa v. European Commission

On June 9, 2011, the Court of Justice dismissed various appeals presented by the three Spanish territories of Historicos of Álava, Vizcaya, and Guipúzcoa, seeking to annul the September 9, 2009 judgment the General Court in *Diputacíon Foral de Álava and others v. Commission*.[8] In its judgment, the General Court had rejected the actions for annulment presented against the Commission's decision to open a formal investigation into the system of fiscal autonomy in force in the territories and against the Commission's final decision concerning the State aid regime executed by Spain in favor of certain categories of undertakings active in the same territories.

The Court clarified that, in state aid matters, the existence of a Commission decision must be ascertainable on the basis of objective factors and must reflect a definitive and clear statement of its position. The Court thus rejected the applicants' arguments that the Commission's behavior and silence, between 1994 when it had received a first complaint concerning the measures in question, and 2000, when it received a second complaint and subsequently opened an investigation, amounted to an implicit decision authorizing the disputed tax systems. In the absence of an express statement, an authorization for State aid can thus not be inferred from mere behavior or silence on the part of the Commission.

Furthermore, the Court held that the General Court had not disregarded the procedural rules of evidence and the right to a fair trial by dismissing the applicants' request to order the Commission to include all the documents relating to the first complaint in the case file. The Court found that to the extent that the applicants had not identified the specific documents they which to be produced, or their content, they had not provided the General Court with sufficient grounds to believe that those documents could be relevant for resolving the dispute.

The Court also added that the General Court was correct in finding that since the appellants had not notified the measures in question, nor cooperated with the Commission by providing the requested information, they could not rely on the argument that the procedure was excessively long, nor on the principle of legitimate expectations, in order to challenge the recovery of the aid granted under the disputed tax systems. A Member State wishing to grant aid derogating from the Treaty rules is in fact bound by a duty to cooperate with the Commission and is thus required to provide all the elements that will allow the latter to verify that the conditions for

7 Council Regulation (EC) No 659/1999 of March 22, 1999, laying down detailed rules for the application of Article 93 of the EC Treaty, in OJ L 83/1 of March 27, 1999.

8 Cases T-30/01 to T-32/01 and T-86/02 to T-88/02, *Diputación Foral de Álava and others v. Commission*, ECR II-2919.

the derogation are fulfilled. This is all the more true for a Member State who, as in the case at hand, has failed to notify a State aid measure, contrary to Article 108(3) TFEU. The applicants were thus not entitled to claim that the length of time that had elapsed between the complaint and the final decision was excessive.

GC – Judgments

Joined Cases T-109/05 and T-444/05 Navigazione Libera del Golfo Srl (NLG) v. European Commission

On May 24, 2011, the General Court ruled on two appeals brought by Navigazione Libera del Golfo (NLG) against the European Commission decisions of February 3 and October 12, 2005 (respectively, the First Decision and the Second Decision under appeal) denying the appellant access to the full text version of the Commission Decision of March 16, 2004 (the state aid decision), authorizing state aid granted by Italy to the shipping companies Adriatica, Caremar, Saremar e Toremar (the Tirrenia Group).

The Commission had partially accepted the request presented by the Italian authorities to delete from the public version of the state aid decision information concerning cost figures of the companies of the Tirrenia group and had, therefore, communicated to NLG only a non-confidential version. DG Energy and Transport and, later, the Secretary-General of the Commission, refused NLG's request for access to the full version on the grounds that the disclosure would undermine the commercial interests of the companies concerned and, thus, violate Article 287 EC (now Article 339 TFEU),[9] Article 20 of Regulation No. 659/1999,[10] and Article 4(2) of Regulation 1049/2001 regarding public access to Parliament, Council and Commission documents.[11] NLG appealed this First Decision to the General Court (Case T-109/05). NLG then presented formal requests to have access to the full document under Articles 6 and 8 of Regulation 1049/2001. This request was denied by a Second Decision of the Commission on the ground that the Italian authorities had specifically requested that the full document not be disclosed. NLG appealed this decision (Case T-444/05) and the General Court then joined the two cases.

In Case T-109/05, the General Court first declared the action admissible, notwithstanding that the state aid decision had been annulled while proceedings were still pending, because the decision refusing access continued to remain in place and the document requested still existed. On the merits, the General Court upheld the applicant's plea that the Commission had given inadequate reasoning for its refusal to give access to certain information. While the Commission had provided adequate reasoning for its refusal to give access to analytical data, the Court found that it had failed to state adequate reasons for the deletion of figures concerning the costs borne by the shipping company Caremar in providing a public service, in particular on the route Naples-Beverello/Capri. It therefore annulled the Commission's decision in this respect. The Court dismissed NLG's claim that the disclosure of information concerning additional costs relating to public service obligations could not harm Caremar's commercial interests and that such costs did not constitute commercial secrets. The Court also found that the Commission had correctly carried out a concrete and individual examination of the documents in question, as required by Regulation 1049/2001, and had correctly held that no overriding public interest in disclosure existed, as the applicant's private interest in presenting an action for annulment could not qualify as such.

In Case T-444/05, the applicant claimed that the Commission's Second Decision was vitiated insofar as it refused to give access to the information concerning the extra costs born annually by Caremar in order to fulfil its public service obligations, on the grounds that the Italian authorities had expressly opposed themselves to the disclosure of such documentation. The General Court clarified and confirmed that Article 4(2) of Regulation 1049/2001, which states that a Member State may request an EU institution not to disclose a document originating from that Member State without its prior agreement, covers all documents that a Member State transmits independently of whoever may be the author. However, under Articles 7 and 8 of Regulation 1049/2001, the institution concerned is always required to give reasons for a decision to refuse access to documents and also to set out the reasons relied on by a Member State to deny access. As the Commission had omitted to indicate such reasons, the General Court annulled the Second Decision.

9 Article 287 EC (now 339 TFEU) states that "*The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*"

10 Council Regulation (EC) No 659/1999 of March 22, 1999, laying down detailed rules for the application of Article 93 of the EC Treaty, in OJ L 83/1 of March 27, 1999.

11 Regulation (EC) 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, in OJ L145/43 of May 31, 2001. Article 4(2) states that "*The institutions shall refuse access to a document where disclosure would undermine the protection of: commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*"

FINING POLICY

GC – Judgments

Case T-299/08 Elf Aquitaine v Commission and Case T-343/08 Arkema France v Commission

On May 17, 2011, the General Court rejected the appeals of Elf Aquitaine and Arkema France against the European Commission's decision holding that they had participated in a cartel in the market for sodium chlorate, a product used for bleaching paper, by allocating market volumes, fixing prices and exchanging confidential information via multilateral and bilateral meetings, as well as telephone conversations.[12] During the relevant time period, Elf Aquitaine held more than 97% of the shares in Arkema France. As a result, the Commission concluded that the former had exercised a decisive influence on the latter and that, together, they formed a single undertaking for the purposes of Article 101 TFEU.

The Court upheld the Commission's approach, according to which, when a parent company controls 100% of the shares of a subsidiary, the Commission can rely on a rebuttable presumption that the parent company does in fact exercise decisive influence, without the need to support this presumption with further evidence. The Court reiterated that the Commission may, but need not, attribute responsibility for an infringement committed by a subsidiary to its parent company. Consequently, even though the Commission did not attribute to Elf Aquitaine the unlawful conduct of its subsidiary in an earlier decision, it could do so here.

The Court agreed that the burden shifted to Elf Aquitaine to rebut the presumption of decisive influence, showing that Arkema France had behaved independently on the market. However, the Court upheld the Commission's rejection of the evidence put forward by Elf Aquitaine, finding, first, Elf Aquitaine's status as a "non-operational holding" was irrelevant, as it coordinated financial investments within the group. Second, even if Elf Aquitaine had never approved the business plan or the budget of its subsidiary, it could still modify, reject, or control their implementation. Third, the fact that Elf Aquitaine did not participate in the infringement, was not aware of it, and was not even directly active on the market for sodium chlorate, was immaterial, because infringements committed by subsidiaries are not attributed to parent companies due to their direct involvement, but because the parent and the subsidiary constitute a single undertaking in the relevant time period.

Lastly, in setting the fine, the Court found that the Commission was entitled to impose a separate increase for deterrence on Elf Aquitaine (70% of the basic fine), given that, while Elf Aquitaine and Arkema France constituted the same undertaking at the time of the events at issue, that was no longer the case at the time of the decision. The Court also upheld the 90% increase of the basic amount imposed on Arkema France for repeated infringement on the basis of three earlier decisions.[13] In that regard, the Court clarified that the deterrence increase and the aggravating circumstance for repeat offenders serve different objectives, *i.e.*, ensuring that fines have a sufficiently deterrent effect vis-à-vis undertakings with a particularly large turnover, and chastising repeat offenders' tendency to infringe competition rules, respectively.

Case T-199/08 Ziegler SA v. Commission; Joined Cases T-204/08 and T-212/08 Team Relocations NV, Amertranseuro International Holdings Ltd and Others v. Commission; Joined Cases T-208/08 and T-209/08 Gosselin Group NV and Stichting Administratiekantoor Portielje v. Commission; Case T-210/08 Verhuizingen Coppens NV v. Commission; and Case T-211/08 Putters International NV v. Commission

On June 16, 2011, the General Court ruled on the appeals against a European Commission decision related to a cartel in the international removals market in Belgium,[14] fining ten international removal companies for directly or indirectly fixing prices, sharing markets, and manipulating the procedures for the submission of tenders, notably by issuing false quotes to customers (cover quotes) and operating a system for compensating each other for rejected offers (commissions). The Commission had found that the overall cartel lasted from October 1984 through September 2003, although the participation of each of the companies varied over different periods.

The Court rejected the appeals of Ziegler, Team Relocations (and its parent companies), and Putters International, which had a number of pleas mostly concerning the calculation of fines under the 2006 Fining Guidelines.[15]

Regarding Gosselin, the Court found that the Commission had not shown that Gosselin had participated in the infringement during the period from October 30, 1993, to November 4, 1996. In particular, (i) there was no documentary evidence supporting Gosselin's

12 Case COMP/38.695, *Sodium chlorate*, Commission Decision of June 11, 2008.

13 Case COMP/IV/30.907, *Peroxygen products*, Commission Decision of November 23, 1984; Case COMP/IV/31.149, *Polypropylene*, Commission Decision of April 23, 1986; Case COMP/IV/31.865, PVC, Commission Decision of July 27, 1994.

14 Case COMP/38.54, *International Removal Services*, Commission decision of March 11, 2008.

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

participation for that period, and (ii) the Commission could not rely on the case law requiring an undertaking to distance itself explicitly from an illegal agreement, given that Gosselin did not participate in any multiparty meetings that formed the basis of the cartel. Consequently, the duration of Gosselin's participation in the infringement was reduced from 10 years 7 months to 7 years 6 months.

With respect to Gosselin's parent company, Portielje, the Court found, first, that it did not constitute an undertaking for the purposes of EU competition law, since (i) Portielje did not engage in any direct economic activity; and (ii) the Commission had not shown that Portielje involved itself directly or indirectly in Gosselin's management and that it therefore took part in Gosselin's economic activity. Second, the Court held that even if Portielje were shown to constitute an undertaking, the evidence adduced by Portielje was capable of rebutting the presumption that it exerted a decisive influence over Gosselin. Therefore, the Commission erred in imputing Gosselin's conduct to Portielje and accordingly, the Court annulled the decision with regard to Portielje and the €270,000 fine for which it was jointly and severally liable with Gosselin.

Lastly, concerning Coppens, the Court found that the Commission was wrong to find that Coppens participated in a single and continuous infringement covering all the anti-competitive conduct, since its participation was limited to issuing cover quotes and did not cover the agreement on commissions and the Commission had not proven that Coppens was aware of the other companies' anti-competitive conduct concerning the commissions or that it could reasonably have foreseen such conduct. The Court therefore annulled the Commission's decision insofar as it concerned Coppens and the corresponding €104,000 fine.

Case T-185/06 L'air Liquide SA v. Commission; Case T-186/06 Solvay SA v. Commission; Case T-191/06 FMC Foret SA v. Commission; Case T-192/06 Caffaro Srl v. Commission; Case T-194/06 SNIA SpA v. Commission; Case T-195/06 Solvay Solexis SpA v. Commission; Case T-196/06 Edison SpA v. Commission; Case T-197/06 FMC Corp. v. Commission

On June 16, 2011, the General Court ruled on the appeals against a European Commission decision fining a number of companies for their participation in a cartel in the market for hydrogen peroxide and sodium perborate that included price fixing, information sharing, and market allocation. The cartel lasted from January 31, 1994, to December 31, 2000.

These companies challenged the Commission's decision based, *inter alia*, on the Commission's failure to state sufficient reasons for the level of fines imposed and for the duration of the participation in the cartel.

The Court annulled the Commission's decisions concerning L'air liquide and Edison on the grounds that the Commission failed to comply with its obligation to state sufficient grounds. The Court found that the Commission had not addressed specifically some of the arguments brought forward by the companies to counter the rebuttable presumption that they had exercised decisive influence over their respective subsidiaries. Instead, the Commission dismissed those arguments without specifically addressing them.

More specifically, Edison had made a number of arguments to the Commission related to the strategy of the group and the structure of Ausimont to demonstrate that Edison did not exercise decisive influence over its subsidiary. The Court held that the Commission was required to address the arguments submitted by Edison, had failed to do so in the decision, and instead had dismissed them by referring to "other elements" in the case that contradicted them (the fact that the managers of Edison took part in a meeting with representatives of Degussa, a potential acquirer for Ausimont; based on the identity of a member of the board of Ausimont; and the conditions in which the group was restructured).

The annulment of those decisions resulted in L'air liquide, which had not been fined by the Commission but was included among the addressees of the decision, being cleared of any fine, and in Edison not having to pay a €58.13 million fine.

Concerning Solvay's appeal, the Court reduced the fine imposed on Solvay because it found that the available evidence was insufficient to find that Solvay participated in the infringement between January 31, 1994, and May 1995. The Court upheld the finding regarding the filing date of the leniency application. In order to establish the time at which the leniency application is lodged, the Court found that the material time is not when an undertaking contacts the Commission to make an oral statement, but instead when the evidence with the potential significant added value is submitted to the Commission. Finally, the Court found that the information provided by Solvay had been widely used by the Commission and that the Commission was wrong to find that the evidence only corroborated certain information already in its possession. As a result, the Court reduced Solvay's fine by 20% instead of the 10% reduction provided by the Commission.

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

Case T-240/07 Heineken Nederland BV and Heineken NV v. Commission and Case T-235/07 Bavaria NV v. Commission

On June 16, 2011, the General Court lowered the fines imposed on Heineken and Bavaria in connection with their participation in a cartel in the Dutch beer market. Heineken and Bavaria supply beer in the on-trade sector (such as pubs and restaurants), and in the off-trade sector, which is meant for consumption at home (mainly through supermarkets).

The Commission had found in 2007 that the InBev Group, Heineken, Grolsch, and Bavaria had entered into a cartel between February 1996 and November 1999, by coordinating (the increase of) prices, as well as occasionally coordinating other commercial conditions with respect to, for example, loans given to their retailers. According to the Commission, the infringements took place in secret multilateral and bilateral meetings.

Heineken and Bavaria alleged that the Commission violated the principles of good administration and due process, lacked evidence, and that the procedure had lasted too long. The General Court decided to lower the fines imposed on Heineken and Bavaria because it found that (i) the Commission had not provided sufficient evidence with respect to the occasional coordination of commercial conditions relating to the loans; and that (ii) the administrative procedure was unreasonably long and that the Commission's reduction of €100,000 was not sufficient to compensate for this.

Regarding the lack of evidence with respect to the commercial conditions for the loans offered to Heineken's and Bavaria's retailers, the Commission relied on (i) statements of InBev and (ii) handwritten notes of the alleged meetings. The Court stated that the Commission may, in principle, rely on statements of participants to the cartel to prove infringements of Article 101 TFEU. However, the Court noted that it is settled case law that corroborating evidence is required in cases, such as this one, where the correctness of these statements is being challenged by the other parties.

As corroborating evidence, the Commission relied on handwritten notes, which indicated that there had been contacts on prices, discounts, and loans. However, the Court concluded that these notes did not prove coordination of the commercial conditions for loans. The Court held that the references to the commercial conditions with respect to the loans in the notes were sporadic and brief and that there was an alternative explanation for the notes, namely the doubtful solvency of some debtors, and that there was no other specific evidence. The Court partly annulled the decision, and reduced the fine imposed on Heineken and Bavaria.

Second, with respect to the lengthy procedure, which lasted 85 months, the Court considered that this was mainly due to the Commission's inactivity. However, the Court found that it is settled case law that an unreasonably long procedure may only lead to annulling a decision if it has negatively influenced its outcome. The Court found that had not been the case here: the appellants had been able to produce exculpatory evidence, and they had not indicated sufficiently precisely the specific difficulties that they had encountered when collecting such evidence. However, the Court accepted the plea of Heineken and Bavaria that the flat-rate reduction of €100,000 granted by the Commission did not take account of the amount of the fine, and it held that the reduction should be increased to 5% of the fine.

The final fine imposed on Heineken was reduced from over €219 million to almost €198 million. Bavaria's fine was reduced from almost €23 million to €20.7 million.

POLICY AND PROCEDURE

ECJ – Judgments

Case C-360/09 Pfleiderer v. Bundeskartellamt

On June 14, 2011, the ECJ issued a preliminary ruling in a case referred by the Local Court of Bonn regarding access to leniency documents by third party claimants seeking private damages for the loss incurred due to cartel practices.

In 2008, the German Bundeskartellamt imposed a fine of €62 million on three European decoration paper manufacturers for cartel activities. Pfleiderer, a customer, sought to obtain full access to the Bundeskartellamt's file in order to prepare its civil action for damages. The Bundeskartellamt denied access to the leniency statements and evidence which it obtained during its investigation. Pfleiderer brought an action before the Local Court of Bonn which decided that Pfleiderer was an "aggrieved party" and had a "legitimate interest" under German law in obtaining full access to the file and, hence, ordered access to both the leniency statements as well as the incriminating material and evidence collected. Access to confidential business information and to the Bundeskartellamt's internal documents, such as correspondence within the framework of the European Competition Network, was nonetheless limited.

The Local Court of Bonn asked whether granting access to leniency statements would be compatible with European competition rules on cooperation and mutual exchange of information between the Commission and the national competition authorities within the context of competition law enforcement.

The Court first pointed out that neither the Commission's Notices on cooperation within the Network of Competition Authorities and on reduction of fines in cartel cases, nor the ECN's model leniency program are binding on national courts. As a result, it is for the Member States to establish and apply national rules on the right of access related to leniency documents, in compliance with European Union law and in such way as not to render the application of European Union law impossible or excessively difficult.

The Court further reiterated the importance of leniency programs for the effective application of competition law. The effectiveness of leniency programs could indeed be compromised if leniency documents were to be disclosed to third party claimants. However, the Court noted that under settled case law any individual has the right to claim damages for loss caused to him by anticompetitive conduct. These actions for damages also make significant contributions to maintaining effective competition within the European Union.

Accordingly, the Court suggested a case-by-case balancing test for national courts taking account of the respective interests in favor of disclosure of the leniency information and the interests in favor of the protection of that information that has been voluntarily provided by a leniency applicant.

The outcome of the Court's judgment differs from the approach suggested by Advocate General Mazak, namely that access to voluntary self-incriminating leniency statements should not be granted by national courts or authorities. The Advocate General opined that such interference with the right of third parties to an effective remedy is justified by the legitimate aim of ensuring effective enforcement of competition law. However, the Advocate General also stated that access should be given to all other pre-existing documents submitted by a leniency applicant. Although the Court does not distinguish between pre-existing documents, *i.e.*, documents not prepared specifically for the leniency application, and the leniency application itself, such distinction could well be relevant in practice, as suggested by the Advocate General.

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