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HORIZONTAL AGREEMENTS

GC – Judgments

Case T-111/08 MasterCard and Others v. Commission

On May 24, 2012, the General Court upheld the European Commission's decision prohibiting the balancing payments, known as multilateral interchange fees ("MIFs"), applied on EEA cross-border transactions with MasterCard and Maestro branded debit and credit cards.[1]

The Commission concluded in its decision of December 19, 2007, that although MIFs levied between the banks of cardholders and merchants are not illegal in themselves, those applied on EEA cross-border transactions under the MasterCard card payment system were excessive and anticompetitive.[2] The Commission considered that the MIFs had the effect of setting a floor under the costs charged to merchants and thus constituted a restriction of price competition. The MasterCard payment organization and the companies representing it (MasterCard Inc. and its subsidiaries MasterCard Europe and MasterCard International Inc.) were ordered to bring the infringement to an end by formally repealing the MIFs within six months, failing which they would be fined 3.5% of their daily consolidate global turnover.

MasterCard brought an action before the Court for annulment of the Commission's decision, and argued the objective necessity of the MIFs to the operation of the MasterCard payment system. Dismissing this action and confirming the Commission's decision, the Court rejected this argument stating that "*… it is unlikely that, without a MIF, an appreciable proportion of banks would cease or significantly reduce their MasterCard card issuing business or would change the terms of issue to such an extent as to be likely to result in holders of those cards favouring other forms of payment or payment cards.*" The Court held, with the Commission, that the effects of the MIFs on competition should be considered independently rather than in conjunction with the effects of the MasterCard system to which the MIFs related, since the MIFs were not an ancillary restriction or directly related and necessary to the implementation of the operation of the MasterCard system. The Court concluded that without the MIFs, "*merchants would be able to exert greater competitive pressure on the amount of the costs they are charged for the use of payment cards*."

MasterCard further objected to the Commission's characterization of the MasterCard payment organization as an association of undertakings, as since its initial public offering on the Stock Exchange in May 2006, it ceased to be controlled by the financial institutions participating in its network, with MasterCard setting the level of MIFs unilaterally and independently from those institutions. The Court, however, was of the opinion that the MasterCard payment organization remained an "institutionalized form of co-ordination" of those participating in the network, since the financial institutions continued, collectively, to exercise decision-making powers in respect of the essential aspects of the operation of the MasterCard payment organization, both at a national and at a European level. This conclusion was also inferred from the fact that there was a commonality of interests between the MasterCard payment organization and the financial institutions in the MIFs being set at a high level. The latter benefited from the fact that the MIFs established a minimum price flow which enabled them to pass on the MIFs to merchants.

The Court also stated that the fees could not be exempted from competition law, as a result of the contribution of the MasterCard system to technical and economic progress. It ruled that the setting of the fees tended to "overestimate" the costs borne by financial institutions on issuing payment cards, and to assess inadequately the advantages to merchants.

The Commission welcomed the Court's judgment and applied the same approach in a subsequent investigation relating to Visa's EEA MIFs, which resulted in the acceptance of binding commitments in December 2010.[3] In 2009, MasterCard reached an interim agreement with the Commission pending the judgment. It announced that it intended to maintain the "existing level of cross-border" interchange fee, indicating at the same time its intention to appeal to the ECJ.

1 Case T-111/08 *MasterCard and Others v. Commission*.

2 Cases COMP/34.579 – *MasterCard*, COMP/36.518 – *EuroCommerce*, COMP 38.580 – *Commercial Cards*, Commission decision of December 19, 2007.

3 Case COMP/39.398 – *Visa Europe*, Commitments offered to the European Commission pursuant to Article 9 of Council Regulation (EC) No 1/2003.

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Commission Decisions

Case COMP/39.600 Refrigeration Compressors

On December 7, 2011, the European Commission fined several producers of refrigeration compressors a total of €161 million in its fifth cartel settlement since the introduction of the settlement procedure for cartel cases in 2008.[4] The Commission found that five manufacturers (ACC, Danfoss, Embraco, Panasonic, and Tecumseh) had participated in a cartel relating to the production and sale of household and commercial compressors,[5] which was aimed at coordinating European pricing policies and keeping European market shares stable in an attempt to recover cost increases. The cartel covered the EEA and lasted from April 2004 to October 2007. The cartel participants held bilateral, trilateral, and multilateral meetings during which they discussed and agreed upon the timing of and general ranges of target price increases of products sold in Europe. The companies further exchanged sensitive information on capacity, production, and sales trends relating to the European market.

According to the Commission, the conduct of the compressor producers gave rise to a single and continuous infringement in light of the following factors: (i) the agreements and/or concerted practices at issue formed part of a single overall scheme to restrict competition; (ii) the arrangements covered the same elements of the overall scheme, the same undertakings and the same core group of employees; (iii) the contact between the cartel participants was of a continuous nature; (iv) most of the meetings related to both household and commercial compressors and four of the members were active in the sale of both household and commercial compressors in the EEA; and (v) the cartel members knew or should have known that their anti-competitive activities formed part of an overall scheme since the same core group of employees participated in the various anti-competitive contacts.

The Commission proceedings lasted 14 months from the initiation of the settlement proceedings to the final decision, including various bilateral rounds of settlement meetings, the submission by the parties of a formal settlement request acknowledging their liability, the Commission's notification of a streamlined SO and the parties' confirmation that the SO reflected their settlement submissions.

As a result of the settlement procedure, all parties – except Tecumseh, which had already received immunity from fines under the Leniency Notice for having revealed the existence of the cartel to the Commission[6] – were granted a 10% reduction of the fine that would otherwise have been imposed on them. The fine reduction under the Settlement Notice added up to the reduction granted to each party under the Leniency Notice (with discounts ranging from between 15% to 40%) for providing evidence that improved the Commission's ability to prove the cartel. Furthermore, the Commission reduced Embraco's fine by an additional 18% in view of Embraco's effective cooperation outside the leniency program. While both Panasonic and Embraco benefited from the application of mitigating circumstances, the former was also subject to an increase in fine for deterrence purposes given its large turnover beyond the sales of products relevant to the infringement. ACC's fine was first capped to €40.7 million, i.e., 10% of its total turnover, and was further reduced on account of its distressed financial situation in application of point 35 of the Fining Guidelines[7] on "inability to pay."

Taking all of these factors into account, the final amount of fines imposed by the Commission was €9 million on ACC, €90 million on Danfoss, €54.5 million on Embraco, and €7.6 million on Panasonic. No fine was imposed on Tecumseh.

VERTICAL RESTRAINTS

ECJ – Judgments

Case C-158/11 Auto 24 SARL v. Jaguar Land Rover France SAS

On June 14, 2012, the European Court of Justice adopted a ruling concerning the interpretation of the "specified criteria" pursuant to which distributors and retailers may be invited to join a selective distribution system referred to in Article 1(1)(f) the block exemption Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector ("Regulation").[8]

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

5 The products concerned are small refrigeration compressors that are used predominantly in household appliances, such as fridges and freezers, and to a lesser extent in commercial equipment such as vending machines, ice cream coolers, display cabinets etc..

6 Commission Notice on Immunity from fines and reduction of fines in cartel cases, O J 2006 C 298/17.

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

8 Article 1 (1) (f) of the Regulation mentions that "*selective distribution system" means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors or repairers selected on the basis of specified criteria and where these distributors or repairers undertake not to sell such goods or services to unauthorised distributors or independent repairers, without prejudice to the ability to sell spare parts to independent repairers or the obligation to provide independent operators with all technical information, diagnostic equipment, tools and training required for the repair and maintenance of motor vehicles or for the implementation of environmental protection measures*."

Auto 24 SARL ("Auto 24") was Jaguar Land Rover France SAS's ("JLR") exclusive distributor in Périgueux, France, since 1994, but this relationship was terminated from September 30, 2004. Thereafter, Auto 24 applied to be an authorized distributor of JLR cars. JLR refused the application in January 2006 based on the ground that JLR's limit on the number of approved distributors prevented it from appointing an additional distributor of new vehicles in Périgueux. However, in October 2006 an authorized JLR distributor opened a secondary outlet close to Périgueux. As a result, Auto 24 launched proceedings against JLR before the Tribunal de Commerce, Bordeaux, to seek compensation for the loss caused by the JLR's refusal to appoint Auto 24 as authorized distributor.

Auto 24's action was dismissed at first instance and on appeal. On appeal to the Court de cassation, Auto 24 argued that, in a selective distribution system that limits the number of selected distributors, the supplier must use quantitative selection criteria that are specific, objective, proportionate to the aim pursued and implemented in a non-discriminatory manner when selecting its distributors.

The Court stated that the Regulation automatically exempts selective distribution systems that limit the number of selected retailers if the supplier's market share does not exceed 40%. If this condition is satisfied, the Regulation's automatic exemption will apply, provided it is possible to verify the precise content of the selection criteria. However, they do not need to be published, so as to avoid collusive behavior, and need not be objectively justified and applied in a uniform and non-differentiated way with regard to all applicants for authorisation.

Only so-called qualitative selective distribution systems benefit from the Regulation's automatic exemption, regardless of the market share of the supplier, if the selection criteria used by the supplier are justified by the nature of the contract goods or services, laid down uniformly for all distributors or repairers applying to join the distribution system, and not applied in a discriminatory manner.

UNILATERAL CONDUCT

AG Opinions

Case C-457/10 P AstraZeneca AB and AstraZeneca plc v European Commission

On May 15, 2012, Advocate General Mazak recommended that the European Court of Justice reject all grounds of appeal against the ruling of the General Court. The opinion provides guidance on the threshold for assessing anti-competitive effects in abuse of dominance cases and on the scope of a dominant company's duty to make disclosures in regulatory proceedings.

In June 2005, the Commission fined AstraZeneca ("AZ") €60 million for having abused its dominant position under Article 102 TFEU on the market for proton pump inhibitors ("PPIs") used for gastro-intestinal indications. The Commission found that AZ had misused pharmaceutical marketing procedures in order to exclude competition from generic alternatives to and parallel imports of its drug, Losec (which inhibits proton pump cells in the stomach from producing acid, and is therefore used in the treatment of stomach ulcers). Specifically, AZ was found to have:

- Provided misleading information to patent offices that prevented the latter from correctly identifying the date of first marketing authorization. The patent office, as a result, issued supplementary protection certificates ("SPCs"). AZ was able to use the SPCs to delay the entry of generic competitors to Losec.
- Deregistered marketing authorizations for Losec capsules in countries where generic companies applied for marketing authorizations for generic versions of the drug. This prevented manufacturers of generics from relying on the originator's marketing authorization in order to access a simplified (faster and less onerous) procedure for obtaining their own marketing authorizations.

In a judgment of July 2010, the General Court upheld the Commission's decision, although it commuted AZ's €60 million fine to around €52.5 million. In October 2010, AZ appealed the General Court's ruling. On May 15, 2012, the Advocate General delivered his Opinion to the Court. The Opinion concludes that the General Court properly assessed the conduct at issue and recommends the dismissal of all grounds of appeal.

AZ's appeal to the Court of Justice comprised two principal limbs. First, AZ argued that the General Court erred in law by upholding the Commission's findings on the relevant product market. AZ argued, *inter alia*, that proton pump inhibitors (at the time of the impugned conduct) formed part of a broader market with H2 blockers, a group of medicines that also inhibit production of acid in the stomach. The Commission and subsequently the General Court had not, AZ argued, properly analyzed evidence showing a strong competitive relationship between the two product categories. This evidence included the evolution of sales and cost of the two treatments over time, and doctors' apparent inertia in prescribing PPIs in favor of H2 blockers. Advocate General Mazak dismissed

these arguments, holding that the General Court had properly considered the evidence. In particular, the AG, found that "*[t]he mere fact that there were significant sales of H2 blockers at the end of the relevant period does not mean that PPIs and H2 blockers were part of the same relevant market*."

Second, AZ argued that the General Court had erred in its assessment of competition on the merits in the context of dealings with patent offices. Two grounds of appeal were put forward.

- AZ argued that the Court should not have dismissed as irrelevant AZ's argument that it reasonably and in good faith considered itself entitled to request and be issued with SPCs for Losec. Advocate General Mazak rejected this ground. Recalling that the concept of abuse was an objective one, Advocate General Mazak held that a dominant undertaking should not make any objectively misleading representations to public authorities in order to obtain legal rights, irrespective of its genuinely held beliefs. The undertaking's subjective beliefs were irrelevant. The Advocate General, moreover, observed that the General Court had unambiguously concluded on the facts that AZ's representations were manifestly non-transparent and in some cases deliberately misleading, as a result of AZ holding back information in its possession that was pertinent to the assessment of SPCs.

AZ argued that the exercise of a legal right to withdraw marketing authorizations did not constitute conduct tending to restrict competition. AZ argued that it was necessary to show – as in duty to deal cases – that a dominant undertaking's exercise of its legal rights tended to eliminate any effective competition. Advocate General Mazak considered at some length the threshold for the standard of proof required to prove anti-competitive effect. In the Advocate General's view, it was necessary to show, taking into account the specific facts of a case, that it was plausible the impugned conduct (at the time it was implemented) harmed or could harm competition.

- Advocate General Mazak considered, further, that there was no need to show that the impugned conduct had harmed or could harm competition. It was sufficient for the competition authority to show that the anti-competitive effect was not so remote from the conduct that a causal link between the conduct and the effect was implausible. It followed that the misleading representations were capable of having anti-competitive effect at the time that they were made, even though, subsequently, certain patent offices had not allowed themselves to be misled or competitors had obtained revocation of AZ's SPCs. The Advocate General summarized: "*this is not a situation where conduct 'would only restrict competition if a series of further contingencies were to occur'. Rather, this is clearly more akin to a situation where conduct would restrict competition unless further contingencies (such as the intervention of third parties) occurred to prevent that happening*".

The Opinion offers a further illustration of the role of competition law in monitoring and circumscribing dominant undertakings' use of regulatory procedures in circumstances where such procedures can have strategic implications. The Opinion confirms that any "*objectively misleading*" statements made by a dominant undertaking to patent authorities can constitute abusive conduct, irrespective of the absence of fraud or intent to deceive on the part of the undertaking. The Opinion makes clear that while AZ's conduct was "*objectively misleading*", the mere non-disclosure of a legal interpretation of the rules governing SPCs would not have been.

MERGERS & ACQUISITIONS

First-phase decisions without Undertakings

Case COMP/M.6438 Saria/Teeuwissen/Jagero II/Quintet/Bioiberica

On February 10, 2012, the European Commission approved the purchase, by Saria Bio-Industries AG & Co. KG and other individual shareholders, of four companies active in the commercialisation of meat for human consumption, pet food and pharmaceutical ingredients.

The transaction led to affected markets in the production and sale of ingredients for wet pet food in the UK and France. However, due to, inter alia, the entities not being each other's closest competitors, low switching costs and no vertical integration with abattoirs, the transaction was held to not have a significant impact on the structure of the relevant market.

The central competition issue was the extent to which the purchaser would exercise control over the targets post-transaction. There were three notifying parties to the transaction, Mr Laham, Mr Ruiz and Saria and four targets, Teeuwissen Holding B.V. ("Teeuwissen"), Quintet Beheer B.V. ("Quintet"), Bioiberica S.A. ("Bioiberica"), and Jagero Holding II, S.L. ("Jagero II") (together, the "Targets"). The purchase of the Targets was viewed as a single concentration by the Commission.

Because Saria would possess 50% of the voting rights with the remainder spread between several other shareholders, the notifying

parties and the Commission agreed that, post-transaction, Saria would exercise sole negative control of both Quintet and Bioiberica.

The notifying parties believed that, as Saria would own 50% of the capital of Jagero II, but significantly less than 50% of the voting rights (due to the existence of numerous priority shares retained by Mr Laham and Mr Ruiz), Saria would exercise de facto joint control over Jagero II together with Mr Laham and Mr Ruiz. The Commission agreed with the notifying parties, concluding that as Saria enjoyed a position of financial strength over Mr Laham and Mr Ruiz, and as they both hold interests in companies under Saria's de facto control, Mr Laham and Mr Ruiz were unlikely to exercise their priority rights in Jagero II against Saria.

However, the Commission did not agree with the notifying parties' submissions concerning control of Teeuwissen. The notifying parties believed that, as Saria would own 50% of the capital, with Jagero Holdings BV controlling the other 50%, Teeuwissen would also be under Saria's sole negative control. The Commission, however, decided that, although there is no formal agreement between the shareholders of Jagero Holdings to exercise their voting rights jointly, these shareholders would have a strong incentive to align their voting positions with Mr Laham, who is also the president of Teeuwissen, in order to prevent Saria from autonomously managing the entity. Therefore the Commission held that Mr. Laham would be able post-transaction to create a deadlock situation with Saria, creating a situation of de facto joint control instead of sole negative control.

Case COMP/M.6504 Linde/Air Products Homecare

On April 18, 2012, the European Commission approved German company Linde's purchase of Air Products and Chemicals, Inc's respiratory homecare services, in Belgium, France, Germany, Spain, and Portugal ("APH"). The respiratory homecare services market encompasses the provision respiratory and some non-respiratory services to patients in their homes.

Although the Commission found that Linde and APH overlapped in the provision of homecare services in all five relevant jurisdictions, due to the parties' limited presence in France, and significant numbers of competitors in Germany, Spain and Belgium, it concluded that the transaction would not give rise to horizontal competition concerns in these countries. The Commission also investigated an affected vertical relationship between the parties in the provision of medical oxygen and oxygen therapy in Belgium, France and Germany. The Commission concluded that no competition concerns were raised by the transaction in these countries due to, inter alia, moderate market shares and the creation of a new oxygen supplier (Air Products and Chemicals, Inc's) that would no longer be vertically integrated.

The principal competition concern was the parties' overlapping activities in all homecare segments in Portugal, with combined markets shares ranging from 50-70%. The Commission noted that these high market shares could be the result of Linde's exclusivity in both the Algarve and Setúbal, and APH's semi-exclusive regime in Santarem and Alentejo. To address the Commission's concerns with respect to the Portuguese markets, on March 23, 2012, Linde offered to divest certain assets in Portugal, which would eliminate the overlap between the parties' activities in this country.

However, in light of evidence that suggested (1) smaller competitors had achieved stronger market positions through recent tenders and (2) the exclusivity regimes mentioned above would be amended in 2012 or early 2013, when a nationwide call for tender would be issued, the Commission held that the offered divestment was not required and cleared the transaction unconditionally.

Case COMP/M.6477 BP/Chevron/ENI/Sonangol/Total/JV

On May 16, 2012, the European Commission approved the establishment of a JV intended to be active in the production of Liquefied Natural Gas ("LNG") based on gas supplied from off-shore exploration blocks in Angola. Although the JV parents (BP, Chevron, Eni, Sonangol and Total) initially planned to sell the LNG only to their affiliates (in proportion to their equity shareholdings) for re-sale in the U.S., they ultimately chose to create a full-function JV that would market its LNG to third parties.

The natural gas found by the JV would be transported along pipelines, constructed by the parents carrying out oil exploration in the blocks, and liquefied at the JV's liquefaction plant in Angola to become LNG. This LNG would then be transported in tankers to customers where re-gasification could occur.

Due to the moderate combined market share of the JV parents in the LNG wholesale supply market in the EEA, and the large number of credible competitors active in this market, the Commission concluded that the JV would not pose a threat to effective competition. This conclusion was reached even though in certain EEA countries, the parents' capacity rights in re-gasification terminals represented a share of over 40%. In this regard the Commission stated that the EU legislation guaranteeing third party access to gas import infrastructures in each member state (including re-gasification

terminals) would prevent the parents from foreclosing access to these terminals to third parties. The Commission also noted the lack of transparency within the LNG industry meaning that tacit coordination among gas producers would be difficult to achieve.

Second-phase decisions without Undertakings

Case COMP/M.6101 UPM/Myllykoski and Rhein Papier

The Commission has published its decision of July 13, 2011, unconditionally clearing the acquisition of sole control of Myllykoski Corporation ("Myllykoski") and Rhein Papier GmbH ("Rhein Papier") by UPM-Kymmene Corporation ("UPM"), all companies being active in the production and marketing of paper products.

The transaction gave rise to horizontal overlaps in the production and distribution of magazine paper, newsprint, acquisition of recovered paper, wood procurement, and production of wood pulp, as well as vertical overlaps in the markets wood procurement (pulp, sawn timber, and wood panel products downstream), production of wood pulp (magazine paper downstream), generation and wholesale supply of electricity (magazine paper downstream), and acquisition of recovered paper (pulp downstream). Only the market definition for magazine paper was examined in detail, with the precise definition of the other markets listed above being left open.

Both parties were active in the market for supply of all grades of magazine paper with the exception of wood-free paper and machine finished coated paper ("MFC"). The Commission noted that the various grades of magazine paper represent a continuum of different qualities and prices, which in general terms runs from wood-free coated paper (used mainly for magazine covers or very high-quality corporate presentations such as annual reports), through to coated mechanical reels ("CMR"), and finally to supercalendered paper grades ("SC"). CMR and SC papers, which themselves can be further segmented into sub-grades, are primarily used for publication of consumer magazines, catalogues and advertising/ direct marketing materials. The Commission found that the boundaries between the different magazine paper grades and sub-grades have become increasingly blurred as production technology has improved such that lower grades now bear many of the characteristics of higher grade products.

The Commission, following its practice in previous cases, determined that all grades of wood-containing paper (e.g., both SC and CMR paper) fell into one product market, while wood-free coated ("WFC") paper fell into another. The Commission reached this conclusion on the grounds that wood-free paper and wood-containing paper have different characteristics, applications, and prices, and that there is limited, if any, supply-side substitutability between WFC and other types of magazine paper. The Commission did not subdivide the market for wood-containing paper further, having found through its market investigation that SC and CMR grades were substitutable, and that the different SC sub-grades constitute an increasingly tight continuum of qualities and prices. Newsprint was considered by the Commission to be a separate market, which can be distinguished from magazine papers by its relatively low cost and high strength. However, the Commission did find that new paper products, called SC-B Equivalent papers, produced on upgraded improved newsprint machines had similar characteristics to SC-B (a sub-grade of SC) paper products. The Commission noted that customers and producers viewed prices of SC-B Equivalent paper as similar or very close to SC-B products. The Commission concluded that SC-B Equivalent was another type of SC paper and thus fell within the wood-containing magazine paper market. The Commission defined the geographic market for wood-containing magazine paper as covering the EEA and Switzerland.

The Commission found that the transaction would lead to combined market shares of 40-50% in the wood-containing magazine paper market, and that although market shares at this level can lead to competition concerns, there were in this case several significant competitors with substantial market shares and financial resources who could ably constrain the parties post-transaction. The Commission stressed that SC-B Equivalent producers represented a substantial competitive force in the magazine paper market, and had significantly increased their sales since the products were introduced. The Commission found that the competitive pressure which these producers exert was likely to increase in the future, because: (1) newsprint producers will try to expand their sales in the SC-B Equivalent paper in the face of rapidly declining demand for newsprint; (2) newsprint producers will want to move production from improved newsprint to SC-B qualities to amortize the considerable investments they have made in improving their facilities; (3) newsprint producers will have incentive to sell SC-B Equivalent papers are their margins are generally higher than those for newsprint; and (4) both the current SC-B Equivalent paper producers and their customers expect the sales of this product to increase in the future.

The Commission did not identify any competition concerns for arising from the transaction in the market for newsprint as the combined entity would continue to face competition from Stora Enso (which would remain the largest player overall (based on capacity)) as well as four other important players – Norske Skog, SCA, Holmen, and Palm. Similarly, the Commission found that no competition concerns arose with respect to the other horizontal overlaps, namely, acquisition of recovered paper, wood procurement, and production of wood pulp, as the combined market shares of the parties would be small (i.e., <20%).

The Commission held that the transaction would not lessen competition in any of the vertically affected markets (wood procurement (pulp, sawn timber, and wood panel products downstream), production of wood pulp (magazine paper downstream), generation and wholesale supply of electricity (magazine paper downstream), acquisition of recovered paper (pulp downstream)) as in each, the merged entity's market share would be either minimal or insufficient for a successful input or output foreclosure strategy.

Case COMP/M.6214 Seagate Technology/the HDD Business of Samsung Electronics

The Commission has published its decision of October 19, 2011, unconditionally clearing Seagate Technology's acquisition of the hard disk drive ("HDD") business of Samsung Electronics following a Phase II investigation.

A decisive feature of the Commission's decision was its decision to assess the transaction ahead of a contemporaneous merger affecting the same relevant markets, namely Western Digital's acquisition of Viviti Technologies, according to a priority principle based on the date of notification of the respective transactions, in accordance with its approach in recent instances of parallel mergers. The Commission justified its approach on the basis that a notified transaction which will not significantly impede effective competition in the internal market, or in a substantial part thereof, is entitled to have its operation cleared without taking into account future changes to the market conditions resulting from subsequently notified transactions that require approval from the Commission. As such, the Commission held that the competitive conditions existing at the time of notification constituted the relevant framework for evaluating the effects of the transaction, without taking into account future changes arising from the parallel transaction.

The significance of this application of the priority principle was that Western Digital's acquisition of Viviti Technologies, which was notified one day after the Seagate/Samsung transaction, was assessed in the light of the competitive situation that would prevail after the Seagate/Samsung transaction, while the Commission's assessment of the Seagate/Samsung transaction was based on the competitive situation prevailing at the time of notification by Seagate, namely a market structure with five independent HDD suppliers: Seagate, Samsung, Western Digital, Viviti Technologies, and Toshiba.

In its substantive appraisal of the transaction, the Commission highlighted the importance of so-called "multi-sourcing" for HDD customers (i.e., making purchases of their HDD requirements from at least two suppliers), due to the need to ensure security of supply as well as competitive pricing. The Commission's investigation demonstrated that three qualified and reliable suppliers was sufficient to ensure customers could undertake an effective multi-sourcing policy, and since at least both WD and HGST could be categorized as qualified and reliable by HDD customers, it followed that post-transaction the ability of customers to multi-source would not be impacted. In addition, the Commission found that Samsung was a less significant supplier to HDD customers than Seagate and the other HDD suppliers. Samsung was also found not be one of the driving forces with regard to innovation in the HDD market.

The Commission therefore concluded that the proposed transaction would not significantly impede effective competition and cleared the concentration unconditionally. Western Digital's acquisition of Viviti Technologies was, however, only cleared subject to conditions, since the reduction of HDD suppliers caused by the merger of Seagate and Samsung was held to impede customers' ability to multi-source in certain HDD segments. Western Digital has appealed the Commission's priority principle and the Commission's conditional clearance of its acquisition of Viviti Technologies before the General Court.

Second-phase decisions with Undertakings

Case COMP/M.6447 IAG/BMI

On March 30, 2012, the Commission cleared the acquisition of sole control of British Midlands Limited ("bmi") by International Aero Group ("IAG"). IAG is the holding company of airlines British Airways ("BA") and Iberia Líneas Aéreas de España, S.A. ("Iberia") subject to conditions. The IAG airlines (BA and Iberia) fly to around 200

destinations with a further 200 destinations served under various codesharing relationships. bmi, an airline which Deutsche Lufthansa AG ("LH") owned prior to the transaction, flies to over 70 destinations with more destinations served under various codesharing relationships.

The transaction affected the following markets: (1) scheduled air passenger transport services; (2) air transport of cargo; (3) ground-handling services, and (4) maintenance repair and overhaul ("MRO") services for aircraft. The Commission left open the precise definition of the product and geographic markets for ground-handling services and MRO services on the basis that the transaction would not damage competition regardless of how the markets were defined. The Commission defined the air transport of cargo market as encompassing all kinds of transported goods, but as with the markets for ground-handling and MRO services, found no serious competition concerns would arise in this market as a result of the transaction.

The Commission defined scheduled passenger air transport services as being particular origin and destination pairs ("O&D pairs" – e.g., London-Paris). Although the Commission accepted that supply-side considerations could militate against the O&D pair model, given that network carriers (large airlines that funnel flights through one or more hubs) could conceivably "fly from any point of origin to any point of destination", it concluded that "in practice network carriers build their network and decide to fly almost exclusively on routes connecting to their hubs." The Commission elected to subdivide the affected O&D markets further between time-sensitive passengers (who place value on flexibility with respect to time of departure) and non-time sensitive passengers (who are willing to forego flexibility in return for reduced price). In addition, the Commission examined the substitutability of airports in or close to the cities of London, Moscow, and Vienna, with a view to determining whether one or more of these airports would constitute an "origin/destination" distinct from the associated city. For this purpose, the Commission referred to a number of Civil Aviation Authority and British Aviation Authority reports and working papers which detailed consumer preferences with respect to the London airports. In addition, the Commission noted which airports were within 100km or 1 hour driving time from the city centre of London, a proxy for determining airport catchment areas which was used in Ryanair/Aer Lingus. However, the Commission did not treat the proxy as conclusive. The Commission reached a firm conclusion with respect to the substitutability of the London airports, and chose to assess the transaction on the narrowest definition (only London-Heathrow as the relevant origin/destination) as well as two broader definitions: a "London(three)" market comprising flights to and from Heathrow, Gatwick and City; and a "London(five)" market comprising flights to and from Heathrow, Gatwick, City, Luton and Stansted. The Commission also left open the question of the extent of substitutability of the three Moscow airports (Domodedovo, Sheremetyevo, and Vnukovo), and the two Vienna airports (Vienna and Bratislava).

The Commission held that, absent the transaction, bmi would most likely have become insolvent. In this counterfactual, bmi's substantial slot portfolio at London Heathrow would be distributed among competitors and/or new entrants, with the result that IAG would on certain routes face a greater competitive constraint than it does at present, given the level of congestion at London Heathrow.

The Commission, left open the question of whether indirect short-haul flights fall within the same market as direct short-haul flights, finding that, in one case, there would be no overlap between the parties, and that in the other, no competition concerns would arise.

The Commission found that for seven (London-Aberdeen, London-Edinburgh, London-Nice, London-Cairo, London-Moscow, London-Amman, and London-Riyadh) of the 13 direct overlap routes, the transaction would give rise to serious competition concerns. The Commission assessed market shares for various market definition permutations, with the result that the merged entity's post-transaction share ranged from 30-40% to 90-100% for the routes where the Commission had serious competition concerns. On five of the seven routes identified, two other competitors were present, while only one competitor was present on the other two routes. In finding that the transaction would reduce competition on these seven routes, the Commission emphasized that, but for the transaction, bmi would have become insolvent and would have made slots, particularly at Heathrow, available such that IAG would have faced greater competitive pressure than it does at present on these routes. As such, even where one or more competitors would retain a sizeable presence on a route post-transaction (40-50%), should the market be defined as the London five, the combined entity's strength at London Heathrow led the Commission to conclude that serious competition concerns would arise.

The Commission noted that the transaction would result in IAG increasing its share of slots at London-Heathrow from 45% to 53%. The Commission described how some competitors considered that IAG's extended portfolio would increase its slot shuffling ability and its ability to react to planned entries by moving flights to the same time as the new entrant's planned flights, or by increasing frequencies on the route, thereby forcing the new entrant to operate

at potentially inefficient levels. The Commission considered that the real effects of the Transaction on IAG's slot portfolio were too limited to increase such shuffling power materially. The Commission also noted that shuffling power did not necessarily have only anti-competitive effects, and in fact can allow a carrier to react flexibly to changes in demand patterns and thereby benefit consumers.

To address the serious competition concerns identified by the Commission with respect to six of the affected routes, IAG committed to divest slots at London Heathrow so that another airline could enter the routes and exert competitive pressure on the merged entity. The commitments would result in making available a total of 84 weekly frequencies from Heathrow. To eliminate the Commission's competition concerns with respect to the London-Amman route, IAG committed to discontinue its codeshare agreement with Royal Jordanian. Pursuant to the commitments, the slots divested would be used only on the routes where the Commission had found competition concerns to arise, but after 3 years, the airline which acquired the slots would be entitled to use the slots for any ex-Heathrow route. The Commission was satisfied that the slots commitments would lead to likely entry by one or several airlines on the routes mentioned above in a timely manner and that this entry would suffice to resolve the competition concerns identified on these markets.

STATE AID

ECJ – Judgments

Case C-124/10 P European Commission v. Électricité de France (EDF)

On June 5, 2012, the European Court of Justice dismissed an appeal brought by the Commission seeking to have set aside the judgment of the General Court,[9] which annulled a Commission decision declaring that certain measures granted by France to EDF constituted State aid that was incompatible with the common market.[10] The Court upheld the General Court's decision that the Commission had erred in refraining to apply the private investor test in assessing whether the measures implemented by France constituted incompatible State aid.

On December 16, 2003, the Commission adopted a decision finding that, in the context of the restructuring of EDF, France had granted State aid in the form of a tax claim waiver. In its appeal to the General Court, EDF argued that the measure did not constitute State aid but a capital injection, in an amount equivalent to a tax exemption, which France had granted, as EDF's sole shareholder, acting as a prudent private investor operating in a market economy.

The General Court had to decide whether the action on the part of the French State constituted action taken by the State acting as a public authority, in which case it could not be compared to that of an economic operator, thus precluding the application of the private investor test, or, if in light of its nature, object and objective pursued, it constituted an investment which could have been made by a private investor. The General Court held that, in carrying out this assessment, it is inappropriate to focus solely on the form of the measure at issue, thus the Commission had erred to rule out the application of the test only because the measure was fiscal in nature. According to the General Court, the use of legislation does not in itself preclude the possibility that, through its intervention in the capital of an undertaking, the State could be pursuing an economic objective comparable to that of a private investor. The General Court thus concluded that, given that the objective pursued by the measure was the recapitalisation of EDF, the mere fact that the claim at issue was fiscal in nature did not mean that the Commission could legitimately decline to apply the private investor test.

On appeal, the Court confirmed this reasoning, stating that, in examining whether the private investor test was applicable, the General Court had not erred in taking into account, for that purpose, the objective pursued by the French State when it adopted the contested measure. If a State wants to rely on the private investor test during the administrative procedure, it must establish unequivocally and on the basis of objective and verifiable evidence that the measure falls to be ascribed to the State acting as shareholder and not in its capacity as public authority. This evidence must show that before or at the same time as conferring the economic advantage the State decided to make an investment and that this decision is based on economic evaluations comparable to those which a rational private investor would have carried out. If the State concerned provides the Commission with the requisite evidence, it is then for the Commission to carry out a global assessment that takes into account all other evidence enabling it to determine whether the State took the measure in its capacity as shareholder or as a public authority. In this regard, the objectives pursued can also be taken into account.

The Court concluded that an economic advantage must – even where it has been granted through fiscal means – be assessed inter

9 Case T-156/04, *EDF v. Commission* 2009 ECR II-4503.

10 Commission Decision 2005/145/EC of December 16, 2003 on the State aid granted by France to EDF and the electricity and gas industries, OJ 2005 L 49/9.

alia in the light of the private investor test, if, on conclusion of the global assessment that may be required, it appears that, notwithstanding the fact that the means used were instruments of State power, the State concerned conferred that advantage in its capacity as shareholder of the undertaking belonging to it.

FINING POLICY

ECJ – Judgments

Case C-289/11 P Legris Industries SA v. European Commission

On May 3, 2012, the European Court of Justice upheld the General Court's judgment confirming the Commission's decision holding Legris Industries ("Legris") liable for the conduct of its 99.99% owned subsidiary, Comap SA ("Comap").[11]

On September 20, 2006, the Commission adopted a decision finding that Comap had infringed the cartel prohibition by participating in a set of agreements and concerted practices in the copper fitting business from December 1988 to April 2004, and imposed a €46.8 million fine on Legris. Legris appealed the Commission decision before the General Court, arguing in particular that the Commission had failed to take into account the facts put forward by Legris to prove the lack of decisive influence over Comap. Legris held that it lacked power to interfere with Comap's management and pointed at Comap's financial and budgetary independence. The General Court rejected Legris' appeal, holding that Legris had not provided any evidence rebutting the presumption.

Legris appealed the General Court's judgment, claiming in particular that the General Court had applied a de facto non rebuttable presumption of parental liability. According to Legris, the General Court merely disregarded the evidence and arguments put forward by Legris on the basis of general considerations applicable to all relationships between parent companies and fully-owned subsidiaries, rather than on the basis of a factual and reasoned assessment. The de facto non-rebuttable presumption also resulted from Legris being required to provide negative evidence of its inability to exercise effective control over its subsidiary. Legris further challenged the General Court's reasoning rejecting the group's organizational model as proof of Comap's independence. The General Court considered that maximum delegation to the subsidiary, as was the case here, proves that the holding company has effective control over the subsidiary's activities. Finally, Legris blamed the General Court for not having applied its own case law according to which the presumption is not applicable to financial holdings, that is a company with no activity of its own and whose interest in the subsidiary is purely financial.[12]

The Court rejected these arguments recalling that the General Court "*has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice*". The Court held that in this case, Legris did not rely on a substantive inaccuracy in the General Court findings or a distortion of the evidence, but on the General Court's alleged incorrect appraisal of these various elements, in reality asking the Court to reappraise the evidence that the General Court considered as insufficient to rebut the parent liability presumption, which fell outside the Court's competence. The Court also reaffirmed[13] that the fact that it is difficult to furnish evidence necessary to rebut a presumption does not imply, in itself, that the presumption is irrebuttable, especially where the entity against which the presumption operates is best placed to find such evidence.

GC – Judgments

Case T-360/09 E.ON Ruhrgas AG and E.ON AG v. Commission and case T-370/09 GDF Suez v Commission

On June 29, 2012, the General Court rendered its judgment in appeals against a 2009 Commission decision imposing fines totaling €553 million on both GDF Suez SA ("GDF") and E.ON Ruhrgas AG ("E.ON") for sharing the French and German markets for natural gas, in breach of Article 101 TFEU.[14]

GDF and E.ON concluded a market-sharing agreement (the "MEGAL Agreement") on July 18, 1975 when they decided to construct and operate the MEGAL gas pipeline across Germany in order to import Russian gas to Germany and France. On July 18, 1975, GDF and E.ON also signed 13 letters (the "Side Letters") which provided, inter alia, that capacities contracted by GDF or E.ON for transportation through the MEGAL pipeline would be purchased and transited for the purposes of consumption in France or Germany respectively. The Side Letters furthermore provided that GDF undertook not to deliver or supply directly and/or indirectly any gas in connection with the

11 Case T-376/06, *Legris Industries/Commission*, judgment of March 24, 2011, not yet published.

12 Case T-24/05, *Alliance One International*, 2010 ECR II-5329, paras. 195 and 197.

13 See Case C-521/09 P, *Elf Aquitaine*, judgment of September 29, 2011, not yet published.

14 Case COMP/39.401 — *E.ON/GDF*, Commission decision of July 8, 2009.

MEGAL agreement to any customer in Germany. However, by an agreement dated August 13, 2004, GDF and E.ON confirmed that they had long regarded these provisions contained in the side letters as "null and void." On March 23, 2006, GDF and E.ON signed a consortium agreement (the "2005 Agreement") reformulating their contractual relationship regarding MEGAL and they subsequently annulled all other agreements relating to MEGAL concluded between them prior to the 2005 Agreement.

According to the Commission, the infringement began in Germany on the date the MEGAL pipeline became operational (January 1, 1980) and began in France when the First Gas Directive should have been transposed and the French market become liberalized, on August 10, 2000. The Commission was furthermore of the opinion that although GDF's legal monopoly on the import and supply of gas was only abolished on January 1, 2003, competition could have been restricted from August 10, 2000, inasmuch as, as of that date, GDF's competitors could have supplied certain customers in France. The infringement ended in both markets on September 30, 2005, since the Commission considered that although the two clauses contained in the Side Letters had been officially annulled in August 2004, the restrictions on GDF's use of the pipeline only ended at the end of September 2005.

GDF and E.ON appealed the Commission decision. On June 29, 2012, the General Court (the "Court") delivered its judgment rejecting most of the companies' arguments. However, in relation to the duration of the infringement, the Court held that the Commission had erred on two points.

In the French market, the Court found that the Commission had not erred in finding that E.ON and GDF were potential competitors from August 10, 2000. However, the Court decided that E.ON and GDF enforced their agreement regarding the French market only until they declared it "null and void" in 2004, rejecting the Commission's allegation that it continued to produce anti-competitive effects until 2005, since the Commission did not put forward any evidence to support such conclusion.

In relation to the German market, the Court found that a number of documents subsequent to August 2004 showed the continuation of the infringement, upholding the Commission's position that the infringement ended only on September 30, 2005. None of the alternative explanations of GDF's conduct called that finding into question. However, regarding the commencement of the infringement, the Court found that the existence of certain demarcation agreements amongst energy distribution companies and between those companies and local authorities, as well as exclusive concessions for gas distribution gave E.ON a de facto monopoly independent from the MEGAL agreements from 1980 to at least April 1998. Thus, according to the Court, the Commission had not established that there was potential competition on the German market for gas from January 1, 1980 to April 24, 1998. This error did not, however, affect the fine imposed since the Commission in its decision had applied a duration of infringement on the German market of only 7.5 years (from April 24, 1998 to September 30, 2005) when calculating the fine.

The Court held that the Commission's approach in setting the amount of the fine did not take into account all of the relevant circumstances and that the Court was not bound to follow that method. The Court held that the final amount of the fine imposed on each company must, particularly in light of the duration and gravity of the infringement, be set at €320 million. This is the highest fine reduction ever granted by the Court.

POLICY AND PROCEDURE

AG Opinions

Case C-199/11 European Community v. Otis NV and others

On June 26, 2012 Advocate General Cruz Villalón issued his opinion in connection with preliminary questions of the Brussels' Commercial Court (*Rechtbank van Koophandel*, the "Commercial Court") as to whether the Commission, representing the (then) European Community (the "Community"), can bring a claim for damages against participants in an elevator cartel that was fined by the Commission.

After a 3-year investigation, the Commission issued a decision in 2007 fining several manufacturers of elevators and escalators (the "Manufacturers") for infringing Article 101(1) TFEU. The Manufacturers appealed unsuccessfully against this decision before the (then) Court of First Instance ("CFI"). Pending the appeal, the Commission started a civil procedure before the Commercial Court to claim damages for the losses the Community had incurred when purchasing elevators and escalators of the Manufacturers above market price.

The Commercial Court decided to interrupt the proceeding to ask the European Court of Justice to rule on the following issues: (i) whether the Commission was allowed to represent the Community in this proceeding and (ii) whether the facts that (a) the Commission's infringement decision is binding upon national judges and (b) the Commission was the entity claiming damages in the civil procedure were compatible with the right to a fair trial and the principle of equality of arms.

As regards the question whether the Commission was allowed to represent the Community in claiming damages, the Advocate General held that Article 282 EC should apply, since the infringements took place before the entry into force of the Lisbon Treaty. Article 282 EC provided that the Commission had the exclusive competence to represent the Community in, *inter alia*¸ legal proceedings whose competence could be delegated to other Community institutions according to the case-law of the ECJ. The Advocate General therefore concluded that the Commission could legitimately represent the Community in the procedure before the Commercial Court.

Although the Advocate General recognized that the dual role of the Commission might potentially restrict the right to a fair trial, he concluded this was not an issue as a result of the checks and balances in the European system of legal protection and the particular facts in this instance.

Firstly, Cruz Villalón emphasized that the damages claim was brought, not by the Commission, but by the Community and the Commission was competent to represent the Community in any legal proceedings, not simply those related to antitrust matters. Secondly, he explained the Commission's dual role is a consequence of a "*normal division of competences within a complex political and administrative organization*." He stressed the importance of this legal development insofar as public bodies now entrust the protection of their private rights to courts. Thirdly, Cruz Villalón highlighted the fact that, although the Commission's infringement decision is binding upon the national court, the Manufacturers had the right to appeal against this decision in front of the European courts. Fourthly, national courts are allowed to interrupt proceedings before them and ask the European Court of Justice for a preliminary ruling on the lawfulness of the Commission decision.

Finally, Advocate General Cruz Villalón held that the Commission's potential information advantage may only restrict the equality of arms principle where the information is actually relied upon in the proceedings. This was not the case here. Furthermore, the Commission pointed to its policy of having Chinese walls for such related procedures as well as the fact that Article 28 of Regulation 1/2003 requires competition authorities to use information collected in connection with an antitrust investigation "*only for the purpose for which it was acquired*."

GC – Judgments

Case T-167/08 Microsoft

On June 27, 2012, the General Court essentially upheld the Commission's decision of February 27, 2008, imposing a periodic penalty payment on Microsoft for failing to comply with a remedy imposed by a previous decision.[15]

In its Decision of March 24, 2004 (the "2004 Decision"), the Commission found that Microsoft had abused its dominant position on the market for PC operating systems by, among other things, refusing to make available to its competitors interoperability information.[16] By way of remedy, the Commission ordered Microsoft to grant access to that information and to allow the use of it on reasonable and non-discriminatory terms. Following this decision, Microsoft developed pricing principles, in negotiation with the Commission. On February 27, 2008, however, the Commission imposed on Microsoft a penalty payment of €899 million, pursuant to Article 24 of regulation 1/2003, on the ground that the remuneration requested by Microsoft for access to the interoperability information was unreasonable.[17] Microsoft appealed this decision before the General Court.

The Court found that the Commission was entitled to impose penalty payment without further specifying what would constitute a reasonable remuneration. Since the objectives of the 2004 Decision were clear, and the pricing principles developed together with the Commission provided sufficiently precise criteria, Microsoft could assess whether the remuneration rates it proposed were reasonable for purposes of the 2004 Decision.

The Court then rejected Microsoft's argument that the creation of an independent monitoring trustee mechanism ensured that all remuneration eventually paid would be reasonable and in accordance with the pricing principles defined with the Commission. This mechanism was intended, at the very most, to handle the situation should Microsoft persist in its abuse, in order to settle possible disputes quickly, but not to restore the competitive situation as it would have been had Microsoft voluntarily offered access to the interoperability information on reasonable terms.

In order to assess whether Microsoft's remuneration rates were reasonable, the Court held that the innovative character of the technologies in question constitutes a relevant criterion, since it

15 Case T-167/08, *Microsoft Corp. v. European Commission*, judgment of June 27, 2012, not yet published.

16 Case COMP/37.792 – *Microsoft*, Commission decision of March 24, 2004, OJ 2007 L 32/23.

17 Case COMP/37.792 – *Microsoft*, Commission decision of February 27, 2008, OJ 2009 C 166/20.

indicates whether those rates reflect the intrinsic value of a technology, rather than a strategic value stemming from Microsoft's market power. The innovative character of the technologies can be assessed by reference to their constituent elements, namely novelty and inventive step. This assessment precludes any remuneration reflecting the strategic value of the interoperability information. A market valuation of comparable technologies is also required to assess the value that the interoperability information would have in the absence of any dominant operator.

The Court however altered the amount of the periodic penalty payment in order to take account of a letter in which the Commission accepted that Microsoft could restrict distribution of products developed by its open source competitors on the basis of non-patented and non-inventive interoperability information, pending the Court's judgment on the 2004 Decision. The Court concluded that the impact of this letter should be taken into account in determining the gravity of the conduct and justified a reduction of the penalty payment of €39 million.

Microsoft is the only company on which a periodic penalty payment has ever been imposed under Article 24 of regulation 1/2003. This judgment confirms the ability of the Commission to impose significant periodic penalty payment for non-compliance with remedies imposed by its decision, even where the interpretation of the remedy obligation, such as the obligation to charge "reasonable rates", can give scope for discussion.

Case T-439/07 Coats Holdings Ltd. v Commission

On June 27, 2012, the General Court upheld the Commission's Decision of September 19, 2007,[18] imposing a €110 million fine on Coats Holdings Ltd. ("Coats") for having agreed to share the haberdashery market with William Prym/Prim Fashion for a period of 21 years, in breach of Article 101 TFEU.[19]

The General Court first upheld the Commission's assessment of the evidence to prove the existence of an infringement. The Court held that, although it is for the Commission to produce sufficiently precise and coherent proof of the existence of an infringement, when it relies on documentary evidence, the burden is on the undertaking concerned not merely to submit an alternative explanation of the facts found by the Commission, but to show that the evidence relied on is insufficient to establish the existence of an infringement. In the present case, the Court found that Coats had failed to do so.

The Court also rejected Coats' claim on the lack of probative value of specific pieces of evidence, and recalled that each item of evidence on which the Commission relies must not individually comply with the relevant standard of proof but must be assessed as a whole. Given that anti-competitive activities take place clandestinely, the existence of an infringement must be inferred from a number of coincidences and indicia, which, taken together, may constitute evidence of an infringement to competition rules, in the absence of another plausible explanation. The Court also stressed that the mere fact that information has been provided by an undertaking, which applied for leniency, does not call into question its probative value, even though statements made by such undertakings must be assessed with caution and, in general, cannot be regarded as particularly reliable evidence if they have not been corroborated by other evidence. Application for leniency does not necessarily create an incentive for the undertaking to submit distorted evidence, since any attempt to mislead the Commission could call into question the sincerity and completeness of cooperation of the applicant, and thereby jeopardize its chances of benefiting fully from a fine reduction.

Coats also claimed that the Commission had failed to prove a single and continuous infringement from January 1975 to July 1998 and pointed out the fact that there was no evidence that the alleged infringement had continued for a period of more than eleven years, from April 1977 to November 1988.

The Court recalled that "the concept of a single infringement covers a situation in which a number of undertakings have participated in an infringement consisting in continuous conduct in pursuit of a single economic aim designed to distort competition or in individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, who are aware that they are participating in the common object)".[20] The Court recalled that in the context of an infringement extending over a number of years, the fact that the cartel is shown to have operated during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the cartel, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement. The Court considered that the standard of proof regarding market-sharing continuous infringements should be less stringent than for price-fixing infringements, since, unlike price-fixing agreements, a

18 Case COMP/39.168, *PO/Hard Haberdashery: Fasteners*, Commission Decision of September 19, 2007, OJ 2009 C 47/8.

19 Case T-439/07, *Coats Holdings Ltd v. European Commission*, judgement of June 27, 2012, not yet published.

20 Para. 141, citing Case T-53/03 BPB v Commission [2008] ECR II 1333, paragraph 257.

market-sharing agreement must be respected by the parties to the agreement from its conclusion and does not require regular meetings of the parties. The Court therefore dismissed Coats' plea as unfounded.

This judgment confirms the General Court's reluctance to impose a high standard of proof on the Commission, especially in cases involving an alleged single and continuous infringement.

Case T-344/08 EnBW v. Commission

On May 22, 2012, the General Court annulled the Commission's Decision of June 16, 2008, refusing to grant access to EnBW to the gas insulated switchgear cartel file, including leniency documents (the "2008 Decision").[21]

Following the adoption of the gas insulated switchgear cartel decision of January 24, 2007 (the "GIS Decision"),[22] which imposed fines totaling to €750 million to a number of companies for having participated in a cartel on the market for gas insulated switchgear, EnBW sought from the Commission full access to the documents relating to the proceedings, under the so-called Transparency Regulation,[23] in order to straighten its damages claim. The Transparency Regulation gives a right of access to all documents held by an institution of the European Union (such as the Commission) subject to some exceptions, inter alia where disclosure would undermine the protection of (i) commercial interests of a natural or legal person; (ii) court proceedings and legal advice; or (iii) the purpose of the inspections, investigations and audits.

In the 2008 Decision, the Commission classified the requested documents into five categories: (i) documents provided in connection with an immunity or leniency application; (ii) requests for information and parties' replies to those requests; (iii) documents obtained during inspections; (iv) statement of objections and parties' replies thereto; and (v) internal documents such as documents relating to the facts and procedural documents. The Commission considered that each of the five categories fell within the exceptions provided for by the Transparency Regulation and that there was no overriding interest in granting access.

The Court assessed whether the Commission had met the necessary conditions for it to dispense with the requirement to undertake and individual and specific overview of the relevant documents. In particular, the Court assessed whether the Commission could dispense with such a requirement because a single justification may be applied to documents belonging to the same category, if they contain the same type of information. However, since in the underlying case, the reasoning of the Commission was essentially identical for each of the five categories, except for internal procedural documents, the Court found that the Commission's division of the documents into categories was artificial.

The Court thus held that the Commission was entitled to carry out an examination by category solely in relation to the exception concerning the protection of the purpose of investigations and only for internal procedural documents. However, when denying access to EnBW, the Commission had already adopted the GIS Decision, as a result of which there was no investigation in progress that would have been jeopardized by the disclosure of the requested documents. The Court also rejected the Commission's argument that the concept of "purpose of investigations" has a more general scope and includes the whole of the Commission's policy in regard to the punishment and prevention of cartels. The protection of the leniency program can therefore not as such serve as a basis to refuse access. The Court recalled that leniency programs are not the only means of ensuring compliance with the EU competition law. Actions for damages before national courts can also make a significant contribution to the maintenance of effective competition.

In light of the above, the Court annulled the Commission's decision. By this ruling, the Court made it all the more difficult for the Commission to prevent the disclosure of leniency documents. If this trend were to be confirmed, applicants for follow-on damages claims could rely on the Transparency Regulation to obtain documents directly from the Commission, without having to ask first for disclosure to a national court.

21 Case T-344/08 *EnBW Energie Baden-Wüttemberg v. Commission*, judgment of May 22, 2012, not yet published.

22 Case COMP/38.899, *Gas Insulated Switchgear*, Commission decision of January 24, 2007, OJ 2008 C5/7.

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

ECN

ECN's Resolution on Protection of leniency Material in the Context of Civil Damages Actions

On May 23, 2012, the European Competition Network ("ECN") issued a resolution on the protection of leniency material in the context of civil damages actions.[24] This resolution follows the European Court of Justice's *Pfleiderer* judgment,[25] where the Court held that follow-on damages claimants should not be systematically precluded from being granted access to leniency documents. In *Pfleiderer*, the Court held that, when assessing whether access to leniency documents should be granted, national jurisdictions must balance the interests in favor of disclosure, and those in favor of protecting the information provided voluntarily by a leniency applicant.

In that framework, the objective of the Resolution is to express the importance of appropriate protection of leniency material in the context of civil damages action for all the ECN Competition Authorities (the "CAs"). Leniency programs are seen by the CAs as the most effective tools for the detection, investigation and punishment of cartels as well as for providing effective deterrence against cartelization. The CAs are therefore determined to defend the effectiveness of leniency programs, which depends on the incentives offered to potential leniency applicants to come forward and cooperate. The CAs notes that, when deciding whether or not to apply for leniency, undertakings consider as an important factor the impact of such cooperation on their position in civil proceedings.

The CAs recognize that civil damage actions can make a very significant contribution to the maintenance of effective competition in the European Union, and constitute a complementary tool to enforce competition rules. However, the CAs also note that at present, they mostly rely on public enforcement, which is nourished by leniency programs. Preservation of incentives to submit leniency applications is hence important both for public and private enforcement.

Finally, the resolution stresses the importance of insuring an equivalent standard of protection of leniency material across the European Union in order to facilitate opportunities for constructive cooperation among CAs as well as the effective allocation of cases and resources.

The Resolution is a clear message to regulators and jurisdictions to take the necessary steps to protect leniency programs, while ensuring the development of private actions. The European Courts have indeed not yet adopted a clear position on the articulation between public and private enforcement of competition law and neither have the national jurisdictions. The solution adopted in each jurisdiction could therefore differ substantially between Member States.

24 Resolution of the Meeting of Heads of the European Competition Authorities of May 23, 2012 on *Protection of leniency Material in the Context of Civil Damages Actions*, http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf.

25 Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, judgment of June 14, 2011, not yet published.

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