CLEARY GOTTLIEB

EU Competition Report

JULY – SEPTEMBER 2012

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MERGERS & ACQUISITIONS

Prohibition Decisions

Case COMP/M.5830 Olympic/Aegean Airlines

On July 3, 2012, the European Commission ("the Commission") published its decision of January 26, 2011, prohibiting the acquisition of joint control of Olympic Air and Aegean Airlines ("the Airlines") by investors Vassilakis, Marfin, and Laskaridis. This was the second occasion on which the Commission prohibited a transaction in the airline sector. The Commission concluded that the transaction would constitute a merger to monopoly on certain domestic routes, and that entry was not sufficiently likely to constrain the merged entity, partly as a result of the large base advantages that the merged entity would maintain.

In line with previous decisions, the Commission identified distinct markets for passenger air transport services between two particular locations (referred to as the "origin/point of destination", or "O&D", model). The Commission left open the question of whether each O&D market could be further subdivided into submarkets for time-sensitive and non-time-sensitive passengers. The Commission concluded that alternative means of transport, such as ferries and trains, do not fall within any O&D market on the grounds that such services were not substitutable with air transport services in terms of time, price, and quality. The Commission also identified the following relevant markets: public service obligation ("PSO") routes (routes for which the carrier is determined by tender issued by the Hellenic Civil Aviation Authority and which are operated in monopoly in exchange for a subsidy), ground handling, maintenance, repair and overhaul ("MRO") services, in-flight catering, and the supply of airline seats to tour operators; no competition concerns were raised in any of these markets.

As an initial matter, the Commission dismissed the merging parties' argument that the Greek market could only sustain one full-service national carrier. The Commission concluded that, absent the transaction, the parties would continue to exert competitive pressure on one another, even if one or both later ended up restructuring or downsizing.

The Commission examined the competitive effects of the transaction in ten domestic O&D routes, as well as six international O&D routes. With respect to the international routes, the Commission held that the transaction would not give rise to competition concerns. For the Athens-Brussels route, the Commission concluded that, despite the merging parties having a substantial combined share of 60-90%, the merged entity would continue to be constrained by SN Brussels, an airline which was due to expand its services on that route. The Commission also noted in respect of the Athens-Brussels route that SN Brussels would enjoy an advantage over the merged entity, as the majority of the passengers on this route did not originate in Greece.

With respect to the Athens-Cairo route, the Commission noted that the merged entity would have a high market share and a frequency advantage over its closest competitor, Egyptair, whose market share was declining. The Commission's market investigation proved inconclusive as to whether Egyptair was a credible competitor. Nevertheless, the Commission concluded that the transaction was unlikely to impede competition: the Commission stressed that Egyptair was a flag carrier and a significant market player and it would retain a higher average point-of-sale market share than the merged entity.

However, the Commission concluded that the transaction represented a merger to quasi monopoly in the domestic O&D markets. It noted that, if alternative transport services were included in the relevant O&D markets, the Airlines' combined shares fell dramatically, to a range between 10% and 60%. However, as noted above, the Commission found that it was unlikely that ferry or train operators could constrain the merged entity's behavior, particularly with respect to fare setting. The Commission also underlined the closeness of the Airlines' competitive relationship, noting that they were the only two airlines to have extensive bases at Athens International Airport and strong brand awareness among Greek passengers.

Regarding the PSO routes, the Commission concluded that the PSO framework allows smaller and/or foreign airlines to compete effectively with the Airlines, because such airlines are granted increased revenue security from regulated fares, and can begin to operate on the relevant routes on a relatively small scale.

The Commission rejected the commitments offered by the Airlines, which included ceding landing slots at various Greek airports. The Commission concluded that the commitments would not lead to likely, timely, and sufficient market entry to sufficiently constrain the merged entity. The Commission stressed that, in light of the difficulties facing the airline sector, the commitments were unlikely to induce entry of one or more airlines of a sufficiently large scale that could establish a base at Athens International Airport.

First-phase Decisions with Undertakings

Case COMP/M.6459 Sony/Mubadala Development/EMI Music Publishing

On April 19, 2012, the Commission cleared the acquisition of EMI's music publishing business ("EMI MP") by a consortium of investors including Sony Corporation of America and Mubadala Development Company PJSC subject to conditions in Phase I. Under the terms of the transaction, Sony/ATV (a music publishing business jointly controlled by Sony Corporation of America and the Michael Jackson Estate) were to administer EMI MP after the acquisition.

The Commission considered that there were separate markets for the exploitation of the following rights: synchronization rights (synchronization of music with visual images, e.g., in advertisements and films); print rights (reproduction of sheet music); mechanical rights (dealing with the reproduction of a work); performance rights (performance of music by commercial broadcasters, e.g., radio stations, nightclubs); and online rights (comprising a combination of mechanical and performance rights). The Commission left open the question of whether there was a market for "production music" distinct from that for "synchronization rights". In addition, the Commission assessed the impact of the proposed transaction on the upstream market for the provision of publishing services to authors.

The Commission's analysis of the transaction focused on the online rights market. In so doing, the Commission reprised the "control share" theory applied in *Universal/BMG*.[1] In *Universal/BMG*, the Commission calculated so-called "control shares" based on the number of Anglo-American titles in the annual top 100 singles chart in which the parties had a share of the recording or publishing rights. The Commission concluded that a publisher with a higher control share could demand a higher price for its repertoire. The Commission explained that a merger would have a significant negative impact in those markets where the merged entity reached or exceeded a "control share" of 50%.

In the present case, instead of using the annual top 100 chart hits to calculate "control shares", the Commission accepted the parties' argument that "control shares" should be based on the songs that enter the aggregated weekly charts in a given year, thus adopting a more representative sample of "hits". As in *Universal/BMG*, the Commission did not take into account Sony Music's titles in calculating the Sony/ATV's "control share" due to the structure of Sony's recording and music publishing businesses (in particular, the fact that Sony/ATV is a joint venture with the Michael Jackson Estate).

Due to the high combined "control shares" of Sony/ATV and EMI MP in the UK and Ireland (>50%), the Commission found that the proposed transaction raised concerns with regard to the markets for the licensing of online rights in those countries. On March 27, 2012, the parties committed to divest four of their publishing catalogues and their interests in the works written by a number of Anglo-American contemporary authors within the EEA. The commitments were revised after the market investigation, and the Parties resubmitted new commitments on April, 17, 2012. This second divestment package expanded the geographic scope of the rights to be divested from the EEA to worldwide and included an additional seven Anglo-American authors, a non-solicitation clause, an increase in the total revenue associated with the package, and the identification of certain purchaser criteria. On the basis of the revised commitments, the Commission cleared the acquisition of EMI Music Publishing.

Case COMP/M.6455 SCA/Georgia-Pacific Europe

On July 5, 2012, the Commission cleared the acquisition of Georgia-Pacific LLP's European consumer-products business ("GPE") by Svenska Cellulosa Aktiebolaget SCA AB ("SCA"), subject to conditions.

In Europe, both GPE and SCA supply, amongst other things, a range of consumer tissue products under both their own brands and private labels for retailers. The principal competition concerns arose in the Dutch, Swedish, and UK/Irish markets for consumer tissue product, which is divided into four categories of tissue products. Each category within the product market is sub-divided into the production and supply of manufacturer brands and the production and supply of private labels/retailer brands.

The Commission was concerned about horizontal overlaps in the production and supply of (i) branded household towels in the Netherlands; (ii) private label toilet paper and household towels in Sweden; and (iii) branded and private label toilet paper and

1 Case COMP/M.4404 *Universal Music Group/BMG Music Publishing*, Commission decision of May 22, 2007, OJ 2007 L 230/12.

household towels in the UK and Ireland. The Commission found that, absent commitments, GPE and SCA, the two largest producers in these markets, would have combined post-merger shares of around 60-80%.

The Commission determined that, post-merger, due in part to high barriers to entry, the parties could easily price-discriminate between different customers, as tissue products are delivered according to customers' specifications and thus are customized products. Hence, even had the largest customers been able to exercise some countervailing buyer power, this would not protect smaller customers. This price discrimination would lead to a higher wholesale prices, harming the final consumer.

To address the Commission's concerns, GPE and SCA agreed to a rebranding commitment of the GPE household Dutch towel brand, a sale of the UK and Benelux manufacturer branded business, and a divestment of the Swedish and UK/Ireland retailing businesses.

First-phase Decisions Without Undertakings

Case COMP/M.6584 Vodafone Group/Cable & Wireless Worldwide

On July 3, 2012, the Commission unconditionally cleared Vodafone Group Plc's ("Vodafone") acquisition of sole control over Cable & Wireless Worldwide Plc ("CWW"). Vodafone is primarily active in mobile telecoms, whereas CWW is mainly active in fixed telecoms.

Despite numerous horizontal overlaps and vertical relationships between the companies within the fixed and mobile communications sector, the Commission found that the transaction would not raise competition concerns. The Commission concluded, in particular, that in most of the relevant markets, the parties' pre-transaction market shares were low and the transaction would result in an insignificant market share increment. The Commission further determined that the merged entity would continue to be sufficiently constrained by several competitors, including BT and/or other competitors with a non-negligible market share in the majority of the markets

In relation to fixed retail business connectivity in the UK, concerns were raised with regard to the merged entity's ability to offer rates with which its competitors' could not compete. The Commission dismissed these concerns for three reasons: (i) reduced rates could be procompetitive; (ii) the concerns were not necessarily merger-specific; and (iii) regulation in the market was sufficient to detect and address any significant market power. The presence of regulation was also held adequately to address concerns with respect to two markets in which the parties had vertical relationships.

Lastly, the Commission dismissed concerns regarding conglomerate effects, specifically that the merged entity would offer to end-users fixed-mobile combined services that may also integrate real-time communication services (the so-called "Unified Communication Services"). The Commission deemed conglomerate effects unlikely based on the presence of alternative products, customer preference for single service solutions, and the lack of incentive to foreclose on account of financial uncertainty.

Case COMP/M.6568 Cisco Systems/NDS Group

On July 23, 2012, the Commission cleared the acquisition by Cisco Systems, Inc. ("Cisco") of NDS Group Limited ("NDS"). Both Cisco and NDS supply products to pay-TV service providers: Cisco produces digital set-top boxes ("STBs"), and NDS provides technical services to digital pay-TV and content providers.

The Commission found that, in the conditional access systems ("CAS")[2] and middleware markets there was limited horizontal overlap between the worldwide activities of both applicants. However, market research suggested that, post-transaction, Cisco would become the leader in these markets.

During the market investigation, third parties expressed concerns that, post-transaction, Cisco would have the ability and incentive to (i) make NDS's software incompatible with the STBs sold by Cisco's competitors; (ii) raise its competitors' costs by charging higher licensing fees for NDS's software; and (iii) bundle its products with those of the target company.

The Commission concluded that it is in the best interest of software providers such as NDS to ensure compatibility with as many types of STBs as possible, as this gives pay-TV providers the greatest flexibility in choosing their STB and therefore increases the distribution of the relevant software. Therefore, post transaction, the merged entity would not have the incentive or ability to foreclose Cisco's competitors or raise their costs. The Commission's investigation confirmed that new pay-TV providers who feared compatibility issues or high licensing fees could use the software of one of NDS's competitors, while existing customers could switch CAS or middleware with any new STBs they created. Additionally, the Commission found that, as an alternative the pay-TV provider could also negotiate contractual safeguards to ensure that NDS' software would be compatible with their hardware.

The Commission dismissed any concerns in relation to post-transaction bundling because other STB providers, such as Google/Motorola Mobility and Pace, are able to offer the same

2 CAS are required to limit access to pay-TV services to paying subscribers and include both software and hardware components in the STBs.

bundled products, while other competitors also have the ability to combine their products. The Commission also noted that under some circumstances an STB bundling strategy could lead to efficiencies and have procompetitive effects.

Case COMP/M.5999 Sanofi-Aventis/Genzyme

The Commission published its decision of January 12, 2011, unconditionally clearing Sanofi-Aventis's acquisition of sole control of Genzyme Corporation.

The Commission's analysis focused on the potential horizontal overlaps between the parties in the treatment of multiple sclerosis. Such overlaps occurs where either (1) both parties have pipeline products in an advanced stage of development ("Phase III"), or (2) one party has a significant presence in the market (a share of over 35%), while the other party has a pipeline product in Phase III. In this case, both parties had pipeline products in Phase III, and Sanofi also already distributed a product (Copaxone), with a market share of over 35% in Austria. The parties argued that there was no overlap because Genzyme was not yet active in this market, Sanofi's rights to distribute the Copaxone would expire in 2012, and the parties' pipeline products were not expected to be direct competitors. The Commission agreed that the transaction would not lead to anti competitive horizontal effects in this market because the parties' pipeline products would only be distant competitors, and sufficient actual or potential competitors would continue to constrain the merged entity post-transaction.

The Commission's market investigation also confirmed that the parties' products for the treatment of leukemia were not close substitutes on the basis of differences in efficacy and side effects. The Commission therefore concluded that the merger posed no anti-competitive threat to this market.

The Commission also ruled out concerns in the market for immunosuppressants used in treatments of rejection in organ transplants, concluding that the parties' activities overlapped only under a wide market definition and that, in any event, the parties' products were not close competitors.

The Commission dismissed conglomerate concerns based on the wide range of uses of the products at issue, which was believed to constrain the ability and incentive to engage in tying or bundling. It further dismissed vertical concerns due to the absence of supply links between the parties for active pharmaceutical ingredients.

STATE AID

GC – Judgments

Case T-139/09 France v. Commission, Case T-243/09 Fedecom v. Commission, and Case T-328/09, PLF v. Commission

On September 27, 2012, the General Court dismissed three separate appeals brought by France, the Federation of the Economic Organization for Fruit and Vegetables (Fedecom) and the French Vegetable Producers (PLF), against a Commission decision finding that France had granted illegal and incompatible aid to the fruit and vegetable sector.[3]

On January 28, 2009, the Commission found that, between 1991 and 2002, France had granted aid, amounting to € 330 million, to the national fruit and vegetable sector in the form of contingency plans, including various measures such as price and processing support, as well as temporary stocking and destruction of excess product. This had allowed the regulation of the market price through a coordinated sectoral approach. The aid was paid through an operational fund managed by farmers' organizations structured at regional level, the so-called "economic agricultural committees". Their establishment and the rules they issued or amended were subject to the approval of the French Minister of Agriculture. Farmers contributed on a voluntary basis to the financing of up to 50% of the operational fund. The remaining contributions were made by Oniflhor, a public institution under the supervision of the French State. The subsidies were considered capable of distorting competition and had to be recovered.

The applicants argued that the Commission erred in classifying the measures in question as aid since they were financed by voluntary private contributions from operators in the sector, and public authorities did not permanently hold the sums involved.

The General Court recognized that this was the first case where measures were financed by public contributions and voluntary contributions from professionals in a sector. It identified the following relevant criteria for the assessment the public or private nature of the resources involved. According to the General Court, regardless of the initial origin of resources, one must assess the degree of intervention by the public authority in the definition of the measures and their methods of financing. The General Court stressed that the degree of State intervention could still be determinant, even if the financing of the measures took place on a voluntary basis and economic operators were not required to contribute. It therefore

3 Commission Decision C(2009)203 of January 28, 2009 on the 'contingency plans' in the fruit and vegetable sector implemented by France, OJ 2009 L 127/11.

examined how the amounts of the contributions were determined, and established that Oniflhor was the only entity entitled to fix the amounts and to determine their allocation. The General Court concluded that, although the amounts were not permanently held by public authorities, they always remained under public control and availability. That in itself was sufficient to consider the sums to be State resources.

Moreover, the General Court pointed out that the farmers could decide only whether they wanted to join the system defined by Oniflhor, and that the State, through its regional *Préfets*, had the important role of approving the economic agricultural committees, which ultimately had no actual discretion in managing the operational fund. Accordingly, the Commission was correct in taking the view that the disputed measures constituted State aid.

Finally, the General Court rejected the applicants' plea based on the protection of legitimate expectations. The General Court recalled that an expectation cannot be regarded as legitimate where, as in the present case, (1) the aid was implemented without prior notification to the Commission; and (2) there were no exceptional circumstances which, even in the absence of such notification, could have justified a legitimate expectation that the aid was lawful. The General Court therefore dismissed the appeals in their entirety.

Case T-257/10 Italy v. Commission and Case T-303/10, Wam Industriale S.p.A. v. Commission

On September 27, 2012, the General Court dismissed two separate appeals brought by Wam Industriale SpA ("Wam") and Italy against a decision of the Commission declaring that Wam had received unlawful State aid.

On May 19, 2004, the Commission found that Wam, a manufacturer of industrial machineries, had been granted illegal aid in the form of an interest rate subsidy from 1995 to 2000 and ordered recovery of the aid ("the first decision").[4] The Commission held that the loan that the company had to repay over five years at a rate of 4.4% was below the normal market rate of 11%. Italy and Wam appealed the first decision claiming, *inter alia*, that the Commission had failed to adequately state the reasons for its decision and did not explain to what extent the alleged aid was capable of having an effect on trade between Member States and why it would distort competition. On September 6, 2006, the General Court concluded that the Commission's reasoning was not sufficient to explain how the grant to Wam would likely affect trade between Member States or distort competition and annulled the first decision.[5] The Commission appealed this judgment before the Court of Justice of the European Union ("the Court of Justice"). This appeal was dismissed on April 30, 2009.[6]

Taking into account the previous annulment and the findings of the Courts, on March 24, 2010, the Commission, without re-opening the investigation phase, adopted a new decision. The Commission qualified the loans granted to Wam as unlawful aid, arguing that they had altered the market structure by making exports easier for Wam compared to other competitors. The Commission explained that, by receiving a loan to finance a market penetration program, Wam reduced its costs and therefore was able either to lower its prices or increase its profit margin.[7] Finally, Wam could reinvest the overall profit from these activities to strengthen its market position in the EU. Therefore, although the amounts in question were relatively small, they could be considered a State aid capable of distorting competition.

Italy and Wam appealed the decision, putting forward several arguments including the breach of the principles of *ne bis in idem, audi alteram partem*, and *res judicata*. In particular, they maintained that their rights of defense had been violated as the Commission had not re-opened a formal investigation procedure before adopting the new decision.

The General Court concluded that the reasons of fact and law set out by the Commission in the first decision were neither erroneous nor insufficient; the Commission simply did not set them out in a clear way. In the contested decision, the Commission did not add any new elements; it merely elaborated on the facts already included in the first decision. The General Court stressed that, to replace a measure that was annulled, the procedure must be resumed at the point in time at which the error in law occurred, and that it is for the institution concerned to draw the appropriate consequences of an annulment. In the present case, the illegality did not affect the investigation phase, as it had occurred afterwards, when the Commission adopted the first decision. Moreover, both applicants were given the opportunity to submit observations and participate in the procedure in due time. Accordingly, it was not necessary to re-open the investigation.

4 Commission Decision 2006/177/EC on State aid implemented by Italy for Wam SpA, OJ 2006 L 63/11.

5 Joined Cases T-304/04 and T-316/04 *Italy and Wam v. Commission*, 2006 ECR II-64.

6 Case C-494/06 P *Commission v. Italy and WAM*, 2009 ECR I-3639.

7 Commission Decision 2010/473/EU on the State aid C 4/03 (ex NN 102/02) implemented by Italy for WAM SpA, OJ 2010 L 235/26.

The General Court dismissed both appeals, concluding that the Commission did not err by not opening a new investigation phase, and clearly set out the reasons why it considered that the support granted to Wam by Italy would affect trade and disrupt competition within the EU.

Case T-565/08 Corsica Ferries France SAS v. Commission

On September 11, 2009, the General Court annulled a Commission decision declaring that certain French measures benefiting Société nationale maritime Corse-Méditerranée SA (SNCM) were compatible with the common market and that other measures did not constitute State aid.[8]

In 2002, France notified the Commission of a capital investment in SNCM of € 76 million (€ 53.48 million in the form of public service bonds and the remaining € 22.52 million in the form of restructuring aid). Four years later, in 2006, France notified the Commission of a privatization plan (recapitalization of SNCM for the sum of € 158 million, an additional capital investment of € 8.75 million, and an advance on a current account of € 38.5 million aimed at financing a possible commercial plan). The Commission found that the 2002 measures were compatible with the common market and that the 2006 measures did not constitute State aid. Corsica Ferries SAS, SNCM's main competitor, appealed this decision.

The applicant first argued that the Commission erred when assessing the capital contribution of € 53.48 as public service compensation. The General Court disagreed, concluding that the Commission correctly examined the existence of a service of general economic interest and legitimately referred back to a former decision regarding the fulfillment of the Altmark criteria.

The applicant also argued that the Commission had committed a manifest error of appreciation in its assessment of the sale of SNCM at a negative price of € 158 million. The Commission applied the market investor principle and compared the selling price to the hypothetical costs of liquidation. It found that, bearing in mind past social unrest, France would have been obliged to make additional redundancy payments, a practice common among large companies, to protect the brand image of the French State. The costs associated with those measures would thus have to be included in the calculation of the costs of liquidation. Given that the hypothetical costs of liquidation would have been higher than the recapitalization expenses, the Commission concluded that the negative selling price of € 158 million did not constitute State aid.

The General Court found that, in a social market economy, a prudent private investor would not have ignored its responsibilities towards all of the undertaking's shareholders, nor the evolution of the social and economic context in which it was carrying out its activities. It therefore recognized that a private investor in a market economy, depending on the circumstances, might legitimately cover redundancy costs with a view to promoting peaceful social dialogue and maintaining the company's brand image. However, the payment of such redundancy costs cannot serve exclusively social or political aims; it also has to have an economic rationale. The General Court found that, in this particular case, the Commission had failed to demonstrate that the payment of additional redundancy benefits is a sufficiently established practice among private undertakings. Furthermore, it had failed to establish that the additional payments would generate indirect material profit in the long term for the French State.

Thirdly, the General Court held that the Commission's analysis concerning the capital investment of € 8.75 million was incomplete. The Commission had found that the investment by the French State did not confer any advantage on SNCM because other private parties had made parallel capital contributions to SNCM under comparable conditions. The General Court agreed that the private and public investments were concurrent, but stated that the Commission had failed to adequately take into account an important clause concerning the cancellation of the sale and the fixed yield of the State's capital investment in its assessment of the comparable nature of the investment conditions.

Finally, the General Court examined the social measures in the amount of € 38.5 million. It held that the mere fact that a measure pursues social aims is not sufficient for it to avoid being classified as State aid. It held that the measure conferred an advantage on SNCM and therefore constituted State aid. Consequently, the General Court annulled the Commission's decision.

8 Commission Decision 2009/611/EC on the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM), OJ 2009 L 225/180.

FINING POLICY

ECJ – Judgments

Case C-494/11 P Otis v. Commission

On June 15, 2012, the Court of Justice dismissed the appeal brought by several Otis entities ("Otis") against the judgment of the General Court[9] upholding the decision of the Commission[10] holding that Otis and others had infringed Article 101(1) TFEU by agreeing or concerting to allocate tenders and contracts for the sale, installation, service, and modernization of elevators and escalators.

The Commission concluded that the parent companies (in this case, Otis SA) of the undertakings directly involved in the infringement (in this case, General Technic-Otis Sarl ("GTO")) should be held jointly and severally liable for the infringement of Article 101(1) TFEU, because they could exercise decisive influence on their subsidiaries' commercial policy during the time of the infringement, and because it could be presumed that they exercised such influence. GTO is owned 75% by Otis SA and 25% by General Technic Sàrl ("GT"). Otis SA is a wholly-owned subsidiary of Otis Elevator Company ("OEC"), which, in turn, is a wholly-owned subsidiary of United Technologies Corporation ("UTC"). UTC, OEC, and Otis SA form part of the Otis group. Otis appealed against, amongst other things, the General Court's conclusion that the Commission was entitled to attribute liability to Otis SA for the infringement committed in Luxembourg by GTO.

The Court of Justice dismissed the appeal and held that the fact that a subsidiary is not wholly-owned by a parent company does not exclude the possible existence of an economic unit. It concluded that, in partial ownership cases, the burden was on the Commission to demonstrate, based on factual evidence, including any management power one of the undertakings may have with regard to the other, that the parent company exercises a decisive influence over its subsidiary. The Court of Justice upheld the General Court's conclusion that the Commission was fully entitled to hold that all major decisions within GTO had to be taken with a majority of 80% of the votes and that, accordingly, during the period of the Luxembourg infringement, GTO operated under the joint control of Otis SA and GT.

This approach seems to be in line with the judgment rendered by the General Court on February 2, 2012, upholding the Commission's finding that E.I. DuPont de Nemours and Company and Dow Chemical Company were jointly and severally liable for the conduct of their 50/50 joint venture.[11] This was based on, amongst other things, the ability of the Members' Committee of the joint venture to make strategic decisions, with respect to which each of the parent companies had an absolute right of veto. The General Court held that, even though a full function joint venture may be considered economically autonomous from an operational viewpoint, this does not necessarily imply autonomy for strategic decisions or preclude liability for the joint venture's conduct at the parent level.

Case C-181/11 and Joined Cases C-628/10 P and C-14/11 P Spanish Raw Tobacco

On July 19, 2012, the Court of Justice dismissed the cross-appeals of the Commission and of Alliance One International and Standard Commercial Tobacco arising out of a fine imposed by the Commission approximately eight years earlier. On October 20, 2004, the Commission fined four Spanish processors of raw tobacco, Compañía española de tabaco en rama SA ("Cetarsa"), Agroexpansión SA, World Wide Tobacco España ("WWTE") and Tabacos españoles SL, and an Italian tobacco processor (the main purchaser of Spanish raw tobacco), Deltafina SpA, over € 20 million for cartel activity in the Spanish tobacco-processing market between 1996 and 2001.[12] The companies were accused of price fixing for tobacco delivery and of allocating the quantities of each variety of raw tobacco that each of the processors could purchase from the producers. The Commission held Alliance One International ("AOI"), Standard Commercial Tobacco ("SCTC") and Trans-Continental Leaf Tobacco Corporation ("TCLT") jointly liable for the involvement of their subsidiary, WWTE, and for paying its € 1.8 million fine. Cetarsa was fined € 3.6 million.

All tobacco processors appealed to the General Court. On February 3, 2011, the General Court upheld the Commission's decision to fine Cetarsa for its participation in the Spanish raw tobacco market cartel.[13] However, the fine imposed on Cetarsa was reduced to € 3.1 million. This reduction was based on the General Court's findings that the Commission did not give Cetarsa sufficient credit under the Leniency Notice for its cooperation and also made a manifest error

9 Cases T-141/07, T-152/07, T-145/07 and T-146/07 *General Technic-Otis and Others v. Commission*, 2011 ECR II-0000.

10 Case COMP/E-1/38.823 *Elevators and Escalators*, Commission decision of February 21, 2007, OJ 2008 C 75/19.

11 Cases T-77/08 *Dow Chemical v. Commission* and T-76/08 E.I. DuPont de Nemours and Others v. Commission, not yet published.

12 Case COMP/C.38238/B.2 *Raw Tobacco Spain*, Commission decision of October 20, 2004, OJ 2007 L 102/14.

13 Case T-24/05 *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v European Commission*, 2010 ECR II-05329.

of judgment in concluding in its statement of objections that Cetarsa had contested certain facts.

Cetarsa appealed to the Court of Justice, arguing that it was unfair not to allow it to benefit from the 40% reduction in fine granted by the Commission. It explained that 10% turnover fining ceiling, which did not come into effect until later in the Commission's fine assessment process, rendered the 40% reduction meaningless. (The Commission originally granted the 40% reduction because of the ambivalent national legislation in place at the time that had led growers and transformers of tobacco to collude.) The Court of Justice dismissed Cetarsa's claim, in part because it was raised for the first time before it. It further noted that the application of the 10% ceiling rule had led to a greater reduction in fine for Cetarsa than for other co-conspirators.

Cetarsa also claimed that the General Court had given insufficient reasons for rejecting its claims, by not expressly dealing with certain raised points. The Court of Justice rejected Cetarsa's claim. It emphasized that the General Court did not have to address every point raised by the litigants, as long as its decision set out sufficient detail to allow those concerned to understand the reasons on which the General Court relied and to provide the Court of Justice sufficient information to enable it to exercise its review power.[14]

Regarding the appeals of AOI and SCTC, the General Court confirmed their liability. However, it also concluded that the intermediary parent TCLT should not be held responsible for WWTE's conduct because, although it had the power to do so, it had not, in fact, exercised decisive influence over WWTE's conduct on the market. In the cross-appeals to the Court of Justice, the Commission sought to reinstate TCLT's liability, while AOI and SCTC sought to be exonerated from any liability.

The Court of Justice recalled that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organizational, and legal links between those two legal entities. A parent company having a 100% shareholding in a subsidiary that has infringed EU competition law is able to exercise decisive influence over the conduct of its subsidiary, and there is a rebuttable presumption that the parent company does in fact exercise such influence. To trigger this presumption, the Commission has to prove only that the parent company controls the subsidiary's entire capital. The burden then shifts to the parent company to rebut the presumption by presenting sufficient evidence that its subsidiary acts independently on the market. If it is unable to do so, the Commission can hold the parent company jointly and severally liable for payment of the fine imposed on its subsidiary.

The Court of Justice explained that, instead of relying on the presumption, the Commission may also establish that a parent company actually exercises decisive influence over its subsidiary by means of other evidence or by a combination of such evidence and the presumption (the "dual basis" method). In the case at issue, by using the dual basis method – i.e., by relying both on the 100% shareholding by the parent and on factual evidence showing the parent's actual exercise of decisive influence over its subsidiary, the Commission waived its ability to rely solely on the presumption of decisive influence and imposed on itself a higher standard than the standard that would have applied otherwise.

Accordingly, the Court of Justice agreed with TCLT that the Commission had violated the principle of equal treatment by finding TCLT liable for its subsidiary's conduct solely on the basis of its 100% shareholding, while at the same time finding other parent companies not liable in similar circumstances, citing the absence of evidence that they actually exercised decisive influence over their respective subsidiaries. The Court of Justice therefore upheld the General Court's ruling, denying the Commission's appeal.[15]

With respect to the appeals of AOI and SCTC, the Court of Justice agreed with the General Court that the evidence showed that the two tobacco companies "exercised decisive influence" over the conduct of WWTE, thereby justifying their liability. The mere fact that they exercised, during the period at issue, only joint control over WWTE could not counter this finding.

Case C-264/11 P Kaimer and Others v. Commission

On July 19, 2012, the Court of Justice dismissed an appeal by Kaimer GmbH & Co. Holding KG ("Kaimer Holding"), Sanha Kaimer GmbH & Co. KG ("Sanha Kaimer"), Sanha Italia Srl ("Sanha Italia", and

14 Case C-181/11 P *Compañía Española de Tabaco en Rama SA (Cetarsa) v European Commission*, judgment of July 12, 2012, OJ 2012 C 287/13.

15 Joined cases C-628/10 P and C-14/11 P *Alliance One International Inc., Standard Commercial Tobacco Co. Inc v. Trans-Continental Tobacco Leaf Corp. Ltd, European Commission and European Commission v. Alliance One International Inc., Standard Commercial Tobacco Co. Inc., Trans-Continental Leaf Tobacco Corp. Ltd*, judgment of July 19, 2012, OJ 2012 C 295/6.

together with Kaimer Holding and Sanha Kaimer, "Kaimer") against the General Court's judgment of March 24, 2011. [16]

On September 20, 2006, the Commission fined Kaimer € 7.97 million for participating in certain agreements and concerted practices in the copper fitting business from July 1996 to March 2001.[17] On appeal to the General Court, Kaimer argued, among other things, that the Commission had incorrectly assessed its participation in the infringement. The General Court accepted this argument and reduced the fine to € 7.15 million.

Kaimer subsequently appealed the General Court's judgment to the Court of Justice, raising three pleas in law. First, Kaimer argued that the General Court had distorted a piece of evidence it relied upon to establish the starting date of the infringement as regards Sanha Kaimer and therefore Kaimer Holding. Kaimer alleged that the contents of the evidence, a fax between employees of IMI, another cartel participant, suggested uncertainty on the marketplace as regards Kaimer's behavior, and that this document therefore could not be used as proof of its involvement in the infringement. The Court of Justice dismissed the first plea on the grounds that it has no jurisdiction to establish the facts of the case or to examine the evidence that the General Court accepted in support of those facts. The Court of Justice added that the distortion of evidence must be obvious from the file, meaning that it cannot be required to conduct a new assessment of the facts and evidence.

Second, Kaimer argued that the General Court had incorrectly assessed the probative value of leniency statements by failing to account for the fact that the leniency applicants tended to blame others to obtain the highest possible fine reduction and because it did not address an inconsistency between the statements of IMI, a leniency applicant, and those collected from Mueller Industries, the undertaking granted immunity by the Commission. The Court of Justice rejected this argument because Kaimer was asking the Court of Justice to reassess the facts, which was beyond its jurisdiction.

The Court of Justice also concluded that the General Court properly took into account all the elements of proof concerning the infringement. While the General Court found that the Commission had relied in part on leniency applications and witness statements, it also determined that the Commission had relied principally on documents that were contemporaneous with the infringement, which had a greater probative value than the evidence prepared after the fact.

Finally, Kaimer alleged an infringement of the Charter of Fundamental Rights and the European Convention on Human Rights, arguing that the plausibility check performed by the General Court in cartel fine proceedings is inadequate, and that Commission proceedings do not constitute a fair hearing because of the Commission's role as a prosecutor, judge, and jury.

The Court of Justice rejected this plea, concluding that Kaimer had failed to specify the contested elements of the General Court's decision and the legal arguments that supported its claim that the General Court's decision should be annulled. In addition, the Court of Justice held that Kaimer's pleas concerning the standard of the EU's control system in competition proceedings was not based on arguments presented before the General Court and therefore violated Article 113(2) of the Court of Justice's Rules of Procedure, which states that the appeal cannot change the subject matter of the proceedings.

AG Opinions

Case C-286/11 P Commission v. Tomkins

On July 19, 2012, Advocate General Mengozzi issued his opinion on the appeal by the Commission against the judgment of the General Court of March 24, 2011,[18] that reduced the fine imposed on Tomkins plc ("Tomkins") by the Commission's decision of September 20, 2006, for its involvement in the copper fittings cartel.[19]

Following its investigation into the market for copper and copper alloy fittings, the Commission fined 11 corporate groups for violations of Article 101(1) TFEU. As part of its decision, the Commission imposed a fine of € 5.25 million on Tomkins, in respect of which it was found to be jointly and severally liable with its subsidiary, Pegler Ltd ("Pegler").

Pegler and Tomkins lodged separate appeals with the General Court. Each company's appeal sought to annul the Commission's decision and, in the alternative, to have its fine reduced. In ruling on the Pegler appeal, the General Court annulled the Commission's finding that it had also participated in the cartel between December 31, 1988, and October 29, 1993.[20] In ruling on the Tomkins appeal, the General Court determined that Tomkins should benefit from a fine

16 Case T-379/06 *Kaimer and Others v. European Commission*, judgment of March 24, 2011, not yet published.

17 Case COMP/F/38.121 *Fittings*, Commission decision of September 20, 2006, OJ 2007 L 283/63.

18 Case T-382/06 *Tomkins plc v. European Commission*, judgment of March 24, 2011, not yet published.

19 Case COMP/F/38.121 *Fittings*, Commission decision of September 20, 2006, OJ 2007 L 283/63.

20 Case T-386/06 *Pegler Ltd v. Commission*, judgment of March 24, 2011, not yet published.

reduction corresponding to that awarded to Pegler. The Commission subsequently appealed the Tomkins judgment arguing, among other things, that the General Court had wrongly assumed that the actions brought by Tomkins and Pegler had the "same object," when in fact the aims of the respective applications were different.

The Advocate General determined that the General Court had failed to acknowledge that Tomkins' plea for the annulment of the Commission's decision was rendered obsolete by the withdrawal of several of its other pleas. As a result, Tomkins' application constituted a request for the General Court to exercise its power to amend the amount of the fine. The General Court was therefore found to have "*erred in describing Tomkins' action at first instance as an action for annulment in which the form of order sought had the same object as that in the parallel action brought by its subsidiary Pegler.*"[21] The Advocate General proposed that the Court of Justice set aside the part of the General Court's decision annulling Article 1 of the Commission's decision insofar as it relates to the period of the infringement excused in the Pegler judgment with respect to Tomkins.

All of the Commission's remaining pleas were rejected. In particular, the Advocate General affirmed the *ne ultra petita* rule, which limits the jurisdiction of a court to the questions submitted to it by the parties, did not apply to the General Court's exercise of its unlimited jurisdiction. The General Court is therefore entitled to "*take into account all the factual circumstances in order to assess the appropriateness of the amount of the fines imposed […] by the Commission*,"[22] including its own findings of fact in parallel cases concerning different entities that are part of the same undertaking. The Advocate General held, however, that this power must be exercised in accordance with the rule that the parties be heard.

GC – Judgments

Cases T-343/06, T-362/06 and Others Bitumen Cartel

On September 27, 2012, the General Court issued 16 separate judgments in the actions brought by bitumen suppliers and road builders against the Commission.[23] The Commission found them liable of infringing Article 101(1) TFEU by regularly fixing the gross price and the rebates for road pavement bitumen in the Netherlands between April 1994 and April 2002. In its decision of September 13, 2006, [24] the Commission imposed fines totaling € 266.717 million on 14 companies. The General Court dismissed all the actions in their entirety, except the appeals from several Shell entities ("Shell")[25] and Ballast Nedam Infra BV ("Ballast").[26] The main issues addressed by the judgments include (i) the parental liability for the actions of a subsidiary, (ii) the application of the 2002 Leniency Notice, (iii) the conditions under which a party may have access to the documents added to the Commission's file after the issuance of the statement of objections ("SO"), and (iv) the aggravating circumstance of repeated infringement.

Parental Liability. Most of the companies claimed that the Commission had erred in law in holding parent companies liable for their subsidiaries' involvement in the cartel. The General Court recalled, in general terms, that the anticompetitive conduct of an undertaking can be imputed to another undertaking where it has not decided independently upon its own conduct, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them. The General Court explained that the parent company that exercises decisive influence over its subsidiary will be held responsible for its conduct. Such decisive influence is presumed to exist where a parent company wholly owns its subsidiary. This presumption may, however, be rebutted by showing that the subsidiary acted independently on the market.

The General Court dismissed the applicants' claims that they did not constitute an economic unit with their respective parent companies. In its judgments, the General Court emphasized the strength of the links between the subsidiaries and the parent companies, in particular through overlaps in their managing boards, reporting mechanisms, hierarchical structures, and the provision of administrative, legal, or treasury services by the parent companies to their subsidiaries.

In the action brought by Shell, the General Court found that the Commission was entitled to apply the presumption of decisive influence to the two ultimate parent companies of the groups that

21 Case C-286/11P *European Commission v. Tomkins plc*, Opinion of Advocate General on July 19, 2012, para. 7, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0286:EN:HTML.

22 *Idem*, para. 69.

23 Cases T-343/06, T-344/06, T-347/06, T-348/06, T-351/06, T-352/06, T-353/06, T-354/06, T-355/06, T 356/06, T-357/06, T-359/06, T-360/06, T-361/06, T-362/06, T-370/06, not yet published.

24 Case COMP/F/38.456 *Bitumen (Netherlands)*, Commission decision of September 13, 2006, OJ 2007 L 196/40.

25 Case T-343/06 *Shell v. Commission*, not yet published.

26 Case T-362/06 *Ballast Nedam Infra v. Commission*, not yet published.

jointly controlled and, respectively, held 40% and 60% of the share capital of the subsidiary that was directly involved in the infringement. The General Court concluded that the two parent companies were in a position analogous to that in which a single company holds the entire share capital of its subsidiary.[27] In reaching that conclusion, the General Court took into account that, amongst other things, the existence of two parent companies in the Shell group could be explained by historical reasons; the two companies declared identical consolidated turnover; they jointly appointed the members of the board of directors of the two holding companies of the group; they jointly set up and controlled supervisory committees; and they decided to merge in 2005. The General Court, however, reduced the fine imposed on Shell from € 108 million to € 81 million, concluding that the Commission had failed to sufficiently substantiate its finding that Shell was the instigator and leader of the cartel.

In the action brought by Ballast, the General Court found that the Commission had violated Ballast's rights of defense by failing to indicate in its statement of objections ("SO") that it considered attributing liability to Ballast not only for its direct involvement in the cartel as of October 2000, but also for the previous actions of its wholly-owned subsidiary. (In the SO, the Commission had only referred to Ballast as a direct participant in the cartel, and not as being indirectly liable for its wholly owned subsidiary.) The General Court explained that it was not sufficient for the Commission to refer in general terms to the concept of "undertaking" within the meaning of Article 101 TFEU and to the presumption of liability for parent companies having a 100% shareholding in a subsidiary. Accordingly, the General Court concluded that Ballast could not defend itself against this allegation. As a result, the General Court reduced the fine imposed on Ballast from € 4.65 million to € 3.45 million.

Application of the 2002 Leniency Notice. Several Kuwait Petroleum entities ("Kuwait Petroleum") claimed that the Commission had violated the last paragraph of point 23(b) of the 2002 Leniency Notice[28] by imposing on them a fine on the basis of facts that could be established only by relying on information provided by them.[29] Kuwait Petroleum had been the first to submit direct evidence of the existence of the bitumen consultation meetings, which, together with information already in the Commission's possession, enabled the Commission to establish the infringement. The applicants argued that the Commission – which reduced their fine by 30% – should not have taken that information into account in its decision with respect to Kuwait Petroleum, and should therefore not have fined them at all.

The General Court endorsed the Commission's restrictive interpretation of the last paragraph of point 23(b), limiting it to cases in which a party to a cartel provides the Commission with new information relating to the gravity or the duration of the cartel, as opposed to information that merely corroborates the evidence of the existence of an infringement. The General Court concluded that the applicants' interpretation would undermine the effectiveness of the leniency program by reducing the incentive to be the first to submit information unveiling the existence of a cartel. Moreover, it would nullify the distinction between the sole company that may benefit from immunity from a fine, and the companies that may benefit from a reduction of the fine but do not receive complete immunity.

The General Court also dismissed the claim of Nynäs Petroleum AB and Nynas Belgium AB (together, "Nynas") that the Commission had unlawfully refused to reduce their fines on the basis of the detailed information provided in their response to the Commission's request for information.[30] The General Court held that the Commission did not err in finding that this information had no significant added value. The General Court reasoned that Nynas had failed to establish that, absent such information, the Commission would have been incapable of proving the essential elements of the infringement. The General Court also rejected Nynas' argument that the Commission had breached the principle of equal treatment by refusing to reduce its fine, while reducing Kuwait Petroleum's fine by 30%. The General Court concluded that Nynas' situation was not similar to that of Kuwait Petroleum because Nynas' information had limited added value and was provided only belatedly.

Access to Documents Subsequent to the Notification of the Objections. Some of the applicants, including Shell, BAM NBM Wegenbouw BV, and HBG Civiel BV (together, "BAM"), and Kuwait Petroleum, claimed that the Commission had violated their rights of defense and essential procedural requirements in rejecting their request for full access to the documents added to the Commission's file after the issuance of the SO, and in particular to all of the other parties' replies to the SO. The General Court held that, even though

27 The decision of the Commission was only addressed to one of the parent companies, as, at that time, the other parent company no longer existed as a separate legal entity.

28 The last paragraph of point 23(b) of the Leniency Notice reads: "*In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.*" OJ 2002 C 45/03.

29 Case T-370/06 *Kuwait Petroleum v. Commission*, not yet published.

30 Case T-347/06 *Nynas v. Commission*, not yet published.

generally no access is granted to the other parties' replies to the SO, a party may be granted access to those replies where they contain new evidence concerning the allegations made in the SO against that party.

According to settled case law, failure to communicate a document infringes the rights of defense only if the undertaking concerned establishes (i) that the Commission relied on it to support its objection concerning the existence of an infringement; and (ii) that the objection could be established only by reference to that document. With respect to the second condition, the General Court distinguished between incriminating and exculpatory documents. For incriminating documents, it must simply be established that the Commission's finding would have been different but for the reliance on these documents. In contrast, for exculpatory documents, the undertaking concerned must demonstrate that non-disclosure of these documents was able to influence, to its disadvantage, the course of the proceedings and the Commission's decision.

The General Court further stated that, if the Commission uses as new evidence a document subsequent to the notification of the objections, it is only required to communicate to the undertakings concerned the relevant passage of that document, placed in the context if that is necessary to understand it. As the applicants had received access to the relevant excerpts of the documents at issue, the General Court rejected their claims.

Repeated Infringement. The General Court rejected Shell's claim that the Commission had unlawfully imposed a 50% increase in the fine for recidivism, on the grounds that another company of the same group had been found guilty of similar infringements in the Polypropylene and PVC II decisions.[31] The General Court reasoned that, because Shell was wholly owned by the same parent company as the companies involved in the two previous infringements, the Commission did not err in finding that Shell was a repeated offender. (By contrast, in the *Eni* judgment,[32] which concerned another company involved in the Polypropylene and PVC II infringements, the General Court invalidated the Commission's increase in the fine for recidivism because the Commission failed to produce detailed and specific evidence that the same undertaking had committed a similar infringement in the past.[33])

Case T-82/08 Flat Glass

On September 27, 2012, the General Court dismissed the appeal in which Guardian had sought partial annulment of the Commission's decision fining it for participation in a cartel, as well as a reduction of the fine. On November 28, 2007, the Commission imposed a fine totaling € 486.9 million on Asahi Glass Company Limited, AGC Flat Glass Europe SA/NV, Guardian Europe Sarl, Guardian Industries Corp, Pilkington Deutschland AG, Pilkington Group Limited, Pilkington Holding GmbH, Compagnie de Saint-Gobain SA, and Saint-Gobain Glass France SA for breaching Article 101(1) TFEU.[34] Guardian Europe Sarl and its parent Guardian Industries Corp (together, "Guardian") were fined a total of € 148 million for participating in the cartel from April 20, 2004 to February 22, 2005.

The cartel participants were accused of fixing price levels, price increases, minimum prices, target prices, and other commercial conditions, as well as exchanging commercially sensitive information in the EEA in respect of sales to independent customers of flat glass products used in the building industry.

In its appeal, Guardian alleged that the Commission made factual errors and contested the duration of its participation in the cartel and the geographic scope of the cartel. The Commission relied on various types of evidence (documents seized during inspections, statements by a leniency applicant, and replies to requests for information) to determine that Gardian joined the cartel on April 20, 2004. The General Court explained that, given the fragmentary and sparse nature of information available in most cartel cases, it was sufficient for the Commission to rely on the evidence, viewed as a whole, to satisfy the requisite legal standard of proof. The General Court concluded that the Commission properly relied on factual circumstances, to confirm the content of an objective item of evidence, such as notes taken during a meeting, which Guardian challenged. Accordingly, the General Court upheld the Commission's position that Guardian joined the cartel as of the date of the above mentioned meeting (April 20, 2004).

Guardian also claimed that the meeting did not indicate that Guardian had joined the cartel at that time, but merely served to inform an individual of other cartel meetings. In response, the General Court pointed out that, to rebut the Commission's presumption that the facts cannot be explained other than by concerted action between undertakings, the applicants need only

31 Case IV/31.149 *Polypropylene*, OJ 1986 L 230/1 and Case IV/31.865 PVC, OJ 1994 L 239/14.

32 Case T-39/07 *Eni SpA v. Commission*, not yet published.

33 In particular, the companies fined in the *Polypropylene* and *PVC II* decisions were not the addressees of the contested decision. Moreover, Eni's name was mentioned in these two previous decisions. Given the complexity of the case due to the various restructurings in the group, the Commission should have been more specific in establishing that the companies addressed by the previous decisions and those addressed by the contested decision were part of the same undertakings concerned.

34 Case COMP/39165 *Flat glass*, Commission decision of November 28, 2007, OJ 2008 C 127/9.

prove circumstances that would allow the substitution of another explanation of the facts for that adopted by the Commission. Applying this standard, the General Court rejected Guardian's explanation based on evidence that, after the meeting, Guardian adopted the same conduct as the three other members of the cartel.

Guardian also claimed that the Commission erred in extending the scope of the infringement to the entire EEA. The General Court rejected this claim. It confirmed that the Commission had satisfactorily established that the cartel was EEA-wide. It explained that, if the actual object of an agreement is to restrict competition, (1) the Commission need not define the geographic market in very precise terms where actual or potential competition in the territories concerned was necessarily restricted; and (2) the market definition does not depend on whether or not those territories constitute proper antitrust markets in the strict sense of the word.

Finally, Guardian claimed that the Commission erroneously failed to recognize its limited and passive role in the cartel. It argued that, where several undertakings are found to have infringed competition law, the Commission must consider the relative gravity of their conduct in setting the fines. The General Court confirmed that, conceptually, this was correct. However, it found no grounds for reducing the fine imposed on Guardian given its involvement from June 2004 to February 2005, and in light of its collaboration with the three other members of the cartel by providing them with essential information for the adoption and implementation of price agreements.

POLICY AND PROCEDURE

ECJ – Judgments

Case C-138/11 Compass-Datenbank GmbH v. Republik Österreich

On July 12, 2012, the Court of Justice handed down a preliminary ruling on a reference from the Oberster Gerichtshof (the "Austrian Supreme Court") concerning the interpretation of the concept of an "undertaking" under Article 102 TFEU. The question arose in the course of proceedings between the Republic of Austria ("Austria") and Compass-Datenbank regarding access to data from the Austrian national companies register (the "Firmenbuch").

Austrian national law requires a company to publish certain information on its business activities in the Firmenbuch. The general public is authorized to access the data (for a fee) via any one of a number of independent billing agencies, appointed by the State on the basis of qualitative criteria. Both these undertakings and the final consumers that they serve are prohibited from more extensive use of the data, including from creating their own databases using the Firmenbuch information.

Compass-Datenbank, a private company, developed a financial database comprising extracts from the Firmenbuch, supplemented by information gathered from third party sources. The database was licensed to third party service providers for a fee. The Austrian government brought an action before the Commercial Court in Vienna, seeking to prevent Compass Datenbank from storing, reproducing, or transmitting data taken from the Firmenbuch to third parties. Compass-Datenbank sought access to the database, characterising the State's conduct as an unlawful refusal of access to the Firmenbuch data, which it qualified as an essential facility. Having failed before the Regional Civil Court in Vienna (2006) and the Higher Regional Court in Vienna (2008), Compass-Datenbank appealed to the Austrian Supreme Court. The Austrian Supreme Court asked the Court of Justice to determine whether a public authority acted as an "undertaking" when storing in a database information reported by undertakings pursuant to their statutory obligations, and where it allowed inspection of the data in return for a fee but prohibited more extensive use. The Austrian Supreme Court asked, further, whether this analysis was affected by the State's reliance on its *sui generis* intellectual property rights as creator of the database (consistent with Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases).

The Court of Justice recalled the consistent case law that "*an undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way it is financed*". The State acted as an undertaking where it offered goods or services on a given market, but did not act as an undertaking when exercising its public powers, since the exercise of such powers was by nature a non-economic activity. The Court of Justice held that the collection of companies' data in a database and the maintenance and making available of that data to the public could not be separated from the exercise by the Austrian State of its public powers. It therefore did not constitute an economic activity. The State's remuneration for the service provided did not change this conclusion, since the remuneration was required by law. Although the independent billing agencies were entitled to charge a supplementary fee, these entities (whose conduct was not at issue) were clearly separate from the State.

The classification of the activities of the State as non-economic in nature was also not altered by the State's reliance on its *sui generis* IPR in order to enforce restrictions on use of the data. The public entity was not required by law to authorize reuse of the data.

Accordingly, provided that the remuneration received by the public entity was limited and inseparable from the activity of making those data available, reliance on IPR to restrict use of the data could not be considered an economic activity.

The referring court had also asked whether the essential facilities doctrine developed in *RTE and ITP and IMS Health* extends to circumstances where there is no "upstream market" because the data at issue were collected and stored in the context of a public authority activity. However, in light of the Court of Justice's conclusions, this issue was left open.

The ruling of the Court of Justice comes at a time when the Commission is seeking to encourage the growth of the EU "*knowledge economy*" by facilitating cross-border access to digital content, including public sector information. In addition to studies undertaken at the national level,[35] an expert group on public sector information established by the Commission has been examining legal and economic aspects of access to and re-use of public sector information.[36] In December 2011, the Commission presented a package of measures including a proposal for a revision of the Directive on the re-use of public sector information,[37] which proposes, *inter alia*, to limit the fees that may be charged by public authorities for access to such data.[38]

AG Opinions

Case C-226/11 Expedia Inc.

On September 6, 2012, Advocate General Kokott advised the Court of Justice that the National Competition Authorities ("NCAs") and national courts must take due account of the Commission's guidance in the *de minimis* notice,[39] although the notice is not legally binding, and that market share thresholds in the notice are irrelevant where an agreement is anti-competitive by object.[40]

The reference for a preliminary ruling arose from a dispute between Expedia, an online travel agency, and the French competition authority (the "FCA") regarding a selling joint venture agreement between Expedia and SNCF. The FCA defined the joint venture as restrictive by object and concluded that it violated Article 101 TFEU and Article L.420-1 of the French Commercial Code. The Paris Court of Appeals upheld the FCA's decision. Expedia appealed to the French Supreme Court, arguing that the FCA had erred in finding an appreciable restriction of competition because its market share was lower than the 10% threshold set out in the Commission's *de minimis* notice. The French Supreme Court asked the Court of Justice whether an NCA can impose fines on an undertaking in these circumstances.

Advocate General Kokott stated that, taking into account its wording, purpose, and context, the Commission's *de minimis* notice was not intended to produce binding legal effects on NCAs and national courts. However, the Advocate General underlined the decisive importance of the notice as guidance to NCAs, contributing to the effective and uniform application of Articles 101 and 102 TFEU throughout the European Union. Moreover, the Commission's leading role in framing European competition policy would be undermined if NCAs could simply ignore its notices. According to the Advocate General, it follows from the duty of sincere cooperation laid down in Article 4(3) TFEU that NCAs must take due account of the Commission's notice when applying Article 101 TFEU. They can, however, depart from the notice depending on the general economic and legal context of a particular agreement, or where there are special national or regional competition problems to which the NCA must be able to react effectively.

Advocate General Kokott also advised the Court of Justice that the market share thresholds in the *de minimis* notice are irrelevant if an agreement is anticompetitive by object. She argued that the certainty or "safe harbour" given to undertakings by virtue of the *de minimis* market share thresholds could not be given to undertakings that enter into agreements with an anticompetitive object because this would "practically invite" such undertakings to join together in restraint of trade.

On this basis, the Advocate General further advised that, even though the prohibition on cartels does not apply where agreements have only an insignificant effect on markets, market share thresholds alone should not determine decisions in this regard: in line with previous case law, an appreciable restriction of competition could be found even if the relevant market share is well below the *de minimis* thresholds.

35 See, e.g., OFT861, "The Commercial Use Of Public Information (CUPI)", December 2006, available at: http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft861.pdf.

36 Public Sector Information Group Portal, available at: http://ec.europa.eu/information_society/policy/psi/facilitating_reuse/psigroup/index_en.htm.

37 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ 2003 L 345/90.

38 COM 2011/877 of December 12, 2011, available at: http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive_proposal/2012/en.pdf.

39 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (the "*de minimis* notice"), OJ 2001 C 368/13.

40 Case C-226/11 *Expedia Inc.*, Opinion of Advocate General of September 6, 2012, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=126392&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=551748.

Were the Court of Justice to follow the Advocate General's Opinion, the boundary between competition "soft" and "hard" law would be blurred. NCAs would not be able to depart from competition soft law, such as the Commission's notices, without providing strong reasons for doing so. Furthermore, the Court of Justice would still need to define which general economic or legal context and special national or regional competition problems could justify such a decision.

Cooperation Agreements

Cooperation agreement in the area of anti-monopoly law between the European Union and China

On September 20, 2012, the European Union, on behalf of the Directorate General for Competition, and China signed a memorandum of understanding to increase cooperation between the Commission's competition department and China's antitrust authorities ("the Cooperation Agreement").[41]

The primary objective of the Cooperation Agreement is to strengthen cooperation and coordination between the EU's and China's competition legislation. It covers legislation, enforcement, and technical cooperation regarding cartels, other restrictive agreements, and abuse of dominant position. Merger control is excluded from the scope of the Cooperation Agreement, because it was the object of an earlier agreement between the EU and China, signed on May 6, 2004.[42]

The Cooperation Agreement envisages the following exchanges between the two competition authorities: (i) exchange of views on developments in competition legislation and on their experience in the enforcement of this legislation; (ii) exchange of experiences on the enhancement of the operation of their competition authorities; (iii) exchange of views with respect to multilateral competition initiatives; (iv) exchange of experiences on competition advocacy, including on raising awareness of companies and the wider public of competition and antimonopoly legislation; and (v) exchange of views and experiences regarding a coordinated approach to technical cooperation between the EU and China in the area of competition law. These exchanges of views and experience may result in the adoption of new Chinese legislation and guidance, thus enhancing Chinese enforcement capability and efficiency. It may also lead to a better education and awareness of Chinese companies about competition law.

The Cooperation Agreement further provides that, should the Commission and the Chinese competition authorities pursue enforcement activities concerning the same or related matters, they may exchange non-confidential information, experiences, and views on the matter and coordinate directly their enforcement activities. The Cooperation Agreement expressly states that the EU and China are not required to communicate confidential information to one another. In particular, information obtained through the leniency program seems to be excluded, because the competition authorities are not required to communicate information which "*would be incompatible with the interest of that Side in the application of its law.*" The Cooperation Agreement thus opens the door for limited cooperation regarding specific cases.

The Chinese competition authorities also recently entered into similar cooperation agreements with other foreign competition regulators, such as the UK Office of Fair Trading, the U.S. Federal Trade Commission and Department of Justice, and the Korean Fair Trade Commission. Similarly, the EU recently signed cooperation agreement with the Russian anti-monopoly service and already has bilateral agreements in place with other national competition authorities, including Brazil, Canada, Israel, Japan, Korea, South Africa, Turkey and the United States.

41 Memorandum of understanding on Cooperation in the area of anti-monopoly law between on the one side the European Commission and on the other side the National Development and Reform Commission and the State Administration for Industry and Commerce of the People's Republic of China, available at: http://ec.europa.eu/competition/international/bilateral/mou_china_en.pdf.

42 Terms of reference of the EU-China Competition Policy Dialogue, available at: http://ec.europa.eu/competition/international/legislation/china.pdf.

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