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VERTICAL RESTRAINTS

ECJ - Judgments

Case C-32/11 Allianz Hungária Biztosító Zrt., Generali-Providencia Biztosító Zrt. and others v. Gazdasági Versenyhivatal

On October 25, 2012, the Advocate-General ("AG") Pedro Cruz Villalón delivered his opinion in a case referred by the Hungarian Supreme Court (Magyar Köztársaság Legfelsőbb Bírósága) for a preliminary ruling.[1]

As of 2002, several Hungarian car dealers that also operated as car repairers entrusted the National Association of Automobile Dealers ("GÉMOSZ") to negotiate a framework agreement with insurance companies with regard to hourly car repair fees to be paid by car insurance companies. Car dealers had a twofold relationship with insurance companies: car dealers both acted as intermediaries, offering insurance policies to their clients, and repaired insured vehicles on behalf of insurance companies.

In 2004 and 2005, GÉMOSZ and Allianz concluded a framework agreement on car repair hourly fees. In addition, Allianz entered into individual contracts with some car dealers, which provided for an increase in the hourly fees if the number of Allianz's policies sold reached a certain percentage. Generali also entered into similar agreements with some car dealers. The AG's opinion suggests that, at the time, Allianz and Generali had a combined market share of over 70% in the market for automotive insurance in Hungary.

On December 21, 2006, the Hungarian National Competition Authority ("HCA") declared (i) the agreements between Allianz and GÉMOSZ, (ii) the agreements between Allianz and Generali and the car dealers/insurance brokers, respectively, and (iii) the three decisions of GÉMOSZ concerning the recommended hourly fee charged by the car dealers to the insurance companies as incompatible with the relevant national legislation.[2] It held that the agreements, individually and jointly, had the effect of restricting competition both in the insurance market and in the car repair market. The HCA concluded that Article 101 TFEU did not apply because the agreements did not affect trade between Member States. On appeal, Hungary's Supreme Court referred to the Court of Justice of the European Union ("Court of Justice") the question of whether bilateral agreements between an insurance company and individual car repairers, or between an insurance company and a car repairers' association, which determine the amount of the hourly repair fee paid by the insurance company to the car dealer based, among other factors, on the number and proportion of insurance contracts signed via the car dealer, qualify as agreements that have as their object the prevention, restriction, or distortion of competition, and thus contravene Article 101(1) TFEU.

In the first part of the opinion, the AG concluded that the referral was inadmissible, because EU competition law (specifically, Article 101 TFEU) would not apply. Neither the contracts at issue nor the decisions of the GÉMOSZ affected the trade between Member States, so that EU competition law was not applicable. Furthermore, neither was the relevant EU competition law incorporated into Hungarian law by direct and unconditional reference.[3] Instead, EU law provisions were used only as a model and merely partially reproduced verbatim, with many national law provisions departing from the

[1] Reference for a preliminary ruling from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary) for Case C-32/11, *Allianz Hungária Biztosító Zrt., Generali-Providencia Biztosító Zrt., Gépjármű Márkakereskedők Országos Szövetsége, Magyar Peugeot Márkakereskedők Biztosítási Alkusz Kft. And Paragon- Alkusz Zrt., legal successor of Magyar Opelkereskedők Bróker Kft. v Gazdasági Versenyhivata*l, January 21, 2011, OJ 2011C 145/4. Opinion of Advocate General of October 25, 2012, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=128941&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=1103769.

[2] Art. 11 of Law no. LVII of 1996 A Tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. Törvény.

[3] *See* Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, para. 16. The judgment established the principle that a reference for a preliminary ruling should be admissible only where there is a genuine "direct and unconditional" reference by national law to EU law (i.e., where EU law provisions are reproduced word for word).

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wording of the corresponding EU law provision (i.e., when EU law provisions are reproduced word for word).

Nevertheless, the AG also analyzed the merits of case. The AG argued that the agreements between insurance companies and car dealers under which the amount of the hourly fees were linked to the number of polices sold could qualify as vertical agreements within the meaning or Article 1(1)(a) of Regulation 330/2010[4] because insurance companies and car dealers/repairers operated at different levels of the distribution chain. The AG concluded, however, that, because individual agreements did not entail a *per se* restriction by object, and, accordingly, the agreements should not be deemed *per se* illegal. In this context, the AG observed that competition law neither expressly prohibits clauses with sales targets nor sanctions a vertical agreement designed to increase sales.[5]

Considering these vertical agreements in their economic and legal context, the AG concluded that a certain degree of parallelism could be detected from the insurers' inclusion of similar conditions in their contracts with the car dealers. However, the AG left it up to Hungary's Supreme Court to determine whether there was any evidence that the two insurers actually coordinated their conduct.

The AG also noted that, by entering into contracts with GÉMOSZ and the individual car dealers, the insurance companies might have facilitated horizontal collusion among car dealers (through GÉMOSZ) with regard to hourly fees. If this turned out to be the case, both the horizontal agreement between the car dealers and the vertical agreements between the insurance companies and GÉMOSZ or the car dealers would be deemed illegal. The AG concluded that the Supreme Court of Hungary should decide whether the number of car dealers implicated in the horizontal coordination would be sufficient to constitute an infringement.

4 Regulation 330/2010, OJ L 102/3.

5 According to AG Cruz Villalón, the clearest proof of this would be the tolerance, under certain temporal limits, of branding and non-compete clauses. Furthermore, the AG underlined that the Court had already analyzed similar non-compete clauses and concluded that they did not restrict competition. *See* Case C-234/89 *Delimitis* judgment of February 28 [1991] ECR I-935, paras. 13-15, case C-214/99 *Neste* judgment of December 7 [2000] ECR I-11121, para. 25, case C-279/06 *CEPSA* judgment of September 11 [2008] ECR I-6681, para. 43, and case C-260/07 *Pedro IV Servicios* judgment of April 2 [2009] ECR I-2437, para. 83.

ABUSE OF DOMINANT POSITION

ECJ - Judgments

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

On December 6, 2012, the Court of Justice dismissed an appeal brought by AstraZeneca ("AZ") against a ruling by the General Court of the European Union ("General Court") upholding the European Commission's ("Commission") 2005 decision fining AZ € 60 million for abuse of dominant position in the market for proton pump inhibitors ("PPIs"). PPIs inhibit proton pump cells in the stomach from producing acid and are used for the treatment of gastrointestinal diseases such as stomach ulcers.

The Commission found that AZ had misused pharmaceutical marketing procedures to exclude competition from generic alternatives to, and parallel imports of, its Losec drug, a PPI. The Commission found abuse based on the following conduct. First, AZ provided misleading information to patent offices that prevented the patent offices from correctly identifying the date of Losec's first marketing authorization. This conduct resulted in the patent offices' issuing supplementary protection certificates ("SPCs") that AZ used to delay entry by generic alternatives. Second, AZ deregistered marketing authorizations for Losec capsules in countries where suppliers of generic alternatives had applied for marketing authorizations, depriving these suppliers of the opportunity to use a faster, less onerous authorization procedure.

In a judgment handed down in July 2010, the General Court upheld the Commission's decision, but commuted AZ's fine to around € 52.5 million. Following a further appeal by AZ, AG Mazak issued an Opinion to the Court of Justice recommending that AZ's appeal be rejected. The Court followed the AG's Opinion.

AZ appealed, challenging the General Court's review of evidence on the definition of the relevant product market. AZ pointed to evidence that it claimed demonstrated a strong competitive relationship between PPIs and H2 blockers, another category of drugs capable of inhibiting acid production in the stomach. For example, AZ emphasized that doctors prescribed PPIs in place of H2 blockers gradually over time, rather than switching suddenly from prescribing H2 blockers to prescribing PPIs (as one might have expected were PPIs so qualitatively superior to H2 blockers as to be in a separate product market). AZ argued that this gradual trend in demand was significant for the analysis of market definition because it showed that H2 blockers exercised a considerable competitive constraint on PPIs. AZ argued that (1) the General Court, in disregarding this evidence, had failed properly to analyze the relevant product market over time; and (2) had the General Court done so, it would have concluded that the relevant product market was broader than PPIs alone.

The Court of Justice dismissed this ground of appeal, finding that the General Court had properly considered the interaction between the two products over the entire period at issue. The Court of Justice observed that the General Court had, for example, taken note of expert evidence that suggested the two types of products were used to treat different types of gastrointestinal conditions. The Court of Justice also concluded that the General Court had carried out an appropriate, detailed analysis of the evolution of the substitution between the two types of products over the entire period at issue, including several years prior to the alleged infringement. The Court of Justice added that, contrary to AZ's argument, the General Court had properly considered and given appropriate weight to the evidence of doctors' prescribing practices. (AZ had argued that there was a degree of "*inertia*" among medical practitioners in prescribing PPIs. Practitioners had not switched suddenly from prescribing H2 blockers to prescribing PPIs but had begun prescribing PPIs in place of H2 blockers gradually over time. In AZ's view, this indicated that H2 blockers acted as a competitive constraint on PPIs and that the relevant market was therefore broader than that for PPIs alone.) The Court of Justice took the view that the General Court had correctly concluded that the reason for this "*inertia*" was practitioners' caution about administering a new product and was therefore a function of the accumulation and dissemination of information on the properties of PPIs, rather than evidence of substantial qualitative similarities between the two treatments. As a result, there was no need to expand the relevant market to include H2 blockers.

AZ also argued that the General Court had misinterpreted the concept of "competition on the merits" in the context of patent-related dealings. Specifically, AZ claimed that the General Court should not have dismissed as irrelevant AZ's good faith, reasonable interpretation of the company's obligations with respect to the rules governing supplementary protection

certificates for medicinal products. AZ had argued before the General Court that, at the time of AZ's conduct at issue, there was considerable ambiguity about whether AZ was entitled to the supplementary certificates. AZ argued before the Court of Justice that, due to this ambiguity, deliberate fraud or deceit should have been required to establish abuse.

The Court of Justice recalled that "abuse" was an objective concept, and therefore the absence of intentional fraud or deceit on the part of AZ could not be relevant. After reviewing at length the General Court's examination of AZ's conduct, the Court of Justice concluded that AZ made highly misleading representations to the patent offices and did not disclose the existence of certain technical authorizations. Through this conduct, AZ deliberately attempted to mislead the patent offices and judicial authorities to prolong for as long as possible its monopoly in the PPIs market. This conduct could not be considered competition on the merits. Even had AZ concluded that its conduct was reasonable and defensible, the onus was on AZ to disclose to the patent offices all the information relevant to those offices' assessment of which authorizations should be granted. The Court of Justice held that AZ's ground of appeal was tantamount to arguing that, where an undertaking in a dominant position believes that it can make a legally defensible claim to a right, it may use any means to obtain that right, including highly misleading representations with the aim of leading public authorities into error. The Court of Justice held that such conduct was manifestly inconsistent with competition on the merits and the specific responsibilities of dominant undertakings. The Court of Justice added that the fact that AZ was not able to implement its strategy in certain countries did not preclude a finding of abuse. This is because abuse can be found based on conduct that has the *potential* to produce anticompetitive effects.

AZ further argued that the exercise of a legal right to withdraw marketing authorizations did not constitute conduct tending to restrict competition and/or that maintaining a market authorization would have imposed unduly onerous pharmacovigilance obligations on it. The Court of Justice held that dominant undertakings have a special responsibility not to misuse regulatory procedures with the purpose of hindering the introduction of generic products and parallel imports, unless they have an objective justification for doing so. The Court of Justice concluded that, because AZ was not protecting its legitimate interest, its conduct did not constitute competition on the merits. The fact that the withdrawal of market authorizations may have been permitted under the relevant regulatory procedures was immaterial. Although, in theory, burdensome pharmacovigilance obligations could have served as a possible objective justification for AZ's conduct, AZ's pleadings had not demonstrated to the requisite degree that maintaining the marketing authorizations would have been unduly burdensome.

Finally, AZ argued, with respect to the deregistration of its marketing authorizations, that the General Court had erred in finding that the "mere" exercise of a right lawfully granted under EU law could be abusive. AZ claimed that such conduct could only amount to abuse in exceptional circumstances where there was an elimination of all effective competition. By contrast, a propensity to distort competition was insufficient. In support of its argument, AZ drew an analogy with the narrow circumstances in which the Court of Justice in *IMS Health*[6] concluded that compulsory licensing was justified. The Court of Justice dismissed AZ's argument, holding that the deregistration of a marketing authorization was not equivalent to a property right. Consequently, restricting a dominant company's ability to use its power to deregister a marketing authorization to impair entry by rivals could not be deemed to constitute expropriation or compulsory license.

[6] Case C-418/01 *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG* [2004] ECR I-5039.

MERGERS & ACQUISITIONS

Prohibition Decisions

Case COMP/M.6166 Deutsche Börse/NYSE Euronext

On February 1, 2012, the Commission prohibited the merger of two of Europe's leading derivatives exchanges, Deutsche Börse Liffe and New York Stock Exchange Euronext. The Commission's decision represents the first ever prohibition of a financial services transaction under the EU Merger Regulation. The Commission examined many discrete markets within the areas of cash instruments, market data and index licensing, information products and services, collateral management, and derivatives. The majority of the Commission's analysis focused on the various derivatives markets; the Commission identified no competition concerns in any of the other markets it examined.

The Commission's analytical framework was driven largely by the conclusions it reached with regard to market definition, where two principal issues arose: (1) whether different types of derivatives products competed in distinct antitrust markets; and (2) whether exchange-traded derivatives ("ETDs") competed with derivatives contracts traded "over-the-counter" without the involvement of a regulated trading venue ("OTC derivatives").

As to the first issue, the Commission identified distinct markets for each asset class (e.g., single-stock derivatives, interest rate derivatives, equity index derivatives, etc.). As to the second issue, the Commission rejected the merging parties' contention that ETDs competed in the same antitrust market as OTC derivatives. The Commission's market investigation revealed that there was, on the one hand, a distinguishable group of customers that had no mandates or operational set up to trade OTC derivatives and hence for whom OTC derivatives were not an alternative, and, on the other hand, a group of customers that traded both ETDs and OTC derivatives but that could potentially switch to OTC derivatives only for a small category of contracts. As to the first customer group, the Commission concluded that, because the parties had the ability to apply, and in fact did apply, differentiated fees and discounts to different exchange customers, the merged entity would have the ability and incentive to increase the overall price of trading and clearing for these users. As to the second customer group, the Commission found that ETDs and OTC derivatives had different and autonomous rationales for their existence, aimed at addressing different customer needs. As a result, customers would not readily switch from ETDs to OTC derivatives should the merged entity attempt to exercise market power. Accordingly, the Commission identified separate markets for ETDs and OTC derivatives.

With respect to the markets for (1) the trading and clearing of European exchange-traded interest rate futures and options; and (2) the trading and clearing of European exchange-traded single-stock futures and options, the Commission found that the merger would eliminate the closest actual and potential competitor and would result in the merged company having a dominant or near monopoly position. In respect of pre-existing competition between the merging parties, the Commission determined that they had competed head-to-head on pricing and trading costs to attract liquidity. As to product innovation, the Commission found that the merging parties had competed at the level of introduction of new and improved contracts around their overlapping core franchises and were one another's closest competitors in this regard. As to actual competition between the merging parties, the Commission found that the transaction would have led to a *de facto* monopoly in a market comprising all European interest rate futures and options. The Commission concluded that, despite the limited overlap in short-term interest rate derivatives, "*the evidence [...] clearly demonstrates the competitive constraint that Eurex represents to Liffe. Eurex's attempts to gain greater liquidity and expand its product range keep Liffe 'on its toes.'*"[7] In addition, the Commission concluded that no other competitor would be able sufficiently to constrain the merged entity post-transaction. For single stock equity options and futures, the Commission found that within the parties' "home" markets, the merger would have led to a near monopoly.

The Commission also assessed the market for the trading and clearing of exchange-traded equity indices. The Commission found that, while there was no existing competition between the parties in this market, the merger would result in the loss of competition for the introduction of new equity index products.

The Commission also considered barriers to entry and expansion, identifying three principal factors: (1) the inability of entrants to offer cross-margining against a wide range of closely correlated assets, which would reduce the cost of collateral for customers; (2) intellectual property rights

[7] Case COMP/M.6166 *Deutsche Börse/NYSE Euronext*, Commission decision of February 1, 2012, para. 673.

controlled by the merging parties; and (3) the need for an installed base of users acting as a distribution network. The Commission also considered previous attempts at entry, in particular the 2007 failure of Project Rainbow, an attempt to develop a rival derivatives trading platform in London by a consortium of banks and derivatives trading firms. (Project Rainbow's backers included Barclays, Deutsche Bank, Goldman Sachs, JPMorgan, MF Global, NewEdge and UBS.) The Commission reasoned that Project Rainbow ultimately failed because it did not have access to a margin pool of correlated contracts, and, accordingly, could not offer its clients effective cross-margining or netting.[8] The Commission thus concluded that the prospect of sufficient and timely post-merger entry was unlikely.

The Commission also dismissed the merging parties' contention that their largest customers had significant buyer power to discipline any attempt by the merged company to exercise market power post-transaction. The Commission found that banks and other larger customers would have to exercise any buyer power collectively, not individually, in order to constrain the merged entity; the Commission held the parties had not made any attempt to show that such collective action would occur.

The merging parties contended that the transaction would have generated considerable efficiencies, estimated at more than €2.5 billion. The parties claimed that these efficiencies would directly benefit customers, outweighing any possible anti-competitive effects. The Commission considered, but ultimately rejected, all but one of the claimed efficiencies, accepting that the merger would bring about collateral savings efficiencies of € 50–110 million. Nevertheless, the Commission observed that, when measured against the merging parties' total annual revenues from derivatives' trading and clearing, these efficiencies would be equal to a fee increase of only a few Euro cents per derivatives contract. The Commission therefore concluded that the verifiable merger-specific efficiencies would not outweigh the transaction's potential anti-competitive effects.

The parties proposed a remedies package, which consisted of two commitments: (1) the divestment of NYSE Euronext's entire single equity derivatives business; and (2) an offer to grant access to the merged entity's margin pool for certain interest rate and equity index derivatives contracts. The Commission rejected both commitments. As to the divestment commitments, the Commission found that there were doubts as to its precise scope (due to the uncertainty of securing regulatory approval) and as to the feasibility of the transfer of open interest relating to the business to be divested. With regard to the access commitments, the Commission found that the complexity of the proposed arrangement and the fact that no similar arrangements could serve as a model raised significant difficulties regarding the possibility of effectively implementing such a commitment in practice.

For all the reasons set out above, the Commission prohibited the transaction.

Second-phase Decisions Without Undertakings

Case COMP/M.6106 Caterpillar/MWM

On October 19, 2011, after a Phase II investigation, the Commission approved Caterpillar Inc.'s ("Caterpillar") proposed acquisition of MWM Holding GmbH ("MWM") without commitments. This was the third Phase II investigation launched by the Commission in 2011. Although the Commission found that the merged entity would have a significant presence in the market of gas generator sets ("gensets") for power generation, it concluded that sufficient actual and potential competitive constraints would remain post-transaction.

Caterpillar is the ultimate parent company of a global diversified group that is, *inter alia*, active in the provision of machinery and engines. MWM is a prominent German company that produces and sells products, services, and technologies for decentralized energy supply using gas and diesel reciprocating engines.

Even though the transaction did not satisfy the EU-level turnover thresholds, the Commission nonetheless examined it pursuant to Article 22 of the EU Merger Regulation. (According to Article 22 of the EU Merger Regulation one or more Member States may request the Commission to examine any concentration that does not have a Community dimension but nonetheless affects trade between Member States and has the potential to significantly impede competition.)

During its Phase I investigation, the Commission concluded that the parties were the two principal suppliers of gensets in

[8] Case COMP/M.6166 *Deutsche Börse/NYSE Euronext*, Commission decision of February 1, 2012, paras. 989, 990.

Europe. The Commission commenced a Phase II investigation having reached the preliminary conclusion that the transaction could potentially result in increased genset prices and reduced access to genset installation services. The Commission noted, in opening Phase II proceedings, that the merged entity may not be effectively constrained by the remaining competitors in the market.

Nonetheless, the Commission concluded at the end of its Phase II investigation that the transaction did not give rise to serious competition concerns. It determined that, although the parties were the two principal suppliers of gensets in Europe, they were not close competitors. In addition, the Commission found that the merged entity would continue to be constrained by strong competitors, as well as by the threat of potential entry. The Commission also concluded that the transaction would not result in coordinated effects because the merger would not remove the strongest challenger from the market of gas gensets for power generation. Finally, the Commission concluded that the merged company would not have the ability or incentive to restrict access to bare gas engines, spare parts, or gas gensets, because customers would continue to be able easily to switch to alternative manufacturers if such action were pursued. The Commission therefore concluded that the proposed concentration would not lead to a significant impediment of effective competition.

First-phase Decisions with Undertakings

Case COMP/M.6564 ARM/Giesecke&Devrient/Gemalto/JV

On November 6, 2012, the Commission approved the formation of a joint venture among ARM Limited ("ARM"), Giesecke & Devrient GmbH ("G&D"), and Gemalto N.V. ("Gemalto"; together, the "Parties") aimed at developing and marketing trusted execution environment solutions ("TEEs").

A TEE is a security solution that provides a separate execution environment for use by trusted applications on consumer electronic devices that include an application processor ("AP"). The Parties submitted that the relevant product market for TEEs included all AP-based security solutions for consumer electronics devices. Based on its market investigations, however, the Commission determined that TEEs may constitute a separate market, because respondents to the market investigations "*indicated that TEE solutions may not be, or may be only partially, substitutable with other AP-based security solutions*."[9]

The Commission found that the joint venture would combine the two most advanced TEE technologies currently available on the market, G&D's and Gemalto's. However, the Commission's investigation confirmed that these TEE solutions have different features (limiting the extent of competition between them) and that a number of actual or potential competitors would remain in the TEE market post-transaction. Additionally, the Commission's market investigation indicated that a majority of respondents believed that the joint venture would have the incentive to create a TEE that was compatible with the specifications set out by GlobalPlatform so that it could be sold to a broad spectrum of customers.[10]

The Commission also concluded that ARM holds a very strong position as a supplier of IP architecture for application processors for consumer electronics devices. The Commission concluded that a third-party TEE developer would need to be able to develop TEEs based on ARM's TrustZone technology. The Commission also found that ARM would have the incentive and ability to degrade the interoperability of its IP architecture with competing TEE solutions by withholding information necessary for these competitors' TEEs to run on ARM's processor architecture and/or by modifying ARM's TrustZone IP design. This conclusion was based primarily on two factors. First, ARM does not charge separately for TrustZone and thus would not risk a loss of revenue as a result of such discrimination. Second, the market investigation respondents indicated that they believed that ARM *"may only support the JV in the future and prevent other TEE solutions from working with future generations of ARM architectures."*[11]

To address these concerns, ARM committed to provide third parties with information on current and future versions of TrustZone (or other equivalent architectures that ARM may release in the future) necessary to develop alternative TEE solutions on the same conditions on which ARM provides such

[9] Case COMP/M.6564 *ARM/Giesecke & Devrient/Gemalto/JV*, Commission decision of November 6, 2012, para. 32.

[10] GlobalPlatform is a cross industry, not-for-profit association that identifies, develops, and publishes specifications that facilitate the secure and interoperable deployment and management of multiple embedded applications on secure chip technology.

[11] Case COMP/M.6564 *ARM/Giesecke & Devrient/Gemalto/JV*, Commission decision of November 6, 2012, para. 151.

information to the JV. ARM also committed not to design its IP in a manner that would intentionally degrade the performance of third-party TEEs.

Case COMP/M.6611 Arla Foods/Milk Link

On September 27, 2012, the Commission cleared Arla Foods' ("Arla") acquisition of Milk Link subject to Arla's commitment to divest Milk Link's milk drinks business located in Devon (UK).

The transaction was notified on August 9, 2012. Arla and Milk Link were co-operatives owned by farmers active in the supply and production of dairy products. The Commission's investigation focused on the horizontal overlap between the parties' activities in the market for the production and supply of long-life milk in the UK.

The Commission concluded that the transaction affected seven different horizontal markets relating to dairy products and three vertical markets. With respect to six of these markets, the Commission found that the transaction would not raise competition concerns due to the small increments it would bring about, and in light of the fact that the merged entity would continue to face pressure from robust competitors.

With regard to the long-life milk market in the UK, the Commission determined that that the merged entity would have a combined market share of 60-70%, and would not face effective competition from other suppliers, which had significantly lower market shares (in the 5-10% range). During the market investigation, both competitors and customers expressed concerns about the paucity of indigenous UK suppliers other than the merging parties with the capacity to produce the required volumes. Accordingly, the Commission concluded that the transaction raised serious doubts as to its compatibility with the internal market in relation to the production and supply of long-life milk in the UK.

Arla offered to divest its Milk Link's milk drinks business, including its long-life milk business in the UK. The divestiture also included a raw milk supply contract and a fresh bulk cream purchase agreement for up to two years. The Commission considered the proposed divestment sufficiently effective to remedy the competition concerns in the long-life milk market and approved the transaction.

First-phase Decisions Without Undertakings

Case COMP/M.6554 EADS/STA/EFW JV

On September 13, 2012, the Commission unconditionally cleared the joint acquisition of Elbe Flugzeugwerke GmbH ("EFW") by EADS Deutschland GmbH ("EADS") and Singapore Technologies Aerospace Ltd ("STA").

EADS is active in the aviation, defense, aerospace and communications industries, while STA is active in passenger-to-freighter ("P2F") conversion of Boeing airplanes. EFW, which before the transaction was a wholly-owned subsidiary of EADS, is also active in P2F conversion.

Despite horizontal overlaps between EFW and STA in two areas – P2F conversion and heavy maintenance – the Commission found that the transaction would not raise competitive concerns. In particular, the Commission determined that the barriers to entry in the P2F conversion market are low because third party converters and independent companies already active in aircraft manufacturing have the technological capabilities to enter. In fact, respondents to the Commission's market investigation believed that, post-transaction, competition in the market for P2F conversion would be improved, resulting in better product availability and lower prices for converted airplanes.

Additionally, the majority of the respondents to the market investigation did not believe that EFW and STA were competitors in the P2F conversion market because EFW converts the Airbus A300-600 and the Airbus A310-300, whereas STA converts the Boeing 757. Before choosing a P2F converter, customers wishing to convert a passenger airplane would first choose the aircraft they wish to convert based on factors such as operating cost, environmental efficiency, fleet lift, or range performance, before choosing P2F converter. The market investigation also showed that because customers do not have exclusive supply contracts with third party providers they could switch to a different converter in response to a post-transaction price increase. However, this would only be possible where there were other third party converters on the market and would require, for example, the provision of additional spare parts and training for ground, flight and maintenance personnel.

Finally, the Commission found that there were no competitive concerns with regard to the market for heavy maintenance. Because STA is not active in the EEA, a horizontal overlap in the heavy maintenance market existed only at a global level. The Commission concluded that, at that level, EFW and STA

would have a market share of only 5-10% and other strong competitors would remain.

Case COMP/M.6577 Avnet/Magirus

On September 21, 2012, the Commission unconditionally cleared the acquisition by Avnet, Inc. ("Avnet") of Magirus AG ("Magirus"). Avnet is a global distributor of electronic components, computer products, and technology services. Magirus is a distributor of IT products and a provider of associated services, such as consultancy and training, in the EU.

Although the Commission left the product market definition open, its market investigation revealed that the parties' customers disagreed as to whether direct sales by manufacturers and indirect sales by distributors were part of the same market. This issue has been discussed extensively in various Commission precedents, including in two other recent Commission decisions, *Ingram Micro/Brightpoint*[12] and *Tech Data/Specialist Distribution Group/ETC Metrologie/Best'Ware France/SDG*.[13] In all three decisions, the Commission found that direct and indirect sales are not fully interchangeable.

The Commission investigated a horizontal overlap in the market for the wholesale distribution of IT products at both the EU and national levels. In particular, the Commission focused on the wholesale distribution of data storage products and servers. The Commission concluded that the transaction would not raise competition concerns with regard to either segment, primarily because the combined entity would continue to be constrained by other established competitors.

Additionally, the Commission determined that the following characteristics of the market for the wholesale distribution of all IT products would make it unlikely that the merged entity could exercise market power: (i) manufacturers and vendors are able to influence wholesale prices as they use non-exclusive distribution agreements; (ii) manufacturers, customers, and retailers are able to switch to the merged entity's competitors who offer a full range of products; (iii) direct sales from manufacturers exert competitive pressure on indirect sales; (iv) the distribution of computer/IT products is characterized by substantial intra-brand and inter-brand competition; (v) barriers to entry are low; and (vi) distributors compete with – and therefore act as a competitive constraint on – resellers.

[12] Case COMP/M.6685 *Ingram Micro/Brightpoint,* Commission decision of October 11, 2012.

[13] Case COMP/M.6713 *Tech Data/Specialist Distribution Group/ETC Metrologie/Best'Ware France/SDG BV,* Commission decision of October 24, 2012.

STATE AID

ECJ - Judgments

Case C-288/11 P Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v. Commission

On December 19, 2012, the Court of Justice rejected the appeals brought by Mitteldeutsch and Flughafen Leipzig-Halle ("the airport" or "the applicants") seeking the partial annulment of the General Court's judgment concerning the financing of the airport infrastructure.

In the judgment under appeal,[14] the General Court had examined a Commission decision declaring that certain German measures benefiting the company DHL and the airport constituted compatible State aid, while a series of other measures amounted to unlawful State aid and were incompatible with the common market ("the Decision").[15] The General Court rejected the applicants' main contention that a €350 million capital increase by public stakeholders destined to finance the expansion of the regional airport infrastructure could not be considered State aid. (The capital increase was part of a framework agreement concluded in 2005 by DHL and the two company appellants, following DHL's decision to move its European cargo hub to the airport, and would be used to build a new landing strip.) The General Court agreed with the applicants with regard to several other contentions, partially annulling the Decision.

The main issue addressed by the Court of Justice was whether the construction of the airport infrastructure could be considered an "economic activity" within the meaning of Article 107(1)TFEU. The appellants argued that the construction or extension of airport infrastructure is not an "economic activity" within the meaning of EU State aid law, so that its financing by means of public funds cannot constitute State aid.

The Court of Justice upheld the General Court's judgment and its conclusion that the construction of the airport runway is an economic activity. First, the Court of Justice dismissed the applicants claim that the activities of operation and construction had to be dissociated. The airport was engaged in an economic activity as it offered airport services in return for remuneration gained from airport fees. The operation of the new runway would also form part of the airport's economic activity as the infrastructure would be operated for commercial purposes in exchange for fees for its use. The construction of the runway could thus not be dissociated from its subsequent operation. The runway would also help increase the airport's capacity and expand its business.

The Court of Justice also agreed with the General Court's conclusion that the fact that the construction activity would not be carried out by private investors or would not be profitable was irrelevant for the purposes of determining whether or not it could be deemed an economic activity. This is because the concept of undertaking includes any entity engaged in an economic activity, regardless of its legal status or its mode of financing, and any activity consisting of offering goods or services in a given market is an economic activity. It follows that, whether or not a particular activity is economic in nature does not depend on the private or public status of the entity engaged in it or on the profitability of the activity.

The applicants also argued that the Commission had retroactively applied the Guidelines on Financing of Airports,[16] and that, by refusing to acknowledge this, the General Court had infringed the principles of non-retroactivity, protection of legitimate expectations, and legal certainty. The Court of Justice disagreed. It concluded that the General Court's decision did not violate such principles and that it did not err in rejecting the applicants' claims on the grounds that they were based on the incorrect assumption that the Guidelines had been retroactively applied. The Court of Justice clarified that the General Court's analysis was based on case law precedent, including the *Aéroports de Paris* judgment.[17]

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[14] Joined cases T-443/08 *Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG v. Commission* and T-455/08 *Freistraat Sachsen and Land Sachsen-Anhalt v. Commission*, [2011] ECR II-1311.

[15] Case C 48/06 *Leipzig Halle Airport*, Commission decision of July 23, 2008, OJ 2008 L 346/1.

[16] Community Guidelines of December 9, 2005, on financing of airports and start-up aid to airlines departing from regional airports, OJ 2005 C 312/1.

[17] Case C-82/01P *Aéroports de Paris v. Commission* [2002] ECR I-9297.

GC - Judgments

Case T-137/10 Coordination bruxelloise d'institutions sociales et de santé (CBI) v. Commission

On November 7, 2012, the General Court annulled the Commission's decision concluding that the funding granted by the Belgian authorities to the public hospitals belonging to the IRIS network in the Bruxelles-Capitale Region was compatible with the common market.[18]

Following a complaint by CBI, a Belgian association of private hospitals, the Commission reviewed four public funding measures in favor of the IRIS hospitals: (i) reimbursement of costs incurred for hospital services of general economic interest ("SGEI"); (ii) reimbursement of hospital deficits; (iii) aid for the restructuring of public hospitals; and (iv) reimbursement of non-hospital SGEI. The Commission, without opening a formal investigation, decided that the measures constituted State aid that was compatible with the common market given their conformity with Article 106(2) TFEU and with the Community framework for State aid in the form of public service compensation.[19] CBI appealed, claiming that, due to the difficulties in determining the compatibility of the measures with the common market, the Commission should have opened a formal investigation pursuant to Article 108(2) TFEU.

In its judgment in *Altmark*,[20] the Court of Justice set out four conditions under which public service compensation does not constitute state aid. These conditions largely correspond to the requirements established under Article 106(2) TFEU to consider SGEI compatible with the common market.

The first condition requires that the undertaking have a clearly defined public service mandate. The General Court found that the Commission's examination of this condition was inconsistent and incomplete. The Commission had neither examined the content of any purported special obligation nor compared it with the ones in place for other hospitals. Given that SGEIs are rendered by all hospitals, it was necessary to prove the existence of special obligations for the IRIS hospitals to justify further funding to their benefit. It was difficult to examine non-hospital services given the absence of any specific measure mandating them.

The second condition requires that compensation be granted pursuant to objective and transparent parameters to avoid conferring an economic advantage which may favour the recipient undertaking over competing undertakings. The General Court found that the Commission's examination of this condition was not sufficiently comprehensive. In particular, the Commission did not distinguish between the final compensation and the preliminary advance payments the hospitals benefited from. Therefore, it could not be excluded that the beneficiaries received a temporary advantage through the advance payments. Furthermore, the Commission did not analyze the content of and the form of compensation for non-hospital services.

The third condition requires that the public service mandate contain measures to avoid overcompensation. This condition was fulfilled, because the general funding scheme prohibited overcompensation and set out the criteria for calculating the hospitals' deficit. However, the Commission did not identify comparable provisions for the advance payments' scheme, thus doubts concerning the existence of mechanisms to avoid overcompensation could arise. Furthermore, the Commission had insufficiently examined the means to avoid overcompensation of the non-hospital services as their content had not been precisely determined in the public service mandate.

In relation to the proportionality of the aid, the Commission examined the annual income of the IRIS hospitals generated by the SGEI and the compensation they received, and concluded that in most years there had been under-compensation. The General Court, however, held that the complexity and breadth of this exercise strongly indicate difficulties in determining the compatibility of the aid without an in-depth examination.

The fourth condition requires determining whether the amount of aid granted to the beneficiary is legitimate based on an analysis of the costs that a typical undertaking efficiently run would have incurred in discharging its public service obligations. Under General Court and European Court of

[18] Case T-137/10 *Coordination bruxelloise d'institutions sociales et de santé (CBI) v. Commission*, not yet reported, concerning Commission decision C(2009)8120 of December 28, 2009, on the funding granted by the Belgian authorities to the public hospitals belonging to the IRIS network in the Région Bruxelles-Capitale, by way of compensation for hospital and non-hospital services they provide in the form of services of general economic interest (NN 54/09), OJ 2010 C 74/1.

[19] Community framework for State aid in the form of public services compensation, OJ 2005 C 297/4.

[20] Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747.

Justice precedent, this condition only applies when assessing whether an aid measure constitutes state aid; it does not apply when assessing the compatibility of the measure with Article 106(2) TFEU.[21] As such, it was not necessary to examine the fourth condition in this case.

The General Court therefore annulled the Commission's decision because it was adopted without opening a formal investigation procedure.

[21] Case T-354/05 *TF1 v. Commission* [2009] ECR II-00471, paras. 130, 135 (collecting cases).

FINING POLICY

ECJ - Judgments

Case C-240/11 P World Wide Tobacco España SA v. Commission ("Spanish Raw Tobacco Cartel")

On May 3, 2012, the Court of Justice dismissed the appeals of the Commission and of World Wide Tobacco España ("WWTE")[22] against the General Court's judgment that partially annulled the Commission's decision imposing a fine on WWTE and other parties for participation in a cartel.[23] On October 20, 2004, the Commission imposed fines totaling over €20 million on five companies active in the Spanish raw tobacco processing market for cartel activities between 1996 and 2001.[24] The companies were accused of fixing prices 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, Standard Commercial Tobacco, and Trans-Continental Leaf Tobacco Corporation ("TCLT") jointly liable for the involvement of their subsidiary, WWTE.

On March 8, 2011, the General Court upheld the Commission's decision to fine WWTE for its participation in the cartel. However, it reduced the fine from €1.8 million to €1.6 million because of a manifest error of judgment in the application of the Leniency Notice. (The General Court decided that the Commission had wrongly concluded that WWTE had substantially contested certain facts on which the Commission had based its allegations.)[25]

On appeal, WWTE first argued that the Commission had violated the principle of equal treatment by increasing WWTE's fine because it belonged to a multinational group of considerable financial and economic strength, while not taking the same approach with regard to other cartelists. The Court of Justice rejected this argument. It concluded that the increase of the fine was justified by the fact that, unlike the other cartelists, WWTE not only belonged to such a group, but also operated under the decisive influence of its parent companies, with which it formed an economic unit and, therefore, a single undertaking for the purpose of Article 101 TFEU.

The Court of Justice also rejected for lack of clarity and specificity WWTE's arguments that (1) it should not have been held liable for the conduct of its mother company TCLT; (2) in any event, its fine should have been reduced based the General Court's prior judgment holding that TCLT was not liable for the infringement; and (3) the General Court had erroneously considered that it formed an economic unit with its parent companies for the purpose of applying the 10% turnover cap.[26]

WWTE also claimed that the Commission had violated the rules concerning the calculation of fines by not taking into account the fact that WWTE had not enforced the cartel in 1996 and 1997. The Court of Justice rejected this argument, because WWTE questioned a lack of reasoning in the decision of the Commission, not of the General Court.

In its cross-appeal, the Commission claimed that the General Court's judgment was not adequately substantiated. The Commission argued that the General Court had automatically reduced the fine by 10% simply because WWTE had not substantially contested the relevant facts, whereas it should have examined whether WWTE's cooperation had helped the Commission to uncover and put an end to an infringement. The Court of Justice concluded that the General Court had not granted WWTE an automatic fine reduction. Rather, the General Court had decided, in the appropriate exercise of its jurisdiction, to grant WWTE a reduction of fine similar to the reduction granted to another party to the cartel that had provided an equivalent level of cooperation. Accordingly, the Court of Justice concluded that the General Court had adequately substantiated its judgment and rejected the cross-appeal.

Case C-441/11 Commission v. Verhuizingen Coppens NV ("Belgian International Removals Cartel")

On December 6, 2012, the Court of Justice set aside the General Court's judgment[27] annulling the Commission's

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22 Case C-240/11 P *World Wide Tobacco España v. Commission* order of May 3, 2012, not yet published.

23 Case T-37/05 *World Wide Tobacco España v. Commission* [2011] ECR II-41.

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

25 Case T-37/05 *World Wide Tobacco España v. Commission* [2011] ECR II-41, paras. 197-198.

26 Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco v. Commission* and *Commission v. Alliance One International and Others* judgment of July 19, 2012, not yet published.

27 Case T-210/08 *Verhuizingen Coppens v. Commission* judgment of June 16, 2011, not yet published.

decision[28] imposing fines totaling €32.76 million on ten undertakings for participation in a cartel in the international waste removal services market in Belgium from 1984 to 2003. The cartel involved price-fixing, market sharing, and the manipulation of tendering procedures, in particular through a system of financial compensation for rejected offers and abstentions from bidding ("commissions") as well as of false quotes ("cover quotes"). Five addressees of the decision, including Verhuizingen Coppens NV ("Coppens"), applied for the annulment of the decision before the General Court.

The General Court annulled the decision to the extent that it applied to Coppens, concluding that the Commission had erroneously assessed the scope of its involvement in the cartel. Although the Commission had proved Coppens's participation in the system of cover quotes, the Commission had failed to establish its involvement in the other components of the cartel.

On appeal, the Commission claimed that the General Court had acted *ultra vires*, in violation of Articles 263 and 264 TFEU, insofar as it had entirely annulled the contested decision in respect of Coppens. The Commission argued that the General Court should have ordered a partial annulment, since Coppens's involvement in at least one aspect of the cartel was established.

The Court of Justice and AG Kokott confirmed that an undertaking that has, by its own conduct, participated in some aspects of a multiform infringement by object with the intention of helping to bring about the infringement as a whole, may also be liable for the conduct of other undertakings in the context of the same multiform infringement throughout the period of its participation in the infringement.

However, such liability may only be attributed where the undertaking concerned was aware of the other participants' unlawful conduct, or could reasonably foresee such conduct and was prepared to accept the risk. The Commission was unable to establish these facts. The agreement on cover quotes, while objectively capable of seriously distorting competition and increasing prices, could therefore not be regarded as forming part of the overall plan pursued by the other cartel participants. As a result, the Commission was entitled to attribute liability to Coppens only for its direct participation in the agreement on cover quotes. By contrast, the Commission had not met its burden of proof with respect to Coppens's involvement in the agreement on commissions.

Even though there were grounds for annulment of the Commission decision, the Court of Justice emphasized that Articles 263 and 264 TFEU should not be misconstrued as an "all or nothing" rule. Rather, the first paragraph of Article 264 TFEU must be interpreted and applied in such a way that the act contested by the action for annulment is declared void only insofar as the action is well-founded. The Court of Justice held that the mere fact that the General Court had found that a plea was well-founded did not automatically enable it to annul the contested measure in its entirety where that plea could provide a basis only for partial annulment.[29]

Accordingly, the Court of Justice set aside the General Court's judgment, while also annulling the contested Commission decision insofar as it held that Coppens had participated in the agreement on commissions. Consequently, the Court of Justice reduced the fine imposed on Coppens from €104,000 to €35,000.

Cases C-445/11 P Bavaria NV v. Commission and C-452/11 P Heineken Nederland BV and Heineken NV v. Commission

On December 19, 2012, the Court of Justice rejected the appeals of Heineken NV and Heineken Nederland BV (together, "Heineken") and of Bavaria against the General Court's judgment that partially upheld the Commission's 2007 decision imposing fines totaling €273.783 million on several brewers for taking part in a price-fixing cartel in the Dutch beer market from February 1996 to November 1999.[30] Heineken, Bavaria, and Grolsch were fined €219.3 million, €22.8 million, and €31.7 million, respectively. InBev benefitted from full immunity from fines under the leniency notice.

According to the Commission, the cartelists had coordinated prices and price increases for beer and allocated customers, both in the on-trade (hotels, restaurants, and cafés) and the off-trade (supermarkets and off-licenses) segments. They had also occasionally allocated customers and coordinated other

[28] Case COMP/38.543 *International removal services*, Commission decision of March 11, 2008, OJ 2009 C 188/16.

[29] Case C-295/07 P *Commission v. Département du Loiret* [2008] ECR I-9363, para. 10.

[30] Case COMP/B-2/37.766 *Dutch beer market*, Commission Decision C(2007) 1697 of April 18, 2007, OJ 2008 C 122/1.

commercial conditions offered to individual on-trade consumers in the Netherlands.

On appeal, the General Court reduced the fines imposed on Heineken and Bavaria to €198 million and €20.7 million, respectively.[31] The General Court found that the Commission had not established that the infringement concerned the occasional coordination of commercial conditions, other than prices, offered to individual customers in the on-trade segment. Fines were further reduced as a result of the excessive duration of the procedure. The applicants appealed to the Court of Justice, asking it to set aside parts of the General Court's judgments and to annul the Commission's decision.

The Court of Justice concluded that the General Court had not breached the principle of equal treatment by refusing to compare the contested decision with a previous decision relating to the Belgian beer sector.[32] Such a comparison of the fines imposed for distinct infringements would have likely distorted the specific functions performed by the different stages in the calculation of a fine, insofar as the final amount of the fines reflects the specific circumstances of each cartel.

The Court of Justice also found that the General Court had not violated the applicants' rights of defense by refusing them access to InBev's response to the statement of objections. Indeed, Heineken and Bavaria already had Inbev's response in their possession, as was evident from the reference made to the content of that response in their appeals. In any event, the Court of Justice reaffirmed that, to access exculpatory documents that are not part of its file, the company requesting access must provide a first indication of the usefulness of these documents for its defense. In particular, it must mention the potential exculpatory elements or at least provide an indication of their existence. The applicants had failed to meet that burden.

Heineken also claimed that the rights of defense and the right to sound administration mandated the General Court to rule on Grolsch's appeal before ruling on the other undertakings' parallel appeals. According to Heineken, the General Court's prior judgment on Grolsch's appeal, which concluded that Grolsch had not directly participated in the cartel, had consequences on the other undertakings' liability. Therefore, the General Court at least should have requested that the Commission indicate whether that judgment warranted the revision of its decision. The Court of Justice rejected this claim. It concluded that the General Court's ruling that the infringement could not be attributed to Grolsch, but should have been attributed to its subsidiary, was irrelevant as regards the infringement committed by Heineken.

Finally, the applicants complained against the application of the stricter fining policy, which came into force in 2005 and was applied to this case as a result of the excessive delay of the administrative procedure entirely due to the Commission's inaction. The Court of Justice concluded that the General Court had duly taken account of the excessive delay by further reducing the fine following the Commission's reduction for the same reason. As a result, the Court of Justice dismissed the appeals in their entirety.

GC - Judgments

Cases T-352/09, T-392/09, T-400/09, and T-410/09 - Calcium Carbide Cartel

On December 12, 2012, the General Court upheld the Commission's July 2009 decision imposing fines totaling €61 million on nine suppliers of calcium carbine and magnesium for participation in market-sharing, quota-fixing, customer allocation, price-fixing, and the exchange of sensitive commercial information from 2004-2007. The General Court dismissed the appeals of four cartel participants in their entirety.[33] The appeals lodged by other cartel participants are still pending.

The first appeal, lodged by Novácke chemické závody ("Novácke"), contested the Commission's refusal to take account of the applicant's inability to pay pursuant to paragraph 35 of the Guidelines on the method of setting fines (the "Fining Guidelines"). That provision allows the Commission to reduce a cartel fine if payment of the full fine would "irretrievably jeopardize the economic viability of the undertaking concerned and cause its assets to lose all their

[31] Case T-240/07 *Heineken Netherland BV and Heineken NV v. Commission* and case T-235/07 *Bavaria BV v. Commission* judgments of June 16, 2011, not yet published.

[32] Case IV/37.614/F3 PO, *Interbrew and Alken Maes*, Commission decision C(2001) 3915 of December 5, 2001, OJ 2003, L 200/1.

[33] Cases T-352/09 *Novácke chemické závody v. Commission*, T-392/09 *1.garantovaná v. Commission*, T-400/09 *Ecka Granulate and non ferrum Metallpulver v. Commission*, and T-410/09 *Almamet v. Commission*, judgments of December 12, 2012, not yet published.

value."[34] The General Court concluded that the mere fact that the imposition of a fine might give rise to the bankruptcy of the undertaking concerned was not sufficient. Bankruptcy, though adversely affecting the financial interests of owners and investors, does not necessarily lead to the disappearance of the undertaking concerned, since it can be either recapitalized or acquired as an economic entity. Therefore, the General Court concluded that paragraph 35 of the Fining Guidelines applies only to situations in which the acquisition of the undertaking, or at least of its assets, appears impossible or unlikely.

In the second appeal, Novácke's parent company 1.garantovaná claimed that it should not be held liable for the anticompetitive conduct of its subsidiary, in particular because it acted purely as a financial investor without any involvement in the subsidiary's management and control. The General Court dismissed the claim, stating that a holding company could still form an economic unit with the company whose shares it holds. The General Court also rejected 1.garantovaná's challenge against the use of its 2007 (rather than 2008) turnover to establish the 10% turnover ceiling. The Commission selected 2007 as the reference year because the applicant had decided to sell all its assets in 2007 with a view to terminating its activities, leading to a decrease of more than 90% of its turnover in 2008. The General Court agreed with the Commission's approach, noting that the Commission must refer to the last full business year in calculating the upper limit of the fine. Finally, the General Court rejected the applicant's contention that the Commission had wrongly refused to take account of its inability to pay the fine. The General Court stated that the "economic viability" of an undertaking cannot be jeopardized in the sense of paragraph 35 of the Fining Guidelines where that undertaking has itself decided to terminate its activities and to sell its assets.

The third appeal was lodged by Ecka Granulate ("Ecka") and its subsidiary Metallpulver, which were held jointly liable for Metallpulver's participation in the cartel. The General Court rejected the applicants' claim that Article 23 of Regulation 1/2003 was illegal because it imposed a penalty while lacking a clear and unambiguous legal basis. The applicants argued that the provisions were illegal because the sole criteria of gravity and duration of the offense, without further definition, granted the Commission unfettered power to determine the amount of the fine (as long as it did not exceed the 10% turnover cap). The General Court rejected this argument. It concluded that these criteria, together with the Commission's general obligation to comply with the principles of equality and proportionality, its obligation to state reasons, and the judicial control of its decisions, constituted sufficient safeguards of the principles of legality of penalties and legal certainty. The applicants also alleged that the Fining Guidelines (in particular paragraphs 35 and 37) were illegal because they gave the Commission quasi-unlimited discretion to set the fine. The General Court ruled that this margin of discretion did not render the Fining Guidelines illegal, but instead allowed for the proper application of the principle of proportionality.

In the fourth appeal, Almamet argued that the Commission had violated its rights of defense by using documents seized at Ecka's premises outside the scope of the Commission's inspection decision, because these documents related to magnesium whereas the inspection decision concerned calcium carbide only. The General Court noted that the Commission had seized the documents under the legitimate impression (given their characteristics and location) that they related to calcium carbide. The Commission had then subsequently initiated an investigation in relation to magnesium based on the evidence obtained not only by means of the seized documents, but also through other sources. The General Court stated that, once the scope of its investigation had been extended to include magnesium, the Commission was entitled to make a fresh request for production of the seized documents. As the Commission had followed such procedure, Almamet's claim was rejected.

[34] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2, para. 35.

POLICY AND PROCEDURE

ECJ - Judgments

Case C-199/11 Europese Gemeenschap v. Otis, Kone, Schindler and ThyssenKrupp

On November 6, 2012, the Court of Justice affirmed for the first time the right of the European Union (the "EU") to claim damages for the loss suffered by a cartel infringement.[35]

In 2007, the Commission fined Otis, Kone, Schindler, and ThyssenKrupp for their participation in cartels in the market for the sale, installation, maintenance and renewal of elevators and escalators.[36] Since several EU institutions were clients of the members of the cartel, the European Union, represented by the Commission, brought a private action for damages before the Brussels Commercial Court in June 2008. The Belgian court decided to refer two questions to the Court of Justice: (i) whether the Commission was entitled to represent the EU before a national court; and (ii) whether the fact that the Commission, which had adopted the fining decision, also represented the EU in such civil proceedings infringed the right to effective judicial protection, as protected by Article 47 of the Charter of fundamental rights.

On the first question, the Court of Justice concluded that Article 282 of the Treaty Establishing the European Community, which was applicable in this case, entitled the Commission to represent the European Community before national courts without needing a specific authorization.

As regards the right to effective judicial protection, the Court of Justice concluded that the fact that the national courts are bound by a Commission decision finding an infringement would not deprive the defendants of their right of access to a tribunal. The Court of Justice explained that the system of judicial review of Commission decisions afforded all the safeguards required by Article 47 of the Charter, because EU courts can review both the law and the facts of a case, have the power to assess the evidence, to annul the contested decision, and to alter the amount of a fine.

Furthermore, the Court of Justice noted that, while the national court is required to accept that a prohibited conduct exists, it still has the sole responsibility to determine the loss caused to each applicant and find a direct link between the loss and the harmful event. The Commission can therefore not be seen as the judge of its own cause.

The Court of Justice also dismissed the argument of the breach of equality of arms, *according to which "*each party must be afforded a reasonable opportunity to present its case, including evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis its opponent". The applicants argued that the Commission was in a favorable position because it had gathered information – including business secrets – during the cartel investigations, which it could use during the claim for damages proceedings. The Court of Justice, however, noted that the Commission did not provide this information in the framework of its private action. It would in any event be precluded from doing so because EU law prohibits the Commission from using information collected in the course of a competition investigation for other purposes.

Case C-226/11 Expedia Inc. v. Autorité de la concurrence and Others

On December 13, 2012, the Court of Justice issued a preliminary ruling stating that the Commission's guidance in its *de minimis* notice (the "Notice")[37] does not bind the National Competition Authorities ("NCAs") and national courts.[38]

On February 5, 2009, the French Competition Authority (the "FCA") found that the partnership regarding a joint selling agreement between SNCF and Expedia breached both Article 101 TFEU and Article L.420-1 of the French Commercial Code. The Paris Court of Appeal upheld the FCA's decision.

Expedia appealed to the French Supreme Court, arguing that the FCA erred in finding an appreciable restriction of competition because its market share was lower than the 10% threshold set out in the Notice. The French Supreme Court referred to the Court of Justice the question of whether an NCA could impose fines on an undertaking, both based on Article 101 TFEU and on national competition law, even though the

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[35] Case C-199/11 *Europese Gemeenschap v. Otis NV and Others* judgment of November 6, 2012, not yet published.

[36] Case COMP/E-1/38.823 *Elevators and Escalators*, Commission decision C(2007) 512 of February 21, 2007, OJ 2008 C 75/19.

[37] 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.

[38] Case C-226/11 *Expedia Inv v. Autorité de la Concurrence* judgment of December 13, 2012, not yet published.

thresholds specified by the Commission in the Notice were not met.

The Court of Justice first confirmed that NCAs can apply the provisions of national law prohibiting cartels to an agreement of undertakings capable of affecting trade between Member States within the meaning of Article 101 TFEU only where that agreement perceptibly restricts competition within the common market.

The Court of Justice explained that, through the Notice, the Commission intended to quantify what does not constitute an appreciable restriction of competition within the meaning of Article 101 TFEU. The objective of the Notice is to ensure transparency in the Commission's application of Article 101 TFEU and to give guidance to the national courts and NCAs. However, the Notice expressly states that it does not legally bind NCAs and national courts. Moreover, the Notice does not contain any reference to declarations by NCAs that they acknowledge the principles set out therein or that they will abide by them. Finally, the Notice's definition of market share thresholds does not imply that agreements of undertakings which exceed these thresholds appreciably restrict competition.

In light of the above, the Court of Justice concluded that NCAs need not take into account the thresholds established in the Notice in order to determine whether a restriction of competition is appreciable. Such thresholds are no more than factors among others that may enable the authority to determine whether a restriction is appreciable by reference to the actual circumstances of the agreement.

Bringing proceedings and imposing penalties on undertakings that enter into an agreement that does not exceed the thresholds would not infringe the principles of legitimate expectations and legal certainty. Furthermore, the principle of the lawfulness of penalties does not require the Notice to be regarded as a legal measure binding on the NCAs, since cartels are already prohibited by Article 101 TFEU.

Finally, the Court of Justice stated that an agreement which may affect trade between Member States and which has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

Interestingly, the Court of Justice did not follow the AG Kokott's opinion of September 6, 2012.[39] The opinion stated that, even though the Notice is not legally binding on NCAs and national courts, it would follow from the duty of sincere cooperation laid down in Article 4(3) TFEU that they must take it into account when applying Article 101 TFEU; they could 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.

GC - Judgments

Case T-164/12 Alstom v. Commission

On November 29, 2012, the General Court issued an order suspending the transmission by the Commission of confidential documents obtained during a cartel investigation to the High Court of England.[40]

On January 24, 2007, the Commission fined eleven groups of companies, including Alstom SA ("Alstom"), for infringing Article 101 TFEU by participating in a cartel in the market for gas insulated switchgear. On March 3, 2011, the General Court upheld the Commission's decision. Alstom's appeal against the General Court's judgment is pending. Meanwhile, in 2008, National Grid Electricity Transmission ("National Grid") brought a claim for damages against the cartel participants before the High Court of England, which requested the transmission by the Commission of certain documents, including Alstom's reply to the Commission's statement of objections.

On January 26, 2012, the Commission communicated its decision to accede to the High Court's request. Alstom appealed this decision and applied for interim measures seeking the suspension of the transmission of the documents.

The President of the General Court ordered the suspension of the decision applying the following three-part test. First, he weighted Alstom's interest in obtaining the interim measure against the interest in the immediate application of the decision. Second, he assessed whether the suspension of the

[39] Opinion of Advocate General Kokott of September 6, 2012 in Case C-226 *Expedia Inc.*, *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.

[40] Case T-164/12 *Alstom v. Commission* order of November 29, 2012, not yet published.

transmission of the documents was urgent, i.e., whether it was necessary to "*avoid serious and irreparable harm to the applicant's interest*".[41] Finally, he confirmed that the arguments put forward by Alstom in support of the action for annulment appeared to be relevant, or at least not unfounded.

When weighing the different interests at stake, the President recalled that the interim measure must be reversible – that is, it should not prevent the decision from being fully effective if Alstom's main action is dismissed. The President noted that the grant of interim measures amounted to no more than maintaining, for a limited period, the status quo that had existed for several years. Moreover, Alstom only objected to the transmission of the confidential version of the requested documents at issue. The Commission could still transmit their non-confidential versions until the General Court ruled on the legality of the decision. The President therefore concluded that Alstom's interest outweighed those of the Commission and of National Grid.

Given that the High Court would, in all likelihood, rule on the claim for damages before the General Court ruled on the lawfulness of the transmission, the President also found that the grant of interim measures was urgent. Dismissing Alstom's petition would cause serious harm to Alstom that could not be repaired by the General Court's ruling in the main proceedings.

Finally, the President found that the main action raised new issues of law, which could not, *prima facie*, be considered irrelevant. In particular, the General Court would have to rule on the degree of control that the Commission should exercise in ensuring that the national court could and would protect the confidential information transmitted to it by the Commission.

In light of the above, the President suspended the application of the decision and the transmission of the requested documents.

Case T-491/07 Groupement des Cartes bancaires "CB" v. Commission

On November 29, 2012, the General Court upheld the Commission's decision declaring anticompetitive some aspects of the card system operated in France by the Groupement des Cartes Bancaires ("GCB").[42]

In 2002, GCB, a French economic group, notified a new charges system to the Commission in the context of the pre-approval procedure in force prior to Regulation No. 1/2003. On October 17, 2007, the Commission found that these new tariffs, which were, in principle, applicable to all GCB's members, breached Article 101 TFEU.[43] In particular, the Commission found that the notified measures were applied in such a way as to hinder the issuing of cards by new members of GCB, such as internet banks or the banking arms of major retailers, at a lower price than that of large banks. The Commission therefore concluded that the measures had both the object and effect of restricting competition. It required GCB to withdraw the measures and to refrain from any conduct having an identical or similar object or effect. GCB appealed this decision.

The General Court confirmed the Commission's method of analysis. The General Court recalled that the subjective intention of the parties to an agreement is irrelevant for the purpose of Article 101(1) TFEU, and that an agreement can have a restrictive object even if it pursues legitimate aims. This legitimate objective can however only be considered when applying Article 101(3) TFEU. The General Court further recalled that EU competition law applies to conduct restricting competition in a market other than the one in which the undertaking concerned provides its services and for the benefit of other undertakings. In this case, GCB took measures that restricted competition between banks in the card issuance market for the benefit of the large banks involved in the preparation of the measures.

The General Court also endorsed the Commission's view that the two-sided nature of an economic activity was compatible with the existence of separate markets, and that the card issuance market, in which the anticompetitive effects of the case occurred, was a separate market from the markets for acquiring and issuing card payment systems.

The General Court found that the measures constituted an obstacle to the natural development of new entrants' market

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[41] Case T-164/12 *Alstom v. Commission* order of November 29, 2012, not yet published, para. 25.

[42] Case T-491/07 *CB v. Commission* judgment of November 29, 2012, not yet published.

[43] Case COMP/D1/38.606 *Groupement des Cartes Bancaires*, Commission decision C(2007) 5060 of October 17, 2007, OJ 2009 C 183/12.

shares, since they were encouraged to limit the number of cards issued to avoid the payment of certain fees. The measures therefore had the object of restricting competition, irrespective of the consideration received.

The General Court also endorsed the Commission's conclusion that the measures could not benefit from the exemption under Article 101(3) TFEU, because they did not contribute to improving the production or distribution of goods or to promoting technical or economic progress.

Finally, the General Court concluded that the Commission's injunction did not infringe the principles of proportionality and legal certainty. An injunction prohibiting an undertaking from engaging in any conduct that may have an object or effect identical or similar to the infringements aims at preventing undertakings from repeating unlawful conduct and does not exceed the Commission's powers. In particular, the use of the word "similar" does not render the obligation disproportionate or in breach of the principle of legal certainty. The prohibition must be read in conjunction with the Commission's decision, which clearly defines its scope and limits.

By this judgment, the General Court confirmed, for the third time in eighteen months, the Commission's approach to payment card scheme arrangements that hinder competition in the EU.

Commission Developments

ECN Model Leniency Programme

On November 22, 2012, the European Competition Network ("ECN"), which comprises the Commission and the competition authorities of the 27 Member States, published a revised Model Leniency Programme (the "revised MLP") for cartels.[44] The revised MLP enhances the summary application system, clarifies the leniency conditions, and expands the scope of the Programme.

Any undertaking participating in a cross-border cartel is exposed to penalties both from the Commission and from national competition authorities, and may therefore have to file for leniency not only with the Commission but also with several of the 26 Member States that have implemented a leniency program. To avoid discrepancies between the different programs, which tend to make this exercise cumbersome, the ECN introduced a Model Leniency Programme in 2006 ("2006 MLP"). The 2006 MLP thus introduced soft harmonization and set out the main procedural and substantive rules on which all programs should be based. In particular, it introduced a model for a uniform summary application system in cases concerning more than three Member States. This system allowed the applicant to submit a limited amount of information to each competition authority, but was restricted only to the first applicant (i.e., the immunity applicant). It also introduced the notion of "markers" for immunity applicants, which protect applicants' respective positions in the "queue" for a given time.

The revised MLP enhances the summary application system in three ways. First, it opens the summary applications system to all leniency applicants. Second, it provides for a standard template for summary applications, which must include information about the applicant, the alleged infringement, and the leniency applications made to the Commission or to other NCAs. Finally, it supplies a list of national authorities that accept summary applications in English.

The revised MLP also provides further guidance on the second leniency condition, i.e., genuine, full, and continuous cooperation from the applicant, in particular with respect to the non-disclosure obligation. The revised MLP clarifies that the obligation of non-disclosure will not be considered breached if the leniency applicant informs another competition authority in the context of multiple applications. The leniency applicant should, however, keep a record of every competition authority that has been informed, when the information was provided, and the exact content of the information.

Finally, the scope of the revised MLP has been broadened. While it still only excludes vertical agreements and horizontal restrictions of competition other than cartels, now it also expressly states that a cartel that includes vertical elements may be covered by the leniency program.

These revisions further harmonize the various leniency programs across the EU and reduce the burden of making multiple applications. They do not, however, provide for a uniform leniency policy. Even though the national competition authorities endorsed the revisions unanimously, they are still not legally bound by the revised MLP, and are only required to make their best effort to align their leniency programs with the MLP.

[44] ECN Model Leniency Programme, as revised in November 2012, *available at*: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

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