HORIZONTAL AGREEMENTS

ECJ Judgments

Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s (Case C-68/12)

On February 7, 2013, the European Court of Justice (the "Court of Justice") ruled that an agreement to exclude an illegally operating undertaking violates Article 101(1) TFEU.[1]

In 2009, the Competition Authority of the Slovak Republic (the "SCA") found that three major Slovak Banks—Slovenská sporiteľňa a.s. ("Slovenská"), Československá obchodná banka a.s., and Všeobecná úverová banka a.s. (together, the "Slovak Banks")—had infringed competition rules by simultaneously terminating current accounts kept by Akcenta CZ ("Akcenta"). Akcenta is a financial institution that provides services involving cashless foreign exchange transactions; it needs current accounts in banks in order to carry out its activities. In the SCA's view, the Slovak Banks, unhappy that their profits had fallen as a result of Akcenta's business, had monitored Akcenta's activity, conferred with each other, and decided by common agreement to terminate Akcenta's current accounts. In particular, the SCA established that, in a meeting held on May 10, 2007, the Slovak Banks had agreed that each would terminate its contract with Akcenta if the others did the same (this condition was necessary to prevent a part of each bank's clientele switching to the bank that continued to hold Akcenta's current accounts). Accordingly, the SCA fined each bank approximately €3 million.

Slovenská appealed the SCA's decision. Slovenská argued that: (1) because Akcenta did not have the license required under Slovak law to carry on business, it was operating illegally and therefore a restriction of competition could not be pleaded; and (2) the Slovenská employee who attended the collusive meeting with the other Slovak Banks was neither authorized by Slovenská to enter into the agreement, nor had endorsed the collusive behavior discussed at the meeting (namely, the coordinated termination of Akcenta's current accounts). The Supreme Court of the Slovak Republic referred these questions to the Court of Justice.

As to (1), the Court of Justice first observed that, once it appears that an agreement has as its object the prevention, restriction, or distortion of competition, there is no need to take account of the concrete effects of that agreement. The Court of Justice further noted that Article 101(1) TFEU is intended to protect not only the interests of consumers and competitors, but also the structure of the market and competition itself. Accordingly, the Court of Justice held that, in determining whether the agreement constituted an infringement, it was irrelevant that Akcenta was allegedly operating illegally.

As to (2), the Court of Justice held that Slovenská could not avoid liability on the ground that it had not authorized the employee who attended the collusive meeting on May 10, 2007. The Court of Justice observed that, unlawful agreements were, more often than not, clandestine and not governed by any formal rules; it is rarely the case that an undertaking's representative attends a meeting with a mandate to commit an infringement. If an undertaking's participation in an anticompetitive meeting is not to be regarded as tacit approval of an unlawful initiative, the undertaking must publicly distance itself from that initiative in such a way that the other participants understand that it is putting an end to its participation.

Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência (Mandatory Training Systems) (Case C-1/12)

On February 28, 2013, the Court of Justice handed down a preliminary ruling on a reference from the Tribunal da Relação de Lisboa (the "Lisbon Court of Appeal") concerning the interpretation of the concept of "decision of an association of undertakings" under Article 101(1) TFEU.[2] The questions referred to the Court of Justice

[1] *Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a.s.* (Case C-68/12), judgment of February 7, 2013, not yet published.

[2] *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência* (Case C-1/12), judgment of February 28, 2103, not yet published.

arose in the course of proceedings between the Portuguese Order of Chartered Accountants ("OTOC") and the Portuguese Competition Authority ("AdC") regarding a regulation adopted by the OTOC imposing certain compulsory professional training on its members.

By a decision of May 7, 2010, the AdC found the OTOC to have infringed Articles 101(1) and 102 TFEU by adopting a regulation laying down binding rules regarding professional training for chartered accountants. The OTOC sought the annulment of the decision before the Tribunal do Comércio de Lisboa (the "Lisbon Commercial Court"), which confirmed that the OTOC had infringed Article 101(1) TFEU, but held that it had not abused its dominant position on the market for compulsory training for chartered accountants. The OTOC then sought the annulment of the Lisbon Commercial Court's decision before the Lisbon Court of Appeal, in so far as it confirmed the finding of a violation of Article 101(1) TFEU. The Lisbon Court of Appeal stayed the proceedings and referred several questions to the Court of Justice for a preliminary ruling.

The first few questions concerned the interpretation of the notion of a "decision of an association of undertakings." In particular, the Lisbon Court of Appeal asked "*whether the fact, firstly, that the OTOC is required by law to adopt binding rules of general application in order to put into place a system of compulsory training for its members with a view to providing citizens with a quality service that can be relied on and, secondly, that those rules do not directly affect the economic activity of chartered accountants is relevant to the application of Article 101 TFEU.*"[3]

The Court of Justice confirmed its established precedent and found that chartered accountants do indeed carry out an economic activity and can be considered "undertakings" within the meaning of EU competition law. The Court of Justice then examined whether the OTOC should be considered an association of undertakings or a public authority. It held that the rules the OTOC was legally entitled to promulgate had a direct impact on the market for the compulsory training for chartered accountants, and that the OTOC did not in fact exercise powers typical of a public authority. The Court of Justice therefore concluded that the OTOC's rules regarding professional training could be seen as decisions of an association of undertakings.

The Court of Justice did not deem relevant either the fact that the OTOC is regulated by public law or the fact that the OTOC was legally required to put into place a system of compulsory training for its members. The Court of Justice relied on its judgment in *Wouters and Others*,[4] which established that the national legal framework within which decisions of associations of undertakings are concluded does not affect the applicability of EU competition law. The Court of Justice also held that, the fact that the contested regulation did not directly affect the economic activity of the accountants, but only the activity of other providers of compulsory training for accountants, competing with the OTOC, did not preclude the application of Article 101(1) TFEU.

The fourth question referred to the Court of Justice concerned the issue of whether the regulation adopted by the OTOC requiring its members to follow certain training courses exclusively provided by the OTOC constituted an infringement of Article 101(1) TFEU. Examining the effects of the regulation on competition, the Court of Justice first found that the OTOC had significant power in the market for compulsory training for chartered accountants, because the OTOC regulation imposed two types of training on accountants, one of which only the OTOC could provide. The Court of Justice concluded that the OTOC's preclusion of other training providers had the effect of distorting competition in the relevant market. Furthermore, the Court of Justice found that competitors wishing to offer the second type of training faced barriers to entry, because they were required to register with and be approved by the OTOC. The Court of Justice held that the rules governing this registration and approval procedure were too vague and resulted in inequality among economic operators in the relevant market.

3 *Ibid*., para. 33.

4 *Wouters and Others v. Algemene Raad van de Nederlands Orde van Advocaten* (Case C-309/99) 2002 ECR I-1577, para. 66.

The Court of Justice went on to examine the proportionality of the restriction to competition caused by the OTOC's regulation relative to the legitimate objective of guaranteeing the quality of services offered by chartered accountants. It found that the regulation had the effect of eliminating competition in a substantial part of the relevant markets, as well as fixing discriminatory conditions in the rest of the market. Accordingly, the Court of Justice concluded that the regulation was not proportionate and was not justified under Article 101(3) TFEU.

Finally, the Court of Justice examined whether any justification could be found under Article 106(2) TFEU, which exempts undertakings operating services of general economic interest from competition rules in so far as the application of these rules would obstruct the performance of their tasks. The Court of Justice held that compulsory training for chartered accountants could not be viewed as a service of general economic interest and that, even if this were the case, the application of EU competition law would not obstruct the performance of this service.

VERTICAL RESTRAINTS

ECJ Judgments

Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal (Case C-32/11)

On March 14, 2013, the Court of Justice delivered its judgment following a request for a preliminary ruling in the context of a dispute between several insurance companies, *inter alia*, Allianz Hungària Biztosìtò ("Allianz") and Generali-Providencia Biztosìtò Zrt ("Generali") and the Hungarian association of automobile dealers Gépjármű-Márkakereskedők Országos Szövetsége ("GÉMOSZ") and the Hungarian Competition Authority ("HCA") which imposed fines on the above-mentioned undertakings for having concluded a series of agreements with an anticompetitive object.[5]

As of 2002, several Hungarian car dealers that also operated as car repairers entrusted 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.

Between 2003 and 2005, the GÉMOSZ set out the recommended prices to the dealers for car repairs, which were applicable to the insurers. 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 repair fees if the number of Allianz's policies sold reached a certain percentage. Generali entered into similar agreements with some car dealers.

On December 21, 2006, the 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, incompatible with the relevant national competition legislation.[6] It held that the agreements, individually and jointly, had the object of restricting competition both in the car insurance market and in the car repair services market. On appeal, Hungary's Supreme Court referred to the 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 (acting as a broker), qualify as agreements that have as their object the prevention, restriction, or distortion of competition, and thus contravene Article 101(1) TFEU.

The Court of Justice first clarified that it had jurisdiction to answer the question submitted because, even though Article 101(1) TFEU did not directly govern the situation at issue in the national proceedings, the domestic provision faithfully reproduced the Article 101(1) TFEU.[7]

The Court of Justice further noted that the Hungarian agreements linked two otherwise independent activities: car repair services and car insurance brokerage. It reasoned that, although such a link does not automatically mean that the agreements concerned have as their object the restriction of competition, it could nevertheless constitute an important factor in determining whether those agreements were by their nature injurious to the proper functioning of normal competition.

The Court of Justice also pointed out that, in the present case, the object of the agreements at issue should be determined in the light of the two markets concerned. Therefore, it is for the Hungarian Supreme Court to

5 *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal* (Case C-32/11), judgment of March 14, 2013, not yet published.

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

7 *Kleinwort Benson Ltd v. City of Glasgow District Council* (Case C-346/93) 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).

determine whether, taking into account the relevant economic and legal context, the contested vertical agreements are sufficiently injurious to competition in the car insurance market to justify a finding that their object is to restrict competition. In particular, this could be the case where domestic law would require insurance brokers and dealers to be independent from the insurers, or where it is proven that, following the conclusion of those agreements, competition in the car insurance market was eliminated or seriously weakened.

According to the Court of Justice, to determine the object of the agreements at issue in relation to the car repair service market, the Hungarian Supreme Court should take account of the fact that those agreements appear to have been concluded based on the 'recommended prices' established in decisions taken by GÉMOSZ. If the Hungarian Supreme Court holds that those decisions had as their object the restriction of competition by harmonizing hourly charges for car repairs and that, by the contested vertical agreements, the insurance companies voluntarily confirmed those decisions (which can be assumed where they concluded an agreement directly with GÉMOSZ), the unlawfulness of those decisions would also vitiate those agreements.

UNILATERAL CONDUCT

Commission Decisions

Rio Tinto Alcan (Case AT.39230)

On December 20, 2012, the European Commission (the "Commission") adopted a decision under Article 9 of Regulation 1/2003 making binding commitments submitted by Rio Tinto Alcan (hereafter, "Alcan") to address concerns relating to its alleged abusive tying conduct.[8]

Alcan is a fully integrated primary aluminum producer. The Alcan group includes Electrification Charpente Levage ("ECL"), which focuses on the manufacturing and supply of mechanical equipment used in the production of primary aluminum and ofpot tending assemblies ("PTAs"). PTAs are specialty cranes used for various operations in aluminum reduction plants or smelters and are considered critical equipment for the start-up and operation of an aluminum smelter.

The Commission opened a formal investigation into Alcan's licensing practices in February of 2008, following a complaint by Groupe Réel. Groupe Réel competes with ECL in the supply of mechanical equipment for aluminum smelters, including cranes.

In July 2012, the Commission adopted a preliminary assessment setting out its concern that Alcan had engaged in unlawful contractual tying of the licensing of its aluminum smelting technology with the purchase of PTAs from ECL, contrary to Articles 101 and 102 TFEU.

The Commission's preliminary assessment identified separate antitrust markets for the licensing of aluminum smelting technology (the tying market), and the supply of PTAs (the tied market). The Commission concluded that both markets were worldwide, excluding China (due to different technological and regulatory conditions). The Commission's assessment concluded that Alcan was dominant in the tying market, reflecting Alcan's consistently high market shares, the existence of barriers to entry and expansion, and high switching costs for customers which, the Commission found, generally lacked countervailing buyer power.

Alcan did not dispute that its relevant smelting technology license agreements during the period under investigation required Alcan's licensees to purchase ECL's PTAs. Alcan argued, however, that the PTAs were integrated into the package of smelting technology and know-how and were therefore not "distinct products"[9] for the purposes of a tying analysis. The Commission's investigation suggested that this was not the case. The investigation indicated that customers, if given the choice, might purchase the products separately. Alcan was the only technology licensor that required the use of PTAs from a specific manufacturer.

The Commission found that the contractual tie had resulted in anticompetitive foreclosure of Réel's competing PTA products. Internal documents suggested that Alcan had made a strategic choice to accept lower gross margins when selling to non-tied customers to exclude Réel. Estimating the non-contestable share of the PTA market at between 20-40%, the Commission found that even an equal allocation between Reel and Alcan of the contestable share of the market would not enable Réel to reach the minimum efficient scale required to sustain innovation. The analysis was corroborated by company financial data supplied by Réel. The Commission found that Réel's marginalization and exit from the market would harm customers, who would be "locked into ECL's product environment."[10] This would likely lead to higher PTA prices and increased capital costs for customers. It would also deter innovation in PTAs, with negative repercussions for the aluminum smelting technology market.

The Commission rejected Alcan's operational and reputational efficiency arguments. Any efficiencies arising from the complementarity of Alcan's smelting technology and PTA products did not result from the tie itself (i.e., there was no causal link between the tie and the purported efficiencies). Licensees' willingness to mix-and-match third party PTAs with Alcan's smelting

[8] *Rio Tinto Alcan* (Case AT.39230), Commission decision C(2012) 9439 of December 20, 2012, OJ 2013 C 89/5.

[9] *Ibid*., para. 60.

[10] *Ibid*., para. 79.

technology indicated that the contractual tie was not necessary to achieve capital and/or operational costs savings.

The Commission's preliminary assessment found that the tying arrangements also infringed Article 101. The agreements could not benefit from an exemption under the Commission's Technology Transfer Block Exemption Regulation,[11] given Alcan's high market shares. Nor could Alcan rely on an exception under Article 101(3) because the tie was not necessary to ensure any essential quality or safety standards.

Under the commitments, Alcan will replace the tying clause with an obligation for licensees to purchase PTAs from one or more "pre-qualified" suppliers. Respondents agreed in principle with the proposal, which were refined following market testing:

Alcan dropped its initial proposal to limit the commitments to aluminum production technologies operating at a certain maximum amperage (450kA).

Alcan committed not to use the pre-qualification process to gain access to intellectual property rights or other commercially sensitive information from third parties (without prior Commission approval). Under the commitments, it will be sufficient for a PTA supplier to be pre-qualified between the signing of the technology transfer agreement and the launch of the selection process for PTAs, rather than prior to the signing of the agreement.

Alcan also committed to act in accordance with established industry practice to ensure efficient post-selection, pre-operation testing (i.e., design review, factory acceptance test, and commissioning of the equipment at the smelter site).

The commitments include a "material ownership interest" exception, according to which smelters in which Alcan has a 25% or higher interest are excluded from the scope of the commitments. The initially proposed 15% threshold was raised following objections from market respondents, who argued that a lower threshold would allow Alcan to circumvent the commitments by acquiring small ownership stakes in relevant smelter projects. The commitments provide for the appointment of a monitoring expert to act on behalf of the Commission. The monitoring expert is required to inform the Commission of any negative pre-qualification decision or any decision that a recommended PTA supplier no longer complies with the required specifications.

[11] Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123/11 ("Technology Transfer Block Exemption Regulation").

MERGERS AND ACQUISITIONS

Second-phase Decisions Without Undertakings

Telefónica UK/ Vodafone UK/ Everything Everywhere/ JV (Case COMP/M.6314)

On September 4, 2012, the Commission cleared unconditionally the creation of a joint venture by Telefónica UK, Vodafone UK, and Everything Everywhere (each, a mobile network operator ("MNO") and together "MNOs") which will be active in the wholesale supply of mobile transaction services (*e.g.*, payment or ticketing via a mobile handset, referred to as mobile "wallet" platforms), mobile advertising platform services, and data analytics services.[12] The primary activity of the joint venture would be to develop a platform upon which users can develop their own mobile wallets offered to end-consumers.

The Commission's review focused on assessing the likelihood of competitive harm arising from possible foreclosure strategies, particularly in view of the strong combined position of the notifying parties in the retail mobile telephony market in the UK.

The Commission identified the following affected markets: (1) the wholesale supply of mobile wallet platforms; (2) the retail distribution of mobile wallet services; (3) advertising services (i.e., coupons and vouchers); (4) wholesale bulk SMS services; (5) data analytics services (6) retail mobile telephony services. The Commission assessed each of these markets according to a geographic market definition that was at least UK-wide in scope.

The Commission found that the transaction was unlikely to give rise to horizontal concerns, concluding that the joint venture would likely be constrained effectively by existing competitors and future entry. The Commission stressed that the affected markets are highly dynamic, with low barriers to entry, and noted that an appreciable number of similar initiatives had been already been announced. The Commission also found that undertakings such as Google and Apple represented credible entrants to the markets in question, particularly to the market for the supply of data analytics services.

With respect to vertical effects, the Commission first examined whether the notifying parties would have the technical capability to foreclose competing mobile wallet providers. The Commission's analysis centered on a necessary input to a mobile wallet platform, a secure storage element ("SE"), which is a piece of hardware and software capable of securely hosting applications ("apps") and their confidential and cryptographic data in accordance with the rules and security requirements set out in a set of well-identified, trusted authorities. SEs can be located on the SIM-card, embedded into the handset, or hosted in the "cloud" (i.e., on external web-accessible servers). The notifying parties were active the production of SIM-based SEs. The Commission found that, while the notifying parties would have the technical ability to foreclose access to their SIM-based SEs, such a strategy would be unlikely to be effective, because competing mobile wallet providers would be able to use embedded SEs or remote SEs accessible with downloadable mobile apps. Furthermore, the Commission concluded that the joint venture would be unlikely to be able materially to influence to its own advantage any technical standard that might emerge in the nascent mobile wallet market because rules and specifications developed by Visa and MasterCard already exist for contactless payments, and "the NFC/SE environment has comprehensive and consistent standards and specifications which are understood, stable and mature."[13]

The Commission then examined whether it would be commercially viable for the notifying parties to engage in foreclosure strategies. The Commission found that even if the notifying parties could request that original equipment manufacturers ("OEMs") remove or block pre-installed embedded SEs of other competitors, such a course of action would be unprofitable. This is because mobile operating system ("OS") providers or fully integrated OEMs could employ effective counterstrategies, because they intervene in the supply chain at an earlier stage than MNOs. For example, an OS provider anticipating any such strategy could itself try

12 *Telefónica UK/ Vodafone UK/ Everything Everywhere/ JV* (Case COMP/M.6314), Commission decision of September 4, 2012.

13 *Ibid*., para. 375.

to influence the relevant OEMs to require that any OS branded mobile handset have a functioning embedded SE. A strong OS provider, such as Google, the main driving force behind the popular Android OS, would have a robust negotiation position. Moreover, any commercial foreclosure would have limited impact, because the notifying parties would not have the ability to affect the indirect retail channel (mobile handsets sold by retailers independent of any MNO), which represents 49% of the total telephony retail markets in the UK. Furthermore, the notifying parties would likely be constrained by adverse consumer reactions that would result from any impairment of rival mobile wallet offers.

Finally, the Commission found that the joint venture would not have the ability to foreclose its rivals in the market for bulk SMS aggregators. (SMS aggregators act as the conveyers of bulk SMS from the sender to the mobile network to which the recipient has subscribed.) This is because substantial investments would be required to identify bulk SMSs coming from other MNOs.

First-phase Decisions Without Undertakings

Arla Foods/Milch-Union Hocheifel (Case COMP/M.6627)

On September 28, 2012, the Commission unconditionally cleared Arla Foods' ("Arla") acquisition of Milch-Union Hocheifel ("MUH").[14] The notifying parties were farmer-owned co-operatives active in the supply of a range of branded and private label dairy products.

The Commission considered six discrete horizontally affected markets: fresh milk, long-life milk, long-life dairy cream, *kondensmilch*, long-life coffee cream, and long-life flavored dairy drinks. The Commission envisaged a potential distinction between branded and private label products. Because the transaction did not raise serious doubts as to its compatibility with the internal market under any alternative approach to market definition, the Commission left open the exact segmentation of the markets. The Commission concluded that the markets were at least national or EU-wide in scope, identifying separate markets for each of Germany, the UK, Denmark, Sweden and Greece. The precise geographic definition was left open because the transaction did not raise anticompetitive concerns.

Following its investigation, the Commission found that the transaction would not give rise to competition concerns in the affected markets, primarily because the merged entity would continue to face strong competition from a sizeable number of established dairy product suppliers. Even in markets where the parties had high combined market shares (70-90%), the Commission found the merged entity would continue to be effectively constrained both by existing competitors and by the prospect of new entry. In Denmark, for example, the prospective German entrants would exercise a particular constraint because their production facilities, which had significant spare capacity, were located closer to Denmark than the parties' facilities and imports accounted for a large share of the Danish market. With respect to private label products, the Commission noted that the lack of brand loyalty facilitates entry and means that customers would readily switch away from the merged entity's private-label products should it attempt an anticompetitive price increase.

The Commission also took into consideration Arla's previous acquisition of Milk Link, which was conditionally cleared two weeks prior to the MUH acquisition.[15] The Commission's competitive assessment in *Arla/Milk Link* focused on the UK market for the production of long-life milk. The Commission determined that the MUH acquisition would not aggravate the competition concerns identified in *Arla/Milk Link*, mainly because, to obtain clearance of the first acquisition, Arla agreed to divest Milk Link's long-life milk business in the UK.

Magna/Ixetic (Case COMP/M.6748)

On November 29, 2012, the Commission unconditionally cleared the acquisition of ixetic Verwaltungs GmbH ("ixetic") by Magna International Inc. ("Magna", together with ixetic the "Parties").[16] ixetic is an automotive supplier of solutions for hydraulic and vacuum pumps

[14] *Arla Foods/Milch-Union Hocheifel* (Case COMP/M.6627), Commission decision of September 28, 2012.

[15] *Arla Food/Milk Link* (COMP/M.6611), Commission decision of September 17, 2012.

[16] *Magna/Ixetic* (Case COMP/M.6748), Commission decision of November 29, 2012.

mainly for OEMs in Europe, while Magna a diversified global automotive company that designs, develops, manufactures and supplies automotive systems, assemblies, modules and components. Magna is also active in complete vehicle engineering and assembly for OEMs and, through its subsidiary Magna Powertrain, also in the supply of pumps.

The Commission examined the competitive effects of the transaction in the market for the sale of vacuum pumps for brake systems and in the market for transmission oil pumps for engines.

The Commission left open the question of whether the market for vacuum pumps should be further sub-segmented into electrical vacuum pumps, mechanical vacuum pumps, and on-demand vacuum pumps, concluding that the transaction would not raise concerns even based on the narrowest possible approach to market definition (i.e., in the market for the sale of mechanical vacuum pumps for passenger cars and light vehicles in the EEA). The transaction would only lead to a small increment in market share. In addition, the Commission's market investigation showed that there were several credible alternative suppliers, which, in the last 5 years, had competed head-to-head with the parties for the award of supply contracts of vacuum pumps to OEMs. OEMs confirmed that such competitors possessed similar technical capabilities and know-how in relation to vacuum pumps. In relation to the latest technological developments in fuel-efficiency, the Commission noted that several alternative suppliers were already active in the area or had plans to expand their production of new fuel efficient solutions within the next 3-5 years; the Commission's market investigation also indicated that new market entrants were expected in relation to fuel efficient solutions.

The parties argued that the transaction would not affect the market for transmission oil pumps because Magna is not active in the EEA. The parties contended that, were the Commission to define a worldwide market for transmission oil pumps, Magna and ixetic's combined share would only be 30-40%, and they would continue to face considerable pressure from credible competitors. The market investigation confirmed the lack of competitive concerns with regard to the proposed transaction. In particular, the investigation suggested that, over the past five years, competitors had been invited to compete directly with Magna and ixetic for the supply of transmission oil pumps, which indicated that these competitors had similar technical capabilities.

Although some competitors were concerned that the new size and global footprint of the merged entity would give it a special advantage compared to its smaller competitors, most competitors indicated that Magna and ixetic have complementary strengths: Magna is strong in North America, while ixetic is strong in Europe. In addition, customers confirmed that there are alternative suppliers, and that they usually multi-source the supply of transmission oil pumps.

LBO France/Aviapartner (Case COMP/M.6671)

On November 30, 2012, the Commission unconditionally cleared the acquisition of Aviapartner Holding NV ("Aviapartner") by WFS Global Holding SAS ("WFS"), an undertaking ultimately controlled by funds managed by LBO France Gestion SAS.[17]

WFS and Aviapartner both provide ground handling services other freight related services at airports across the EU. They submitted that these services should be grouped into four separate product and geographic markets: (i) ramp, passenger and baggage handling services at a specific airport; (ii) landside cargo handling services at a specific airport; (iii) offline freight related services (i.e., services provided for freight which will not be loaded at the airport where it is handled) on a regional geographic market; and (iv) freight forwarding by truck on a national geographic market. The Commission concluded that this approach found this delineation to correspond to the situation in the overall ground handling services sector and therefore largely based its market definition on it.

Because the parties did not compete in the provision of ramp, passenger and baggage handling services, the Commission's investigation focused on the provision of landside cargo handling, in which the parties competed at five airports: Amsterdam-Schiphol, Basel-Mulhouse,

[17] *LBO France/Aviapartner* (Case COMP/M.6671), Commission decision of November 30, 2012, OJ 2013 C 31/3.

Brussels National, Frankfurt/Main and Paris Roissy-Charles de Gaulle. The parties' combined market shares at these airports ranged from 20% to 80%. However, with the exception of Brussels National and Frankfurt/Main, the increments in market shares were very low (i.e., in the range of up to 20%).

The Commission concluded that the transaction would not raise serious competition concerns with regard to the Frankfurt/Main airport. This conclusion was based on the parties' relatively low post-transaction market share of 20-30%, in combination with the presence of strong competition and the absence of significant market entry barriers. The Commission also concluded that the transaction would not raise serious concerns with regard to the Brussels National Airport: despite the combined company's post-transaction share of 50-60%, it would continue to be constrained by strong competition of other ground handlers, most notably Swissport/Flightcare.

The Commission noted that barriers to entry were low and that cargo space was either readily available or under construction at all five airports, facilitating both expansion by existing competitors and entry by new companies. The Commission's investigation also indicated that the customers (i.e., the airlines) could self-handle or switch between different cargo handlers. The Commission concluded that the airlines' ability to switch and thereby to exert significant buyer power on the providers of landside cargo handling services would not be affected by the transaction.

The Commission also examined whether the proposed acquisition would lead to conglomerate effects based on the fact that the merged entity would be able to provide both landside cargo handling and ramp, passenger, and cargo handling services at many airports. However, the Commission rejected conglomerate concerns since the market investigation demonstrated that customers would continue to contract these services separately and would continue to be able to switch to other suppliers.

Precision Castparts/Titanium Metals (Case COMP/M.6765)

On December 19, 2012, the Commission unconditionally cleared Precision Castparts's ("PCC") acquisition of Titanium Metals ("Timet").[18] PCC manufactures metal components and products, including investment castings, forgings, and fasteners/fastener systems, for various applications mainly in the aerospace industry. Timet produces of a range of titanium-based melted and mill products used in the manufacturing of titanium components.

The Commission determined that the upstream market for titanium products (comprising (i) titanium raw material products, (ii) titanium melted products, and (iii) titanium mill products) may be segmented according to form, grade, and alloy type. The Commission defined two downstream markets: the market for cast titanium products and the market for forged titanium products. The Commission noted that each of these markets could be further sub-divided according to end-use (*e.g.*, rotating engine components, aerostructures, etc.). Ultimately, the Commission left open questions of product market definition, concluding that the transaction did not give rise to competition concerns regardless of product market definition. The Commission concluded that the upstream markets were worldwide in geographic scope, and that the downstream markets were at least EEA-wide and possibly worldwide.

The Commission's competitive assessment concerned only vertical effects arising from the transaction, given that no material horizontal overlaps were identified. The Commission first outlined the non-traditional vertical relationship between the notifying parties: although the parties operate at different levels of the titanium-based component supply chain, both serve the same key customers— aerospace OEMs. The Commission described how, to control their costs, OEMs started negotiating directly with titanium input producers for the supply of inputs, not only for their own manufacturing activities, but also for the components they purchased from component manufacturers. OEMs usually enter into long-term agreements ("LTAs") with titanium producers and component manufacturers. LTAs generally remain in force for up to ten years.

[18] *Precision Castparts/Titanium Metals* (Case COMP/M.6765), Commission decision of December 12, 2012.

Respondents to the Commission's market test alleged that there was a risk that the merged entity would restrict the availability of inputs to third-party component manufacturers to benefit its own component operations. However, the Commission concluded that the merged entity would be incapable of foreclosing access to titanium inputs due to the protection offered by LTAs; the LTAs do not provide for price renegotiation before the end of their terms, including due to a change of control. The Commission also noted that the merged entity would continue to be constrained by strong competitors and the OEMs themselves, who maintain strong buyer power and are able to sponsor entry. Because the Commission concluded the merged entity would be incapable of engaging in input foreclosure, it did not examine the issue of incentives to engage in such strategies. In addition, the Commission rejected the argument that the merged entity could engage in customer foreclosure strategy because PCC already sourced most of its titanium inputs either internally or from Timet.

The Commission also dismissed concerns relating to exchanges of commercially sensitive information, finding that the parties had implemented effective non-disclosure mechanisms to prevent transfer of strategic information between the merged entity and third parties, as well as between certain parts within the merged entity.

Respondents to the Commission's market test also voiced concerns that the transaction may result in a concentration of R&D capability, leading to the possible termination of the parties' existing R&D arrangements with third parties. The Commission found no evidence to support these concerns.

Advent International Corporation/Cytec's Resin Business (Case COMP/M.6778)

On February 6, 2013, the Commission cleared Advent International Corporation's ("Advent") acquisition of the coating resins business ("CRB") of Cytec Industries Inc..[19] Advent is a U.S.-based private equity investor with shareholdings in various sectors, including media, communications, information technology, internet, chemicals and pharmaceuticals. CRB, also a U.S.-based company, is a worldwide producer of coating resins, additives, and cross-linkers used in the production of coatings, paints, and inks.

The Commission's investigation focused on the vertical relationships between CRB and two of Advent's portfolio companies, Oxea S.a.r.l. ("Oxea", Luxembourg) and Deutek SA ("Deutek", Romania).

The Commission found that the potential vertical relationship with Deutek did not raise any concerns because the companies' shares were below 25% in all markets at both the upstream and the downstream levels.

The Commission found that the proposed acquisition led to a large number of vertical relationships between Oxea (upstream) and CRB (downstream).

At the upstream level, Oxea produces 16 raw chemicals which can be used for the downstream production of resins by CRB. The Commission concluded that these chemicals could be classified into four categories: (i) solvents; (ii) polyhydric alcohols; (iii) carboxylic acids; and (iv) amines. The Commission further subdivided three of these categories as follows. Solvents were subdivided into (i) Butanol; (ii) 2-Ethylhexanol (2-EH); and (iii) Butyl acetate. Polyhydric alcohols were subdivided into (i) Neopentyl glycol; (ii) Trimethylolpropane; (iii) 1,3-Butylene glycol; and (iv) TCD alcohol. Amines were subdivided into (i) 2-Ethylhexylamine; (ii) n-Octylamine; (iii) Propylamine; (iv) Butylamine. Further subdivisions were left open. The precise geographic market definition was left open (EEA or worldwide).

At the downstream level, the Commission distinguished among coating resins according to (i) the delivery technology of the coating; and (ii) their base chemical component. It defined the following markets: (i) amino resins; (ii) Cathodic electro deposition resins; (iii) solvent-borne acrylics; (iv) water-borne alkyds; (v) radiation curable resins; (vi) unsaturated polyester resins; (vii) additives; (viii) solvent-borne alkyds; and (ix) water-borne polyurethane dispersions. It left open further subdivisions. The Commission continued its established

[19] *Advent International Corporation/Cytec's Resin* Business (Case COMP/M.6778), Commission decision of February 6, 2013, OJ 2013 C 111/2.

approach of defining the geographic scope of these markets as EEA-wide.

The Commission expressed concerns with respect to customer foreclosure and input foreclosure with regard to some of these markets.

With respect to customer foreclosure, the Commission concluded that CRB's low downstream market shares (often below 30%), and its shares when purchasing the upstream products meant that Oxea's competitors had sufficient alternatives to sell their products, should Oxea attempt to foreclose customers post-transaction.

With respect to input foreclosure, the Commission noted that, in several markets, Oxea's market share was below 30%, and it faced competition from strong competitors. In the few markets in which Oxea's share was above 30%, the Commission concluded that CRB's share when sourcing the product and its share of the downstream market were often small or negligible, rendering input foreclosure unlikely. With regard to the market for the input known as TCD alcohol,

Oxea holds a market share of 90-100% in the market for TCD alcohol (worldwide and EEA-wide). With respect to this market, the Commission noted that TCD-alcohol based products were substitutable with certain products manufactured without TCD-alcohol. Accordingly, CRB's competitors could readily switch to an alternative input, curbing Oxea's incentive to engage in input foreclosure. Furthermore, Oxea's largest TCD customers are also suppliers of critical inputs to Oxea. Consequently, the Commission concluded that Oxea would be unlikely to engage in input foreclosure at the risk of affecting these business relationships.

The Commission therefore concluded that the transaction did not raise competition concerns and declared it compatible with the internal market and the EEA Agreement.

First-phase Decisions With Undertakings

La Poste/Swiss Post/ JV (Case COMP/M.6503)

On July 4, 2012, the Commission approved, subject to commitments, the creation of a joint venture between La Poste Global Mail SAS ("La Poste") and Swiss Post International Holding AG ("Swiss Post"), consisting of the majority of the parties' current international mail delivery services.[20] The parties offered to divest the French division of Swiss Post International in order to address the concerns identified by the Commission in the market for standard outbound cross-border addressed mail delivery services offered to business customers.

The Commission segmented the mail delivery services markets into (i) standard or express mail delivery services; (ii) domestic or cross-border mail; (iii) business mail or mail for private customers; (iv) addressed or unaddressed mail; and (v) cross-border mail services, either inbound or outbound.

The parties' combined market share in the market for standard outbound cross-border addressed mail delivery services offered to business customers was 70%-80%. Based on the results of its market investigation, the Commission rejected the parties' arguments that their high combined market shares are ameliorated by other factors. First, while the joint venture would act independently on the market, this would not be enough to prevent La Poste from using its ownership to strategically align the joint venture's conduct with its own. Second, respondents to the market investigation considered Swiss Post to be one of only a few credible competitors in the market; accordingly, its elimination would remove an important competitive constraint on La Poste. Third, market entry was considered to be unlikely, given the declining state of the market as a result of the economic crisis and dematerialization (e-substitution) of correspondence. Finally, barriers to entry were considered to be quite high: entry would require local presence, investments in infrastructure, and a well-known brand or trademark.

The Commission also considered possible anticompetitive effects resulting from the creation of a vertical relationship between the joint venture and La Poste as the sole provider in the downstream market of inbound cross-border mail services in France. The Commission found that La Poste would not have the ability to foreclose the joint venture's competitors because of its role as the Universal Postal Union

[20] *La Poste/Swiss Post/ JV* (Case COMP/M.6503), Commission decision of July 4, 2012.

designated operator, which obliges it to accept and deliver the cross-border mail it receives. Furthermore, following the requirements set by the Postal Directive with regards to transparent and non-discriminatory terminal dues, La Poste would not be able to give preferential terms to the joint venture.

The Commission also found that there would be no incentive to foreclose. First, any loss of revenue resulting from preferential treatment of the joint venture would be carried entirely by La Poste, while any gains for it would be shared with Swiss Post as the other shareholder of the joint venture. Second, in the face of a declining market, La Poste has little inventive to risk losing any business. Finally, La Poste's customers, who are mainly incumbent foreign postal operators, would be in a position to retaliate in their own inbound mail market services.

Business-to-consumer standard parcel delivery services and a few other small markets were also considered, but were not found to be problematic given La Poste's and Swiss Post's low market shares.

The Commission therefore declared the transaction compatible with the internal market and the functioning of the EEA Agreement and approved the transaction subject to full compliance with the divestiture commitments.

STATE AID

ECJ Judgments

Ellinika Nafpigeia AE v. Commission (Case C-246/12 P)

On February 28, 2013, the Court of Justice upheld the General Court's decision[21] finding that aid benefiting the production of civil material does not fall under Article 346(1)(b) TFEU and needs to be considered separately, regardless of whether it is necessary for the viability of the military activity carried out by the same undertaking.[22]

Ellinika Nafpigeia AE ("EN") is a large shipyard, acquired by the state-owned Elliniki Trapeza Viomichanikis Anaptixeos AE ("ETVA") in 1985. In 2001, Greece decided to privatize EN and sold its shares to the consortium Howaldswerke-Deutsche Werft GmbH and Ferrostaal AG, which set up Elliniki Nafpigokataskevastiki AE Chartofylakeiou to manage their holdings. In 2005, ThyssenKrupp AG acquired the shares and currently holds 100% of the shipyard. The production of military vessels accounts for approximately three-quarters of EN's activities, with the remainder attributable to certain civil activities, *e.g.*, the repair of merchant ships, construction of railroad rolling stock and hulls of merchant ships.

The Greek government granted EN several installments of aid, which were approved by the Commission. However, in 2006, the Commission required the Greek government to recover sixteen of those installments, which were declared incompatible with the internal market because they were found to be attributable to EN's civil activity.[23] EN challenged the decision before the General Court. After the General Court rejected its arguments in 2012, EN appealed the General Court's decision to the Court of Justice.

First, EN submitted that the General Court had erred in interpreting Article 346(1)(b) TFEU. The provision allows Member States to adopt measures that are necessary for the protection of the essential interests of their security and that are connected with the production of or trade with arms, munitions and war material. However, these measures must not adversely affect competition with regard to products not intended for military purposes. The Court of Justice found that this provision constitutes an exception and therefore needs to be interpreted narrowly. It imposes a strict distinction between the production of and trade with military material on the one hand, and all other economic activity on the other hand. The same approach applies to undertakings that pursue both military and civil activities. Therefore, aid granted to an undertaking active in the production of both military and civil material cannot be exempted under Article 346(1)(b) because the civil activity is necessary for the viability of the primary military activity. The Court of Justice held that the General Court had correctly attributed a specific percentage of the aid to EN's civil activity and accordingly examined the aid measure in proportion to the respective amounts directed towards civil and military purposes.

The Court of Justice also held that the administrative proceedings are only open to Member States and that beneficiaries of the aid are interested parties that have no rights of defense, but a right to be involved, which EN had duly exercised in the proceedings leading to the Commission's decision.

Bouygues SA and Bouygues Télécom SA v. Commission and Others (Joined Cases C-399/10 P and C-401/10 P)

On March 19, 2013 the Court of Justice quashed the General Court judgment[24] annulling a Commission decision[25] finding that France had granted France Télécom ("FT") illegal "psychological" State aid through a combination of a public statement of support and the

[21] *Ellinika Nafpigeia AE v. Commission* (Case T-391/08), judgment of March 15, 2012, not yet published.

[22] *Ellinika Nafpigeia AE v. Commission* (Case C-246/12 P), judgment of February 28, 2013, not yet published.

[23] Commission decision C(2008) 3118 of July 2, 2008 (State Aid C 16/04 (ex NN 29/04, CP 71/02 and CP 133/05)), OJ 2009 L 225/104.

[24] *France and Others v. Commission* (Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04), 2010 ECR II-2099.

[25] Commission decision C(2004) 3060 of August 2, 2004, on the State Aid implemented by France for France Télécom, OJ 2006 L 257/11.

offer of a shareholder loan.[26] This was the first time psychological aid provided through intangible government support was challenged before the Court of Justice.

In July 2002, in response to FT's deteriorating financial situation, the French Minister of Economic Affairs, Finance and Industry stated in an interview that the French state would take whatever action necessary to overcome any financing problems that FT faced. On December 4, 2002, a press release from the Minister stated that the French state would assist FT by issuing a shareholder loan in proportion to its share of FT's capital, which equaled a €9 billion investment. The draft shareholder loan was sent to FT on December 20, 2002, but never signed or implemented by FT.

Two French companies, Bouygues SA and Bouygues Télécom SA ("the Bouygues"), complained to the Commission, claiming that the shareholder loan offer was illegal. In August 2004, the Commission concluded that, in the context of the declarations made in July and December 2002, the shareholder loan offered to FT was, indeed, incompatible with EU law. The Commission, however, did not order the recovery of the aid as the effect of the aid could not be evaluated with precision.

In May 2010, the General Court annulled the Commission's decision, holding that, although the declarations by the French authorities had conferred a "psychological" advantage on FT by restoring the confidence of financial markets, such advantage did not lead to a transfer of state resources. The General Court held that, for each state intervention, the Commission should have individually assessed whether this intervention (i) reduced the state budget or (ii) created a concrete risk of economic burdens on the budget, being equivalent or at least closely linked to the advantage identified.

The Bouygues and the Commission filed separate appeals asking the Court of Justice to set aside the General Court's judgment.

The Court of Justice annulled the judgment on the grounds that the General Court had erred in law, both in its review of the Commission's identification of the intervention measure conferring State aid, and in its assessment of the links between the advantage identified and the commitment of state resources found by the Commission.

The Court of Justice stated that state interventions could take various forms and should be assessed based on their effects. It also held that it could not be excluded that several consecutive measures of state intervention could, for the purposes of Article 107(1) TFEU, be treated as a single intervention.

The Court of Justice further clarified that, when determining the existence of State aid, the Commission should establish a sufficient link between the advantage given to the beneficiary and (i) a reduction of the state budget or (ii) a sufficiently concrete economic risk of burdens on that budget. Contrary to the General Court's judgment, however, it is not necessary that such a reduction, or even such a risk, be equivalent to that advantage or, in particular, be of the same nature as the commitment of state resources from which it derives.

The Court of Justice went on to state that the French government's announcements in July and December 2002 were inseparable from the shareholder loan offer, at least insofar as the announcement in December explicitly mentioned the shareholder loan. It also held that the Commission had correctly determined that the shareholder loan offer conferred an advantage on FT within the meaning of Article 107(1) TFEU, and that the shareholder loan offer constituted a commitment of state resources because, in fact, FT could have signed the agreement at any time, thereby acquiring the right to obtain immediate payment of €9 billion.

In addition to setting aside the General Court's judgment, the Court of Justice referred the cases back to the General Court to consider the arguments raised by the parties, on which the Court of Justice did not rule.

[26] *Bouygues SA and Bouygues Télécom SA v. Commission and Others* (Joined Cases C-399/10 P and C-401/10 P), judgment of March 19, 2013, not yet published.

General Court Judgments

Andersen v. Commission (Case T-92/11)

On March 20, 2013, the General Court annulled the Commission's decision[27] finding that Danish railway public service contracts constitute State aid compatible with the internal market.[28] The General Court stated that the Commission's assessment was based on incorrect legal rules. The Commission should have assessed the legality of aid paid without being notified to the Commission based on the substantive legal rules in force at the time the aid was paid.

Danske Statsbaner ("DSB"), active in railway passenger transport, was awarded public transport service contracts for the periods 2000-2004 and 2005-2014. Following two complaints regarding those contracts, the Commission adopted a decision on February 24, 2010, concluding that the contracts constituted State aid compatible with the internal market. The Commission's assessment was based on Regulation 1370/2007 of October 23, 2007.[29] One of the former complainants appealed this decision before the General Court.

The General Court annulled the Commission's decision. Furthermore, the General Court distinguished between two types of State aid: aid that has been notified to the Commission, but not paid, and aid that has been paid without notification. Aid that has been notified, but not paid, only has effects on the common market from the time of the Commission's decision onward; therefore, the rules in force at the time of the Commission's decision apply. Aid that has been paid without notification produces effects on the common market at the time it is paid; therefore, the rules in force at the time of the payment apply. As in the case at issue, the public service contracts fell into the second category (i.e., they have been awarded without notification), the applicable rules should have been the ones in force at the time of conclusion of the contracts, which is the moment the aid has been implemented.

The General Court further explained that, in contrast to procedural rules, which generally apply to all proceedings pending when they enter into force, substantive rules (like Regulation 1370/2007) also apply retroactively, i.e., to situations existing before their entry into force only if such retroactive application follows clearly from their terms, objectives, or general scheme. Because Regulation 1370/2007 did not clearly provide for its retroactive application, the General Court held that the Commission had erroneously based its assessment of the aid's compatibility on legislation that only entered into force after the implementation of the aid.

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27 Commission decision C(2010) 975 of February 24, 2010 (State Aid C 41/08 (ex NN 35/08)), OJ 2011 L 7/1.

28 *Andersen v. Commission* (Case T-92/11), judgment of March 20, 2013, not yet published.

29 Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ 2007 L 315/1.

FINING POLICY

ECJ Judgments

Commission v. Tomkins plc (Case C-286/11 P)

On January 22, 2013, the Court of Justice dismissed the appeal by the Commission against the judgment of the General Court of March 24, 2011,[30] that reduced the fine of €5.25 million imposed on Tomkins plc ("Tomkins") by the Commission's decision of September 20, 2006,[31] for its involvement in a copper fittings cartel.[32] The Commission had found Tomkins jointly and severally liable with its subsidiary, Pegler Ltd ("Pegler").

Pegler and Tomkins lodged separate appeals with the General Court seeking to annul the Commission's decision and, in the alternative, to have its fine reduced. The General Court annulled the Commission's finding that Pegler had participated in the cartel between December 31, 1988, and October 29, 1993.[33] In ruling on the Tomkins appeal, the General Court determined that Tomkins should benefit from a fine reduction corresponding to that awarded to Pegler. The Commission 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 the aims of the respective applications were different.

The Court of Justice found that the General Court had not ruled *ultra petita*[34] by deciding more than it was asked to. The Court of Justice concluded that multiple actions can have the "same object" even where their scope and the arguments relied on to contest the duration of the infringement, are not identical. The fact that both Pegler and Tomkins challenged the duration of the infringement and disputed part of the same period was sufficient to conclude that their applications had the "same object." The Court of Justice therefore held that the General Court was entitled to reduce the fine imposed on Tomkins based on the outcome of the Pegler action, because Tomkins's liability was derived exclusively from its link with Pegler, and the parties brought parallel actions having the same object. The Court of Justice also concluded that there was no guarantee that Tomkins's rights of defense would be upheld were the Commission to amend its decision to account for the General Court's ruling in relation to Pegler.

ECJ Advocate General Opinions

Aalberts Industries NV (Case C-287/11 P), Opinion of AG Mengozzi

On February 28, 2013, AG Mengozzi advised the Court of Justice to set aside the General Court's judgment upholding the appeal of *Aalberts Industries NV* ("Aalberts") against the Commission's decision in the copper fittings cartel.[35]

The Commission had originally fined Aalberts €100.8 million for participating in the copper fittings cartel through its subsidiaries Aquatis France SA ("Aquatis") and Simplex Armaturen + Fittings SAS ("Simplex"). The General Court annulled the fine imposed on Aalberts and its subsidiaries, concluding that the Commission: (1) did not meet its burden of proof with regard to establishing the anticompetitive nature of the two events Simplex was alleged to have participated in; and (2) did not establish that Aquatis knew that it had joined a cartel consisting of different parts that had a common purpose.

The Commission appealed the General Court's judgment. The Commission's primary ground of appeal was that the General Court's judgment was vitiated by inconsistency: the General Court had assessed the evidence relating to the participation of Simplex and Aquatis in *isolation,* failing to rule on whether Simplex, Aquatis and Aalberts belonged to a single economic entity for the purposes of competition law analysis.

AG Mengozzi agreed with the Commission. First, the ground of appeal was admissible, because, contrary to Aalberts' claims, it was not confined to criticism of the

30 *Tomkins plc v. Commission* (Case T-382/06) 2011 ECR II-1157.

31 *Fittings* (Case COMP/F-1/38.121), Commission decision of September 20, 2006, OJ 2007 L 283/63.

32 *Commission v. Tomkins plc* (Case C-286/11 P), judgment of January 22, 2013, not yet published.

33 *Pegler Ltd v.* Commission (Case T-386/06) 2011 ECR II-1267.

34 "Beyond that which is sought."

35 *Aalberts Industries NV* (Case C-287/11 P), opinion of Advocate General Mengozzi of February 28, 2013.

General Court's assessment of facts or evidence. Second, AG Mengozzi concluded that the General Court had merely examined "*in a fragmentary manner*"[36] the individual pieces of evidence that the Commission had gathered against Aalberts and its subsidiaries, without ascertaining the interaction between those pieces of evidence. By failing to examine *together* the evidence against Aquatis and Simplex, the General Court had committed an error of law. AG Mengozzi accordingly advised that the General Court's judgment be set aside, and the case be referred back to the General Court.

The Commission also alleged, in the alternative, that the General Court had committed an error of law by annulling the decision against Aquatis (and Aalberts) in its *entirety*, despite the fact that it had confirmed Aquatis's participation in cartel activities in the French market. The Commission argued that, accordingly, the General Court should have upheld certain parts of the decision. AG Mengozzi concluded that a Commission infringement decision categorizing a global cartel as a single and continuous infringement may only be divided (and thus partially annulled) if: (1) the undertaking is informed during the investigative procedure that it is also alleged to have engaged in each of the forms of conduct comprising the overall infringement (and therefore is in a position to defend itself on that point); and (2) the Commission decision is sufficiently clear in this regard. AG Mengozzi determined that it was possible that at least one of the relevant conditions was not satisfied; in particular, the Commission decision was insufficiently clear as regards the characterization of the participation of Aquatis (and therefore Aalberts) in cartel meetings. However, AG Mengozzi explained that the Court of Justice would not be able to substitute its view for that of the General Court, as this would involve an assessment of the facts not considered as part of the General Court's judgment.

AG Mengozzi concluded that, if the Court of Justice did not uphold the Commission's main ground of appeal (as advised), then it ought to set aside the operative parts of the judgment as to Aquatis's participation, and refer the case back to the General Court.

[36] *Ibid*., para. 28.

Schenker (Case C-681/11), Opinion of AG Kokott

On February 28, 2013, AG Kokott advised the Court of Justice to decide that fines may not be imposed on undertakings for violation of Article 101 TFEU, where those undertakings erred in a non-culpable manner about the lawfulness of their behavior.[37]

In 2007, the Austrian Federal Competition Authority (the "AFCA") alleged that several freight forwarding undertakings participated in price-fixing agreements within the Spediteurs-Sammelladungs-Konferenz (the "SSK"), an incorporated association created for the explicit purpose of facilitating the publication of unit prices for freight forwarding in breach of Article 101 TFEU and Austrian cartel law. In the proceedings before the Austrian *Oberster Gerichtshof* (the "Austrian Supreme Court"), SSK members claimed that they should not incur liability for any infringing acts because legal advice and the orders of the *Kartellgericht* (the 'Austrian Cartel Court') had led them to assume, in good faith, that their price agreements did not affect trade between Member States and thus fell outside the scope of EU competition law. The Austrian Cartel Court eventually found that the fault of the undertakings was not established. The AFCA appealed the decision to the Austrian Supreme Court, which asked the Court of Justice for a preliminary ruling on the question of whether undertakings could be fined for breaches of Article 101 TFEU if those undertakings erred with regard to the lawfulness of their conduct and those errors were unobjectionable.

AG Kokott first noted the principle of *nulla poena sine culpa* (no punishment without fault) is a fundamental right within the EU. Therefore, an undertaking that acts on the basis of an excusable or unobjectionable error of law, acts without fault and thus should not be liable for any wrongdoing. However, errors of law are unobjectionable only where all possible and reasonable steps have been taken to avoid the alleged infringement, which would, in practice, be very rare.

AG Kokott advised that, in the context of the self-assessment regime provided for under Regulation 1/2003, consulting a legal advisor is often the only way

[37] *Schenker and Co AG and Others* (Case C-681/11), opinion of Advocate General Kokott of February 28, 2013.

for undertakings to obtain detailed information about the assessment of their conduct under EU law. The fact that an undertaking relied in good faith on advice from its legal advisor must therefore have a bearing on cartel proceedings for the imposition of fines. Civil liability of lawyers would not provide adequate compensation for fines incurred following incorrect legal advice.

Legal advice should, however, not exempt undertakings from all liability. Any legal opinion at issue must satisfy the following minimum criteria: it should (1) be obtained from a sufficiently specialized independent external lawyer, (2) have been provided on the basis of a full and accurate description of the facts; (3) not be manifestly incorrect; and (4) deal comprehensively with the relevant EU rules. Moreover, undertakings act at their own risks if the legal opinion obtained shows that the legal situation is unclear. In the present case, AG Kokott advised that SSK members could not rely on the legal advice they obtained to excuse their liability: not only had they not done everything possible to obtain detailed information about the assessment of their conduct under EU competition law because they had not sought negative clearance under Regulation 17, but also the legal advice they obtained did not address EU competition law issues.

As regards any expectations created by national competition authorities ("NCAs") or national court decisions, AG Kokott advised that such decisions can give undertakings important indications as to the applicable legal situation under EU competition law. Under the principle of legitimate expectations, undertakings can rely upon decisions taken by NCAs and courts to preclude a finding of liability for anticompetitive behavior, where such decisions satisfy the following minimum requirements: (1) the decision must be taken by a national court or NCA with powers to apply EU antitrust law; (2) the undertaking concerned must have provided full information on all circumstances relevant to the decision; (3) the decision must concern exactly the same matters of fact and law in respect of which the undertaking invokes an error of law precluding liability; (4) the decision cannot be manifestly incorrect; and (5) the undertaking must have arrived at its expectation in good faith.

Applying these criteria to the case at issue, AG Kokott noted that the 1996 Cartel Court order, which recognized the SSK as a "minor" cartel, commented only on the compatibility of the SSK with national competition law, which differs in scope from EU competition law. On this basis, AG Kokott advised the Court of Justice to find that the 1996 order did not create a legitimate expectation on the part of SSK members on a matter of EU law on which it could rely to escape liability for its infringing behavior.

General Court Judgments

Fresh Del Monte Produce v. Commission (Case T-587/08) and Dole Food Company v. Commission (Case T-588/08)

On March 14, 2013, the General Court ruled on the appeal of Chiquita Brands International, Inc. ("Chiquita"), Dole Food Company Inc. ("Dole"), and Fresh Del Monte Produce Group ("Del Monte") (through its subsidiary International Fruchtimport Gesellschaft Weichert GmbH & Co. KG ("Weichert", together with Chiquita and Dole, the "Parties")) against the Commission's decision of October 15, 2008,[38] concluding that the companies breached Article 101(1) TFEU[39] by coordinating their quotation prices[40] for bananas marketed in northern Europe between January 2000 and December 2002.

The Commission fined Dole €45.6 million and Del Monte/Weichert jointly €14.7 million. Chiquita received immunity from fines under the 2002 Leniency Notice.[41]

The existence of an infringement of Article 101(1). The General Court rejected Del Monte's and Dole's argument that the Commission had misapplied Article 101(1) TFEU by concluding that there was a concerted practice having an anticompetitive object:

[38] *Bananas* (Case COMP/39.188), Commission decision C(2008) 5955 of October 15, 2008, OJ 2009 C 189/12.

[39] *Fresh Del Monte Produce, Inc. v. Commission* (Case T-587/08) and *Dole Food Company, Inc. and Dole Germany OHG v. Commission* (Case T-588/08), judgments of March 14, 2013, not yet published.

[40] Quotation prices are weekly reference prices, used as market signals, trends, and/or indications as to the intended development of banana prices. Quotation prices also (indirectly) influence the actual price setting by banana importers.

[41] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 45/3 (the "2002 Leniency Notice").

- The General Court dismissed the claim that the Commission had failed to demonstrate a meeting of the minds between Dole and Weichert. The General Court confirmed that, to establish a concerted practice, it is simply necessary to establish that the companies have knowingly substituted practical cooperation for the risks of competition; an actual "meeting of the minds" is not required. More specifically, the General Court explained that the concept of a concerted practice implies (i) concertation; (ii) subsequent conduct on the market; and (iii) a relationship of cause and effect between the two. Subject to proof to the contrary, it is presumed that information exchanged between the concerting parties is taken into account when determining their conduct on the market. By contrast, an agreement within the meaning of Article 101(1) TFEU "*arises from an expression, by the participating undertakings, of their joint intention to conduct themselves on the market in a specific way.*"[42] The General Court therefore concluded that the Commission did not err in finding a concerted practice, where the parties discussed price-setting factors, discussed or disclosed price trends and indications of quotation prices, and exchanged information on expected import volumes as well as on other market conditions. Even though some of the information may have been publicly available, the point of view of the parties as regards that particular information was not.

- The General Court also dismissed the argument that the Commission had failed to show the actual anti-competitive *effects* of the information exchange. Since the Commission considered the information exchange a concerted practice having an anticompetitive *object*, it was not required to examine its effects. In view of the content and the frequency of the communications between the parties, the General Court held that the Commission correctly concluded that the information exchange between the parties concerned the fixing of prices and, therefore, gave rise to an object restriction.

- Del Monte and Dole challenged the Commission's finding that bilateral advance communications relating to quotation prices could be deemed communications relating to the fixing of prices because quotation prices do not determine actual prices. The General Court rejected that argument and affirmed the Commission's analysis.

- Del Monte also argued that, because Weichert was not aware of the communications between Dole and Chiquita (the fact the Commission had ackowledged), there was no single and continuous infringement. The General Court disagreed, noting that even an undertaking that not participate in all aspects of an anticompetitive scheme or played only a minor role in it may be found to have infringed competition law.

- Dole added that Chiquita's evidence lacked credibility given its status as a leniency applicant. The General Court noted that Chiquita's evidence was only one of the elements the Commission took into account. It observed that the fact that Chiquita may have had a personal interest in obtaining immunity did not necessarily affect its credibility.

- Lastly, Dole claimed that the Commission was inconsistent in holding that the purpose of the bilateral communications between the parties was to coordinate their quotation prices. Dole argued that each of Chiquita and Dole was setting quotation prices for different products, customers, and weeks in the banana market three-week cycle. The General Court, however, rejected this argument by confirming the uniform nature of the relevant products (i.e., the product definition of fresh bananas includes both green and yellow bananas), rendering irrelevant the distinctions between quotation prices for various customers and points in time during the banana market cycle.

Breach of rights of defense. The General Court also dismissed Del Monte's and Dole's arguments alleging breach of their rights of defense. Del Monte claimed, in particular, that the Commission's refusal to disclose other undertakings' responses to the statement of objections had prevented Del Monte from defending itself adequately. The General Court noted that it was for Del Monte to establish either that (i) incriminating evidence that the Commission relied on and to which Del Monte

[42] *Fresh Del Monte Produce, Inc. v. Commission* (Case T-587/08), judgment of March 14, 2013, not yet published, para. 299.

had no access was inadmissible, or that (ii) the non-disclosure of exculpatory evidence negatively affected the course of the proceedings and/or the content of the Commission's decision. The General Court concluded that Del Monte did not establish either.

Reduction of fines. The General Court accepted a reduction of Del Monte's fine on the basis that the Commission should have given greater weight both to Weichert's cooperation during the administrative procedure and to its relatively limited involvement in the cartel. As regards Weichert's limited participation in the cartel, the General Court concluded that the Commission did not comply with the principle of proportionality by only reducing the fine by 10%. The General Court increased the fine reduction to a total of 20%. As regards Weichert's cooperation in the administrative procedure, the General Court concluded that, given the added value of the information Weichert had voluntarily provided to the Commission, Weichert should be granted a further reduction of 10% on the basis of the 2002 Leniency Notice.

However, the General Court refused to reduce Dole's fine. Dole claimed that the Commission had misapplied the Fining Guidelines[43] by taking into account the value of sales of products unrelated to the alleged infringement, such as non-Dole branded green bananas. The General Court disagreed, reconfirming that the relevant product market was the overall market for fresh bananas.

Dole also claimed that the basic fine was disproportionate because it was based on the incorrect finding that the conduct concerned the fixing of prices. The General Court, again, disagreed, and reiterated that the information exchange concerned constituted a price-fixing agreement. Finally, the General Court also dismissed Dole's argument that the Commission should have taken into account its precarious financial situation, because Dole did not prove that the imposition of a fine would irretrievably jeopardize its economic viability.

Parental liability. In Del Monte's case, the General Court found that the Commission had not erred in holding Del Monte liable for the actions of Weichert, because (i) Weichert was not a subsidiary of Del Monte, but a partnership between Del Monte and the Weichert family; and (ii) Del Monte's control over Weichert was determined, in part, by the terms of this partnership agreement. It also concluded that the Commission did not have to further substantiate its finding that Del Monte had decisive influence over Weichert, holding that the Commission decision described the Del Monte group structure clearly, identified the different shareholdings in Weichert, and cited the relevant case law.

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

POLICY AND PROCEDURE

ECJ Advocate General Opinions

Donau Chemie and Others (Case C-536/11), Opinion of AG Jääskinen

On February 7, 2013 Advocate General Jääskinen advised the Court of Justice[44] to decide that the principle of effective judicial protection precludes a provision of national competition law which conditions access to relevant court file to third parties wishing to bring civil damages claims against cartel participants on the consent of those participants.[45]

On March 26, 2010, the *Oberlandesgericht Wien* acting in its capacity as a cartel court (the "Cartel Court") fined seven companies for their participation in a cartel in the Austrian market for the wholesale distribution of printing chemicals in breach of Article 101 TFEU. Once the decision became final, Verband Druck & Medientechnik, an association representing the interests of undertakings in the printing sector (the "Association"), sought access to the Cartel Court's file to quantify the damages it suffered as a result of the cartel, in preparation for filing an action for damages. Under the Austrian rule at issue (the "Consent Rule"),[46] third parties cannot access court files of public law competition proceedings without the consent of all parties to the proceedings, which the Association did not obtain.

Following the judgment in *Pfleiderer,*[47] in which the Court of Justice held that national courts must balance the interests of protecting leniency documents with those of ensuring that damages actions can be brought, the Cartel Court asked the Court of Justice to determine whether the absolute ban contained in the Consent Rule was compatible with the EU principles of equivalence and effectiveness. The principle of equivalence requires that that domestic procedural law be neutral in its treatment of rights derived from domestic substantive law and those derived from EU law. According to the principle of effectiveness, domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law and the obligation on Member States to allow individuals to bring actions for damages for breach of competition law.

Regarding the principle of equivalence, AG Jääskinen noted that the Consent Rule applied to cases based on both EU and Austrian competition laws. He therefore advised that the principle of equivalence should not preclude the application of the Consent Rule. However, according to AG Jääskinen, the Consent Rule would significantly deter parties from exercising their right to claim civil damages for breach of EU competition law, contrary to the principle of effectiveness and Article 19(1) TEU, which requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. AG Jääskinen also found that an absolute ban on access to the court file absent the consent of the parties is a disproportionate impediment to the right of access to a court as guaranteed by Article 47 of the Charter of Fundamental Rights of the EU. National courts must have the power to conduct a weighing exercise of the kind contemplated under *Pfleiderer*. The national legislator may regulate the factors to be taken into account as part of this exercise, but may not preclude it from taking place, except perhaps in respect of information provided by undertakings benefiting from leniency (so as to preserve the public interest relating to effective implementation of competition rules).

General Court Judgments

Henkel and Henkel France v. Commission (Cases T-607/11 and T-64/12)

On March 7, 2013, the General Court upheld two Commission decisions refusing to transfer certain documents produced in relation to the consumer detergents cartel case to the French Competition Authority ("FCA").[48]

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[44] This case was decided by the Court of Justice on June 6, 2013, the judgment of which will be discussed in next quarter's European Competition Report (Q2 2013).

[45] *Donau Chemie and Others* (Case C-536/11), opinion of Advocate General Jääskinen of February 7, 2013.

[46] Paragraph 39(2) of the Austrian Federal Law of 2005 on Cartels and Other Restrictions of Competition (Bundesgesetz *gegen Kartelle und andere Wettbewerbsbeschränkungen* ('KartG')).

[47] *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09) 2011 ECR I-5161.

[48] *Henkel AG & Co. KGaA and Henkel France v. Commission* (Cases T-607/11 and T-64/12), orders of March 7, 2013, not yet published.

On April 13, 2011, the Commission fined Procter & Gamble and Unilever for participation in a cartel in the consumer textile detergent market, while Henkel received full immunity under the Commission's leniency notice. The FCA investigated a similar case in parallel with the Commission. Henkel deemed documents in the Commission's possession relevant to the exercise of its rights of defense before the FCA and therefore, at Henkel's insistence, the FCA requested that the Commission transmit the documents to it. On September 30, 2011, the Commission rejected this request on the ground that these documents where submitted by leniency applicants and therefore enjoyed particularly high confidentiality protection. Moreover, pursuant to Article 12(2) of Regulation 1/2003, they could only be used for the purpose for which they had been collected (i.e., the Commission's investigation). On December 7, 2011, the Commission also rejected Henkel's request regarding a transfer of the documents to the FCA. On December 8, 2011, the FCA fined Henkel for its participation in the cartel. Henkel appealed the Commission's rejection decisions.

The General Court first noted that the applicants' requests have to be considered as requests for the transmission of the documents and not requests to use and disclose them. The General Court's analysis then focused on the applicants' legal interest in obtaining the annulment of the Commission's decisions.

The General Court found that Henkel did not retain a legal interest in obtaining the annulment of the Commission's decisions following the adoption of the FCA's decision. The General Court noted that the FCA knew why Henkel considered the documents relevant to the French proceedings but, nevertheless, deemed it appropriate to rule on the case even in the absence of these documents. Because the FCA's decision ended the proceedings before it, Henkel did not retain a legal interest in the annulment of the Commission's decision.

The General Court further noted that the applicants' potential legal interest in having those documents at their disposal for the purposes of the proceedings before the Paris Court of Appeals is irrelevant, considering that their interest must be assessed in light of the subject matter of the decisions concerned, which encompass neither the transmission of the documents to the Paris Court of Appeals, nor the possibility of authorizing the applicants to use those documents before that court.[49] In this context, the annulment of the decisions would not automatically lead either to the transmission of the documents by the Commission to the Paris Court of Appeals or to an authorization allowing the applicants to disclose those documents to that General Court. Therefore, the General Court rejected the applicants' requests as inadmissible.

Pilkington Group v. Commission (Case T-462/12)

On March 11, 2013, the General Court partially upheld Pilkington Group Ltd.'s ("Pilkington") application for interim measures suspending the Commission's decision of August 6, 2012 (the "August 2012 Decision"),[50] in which the Commission rejected Pilkington's confidentiality claims over information which the Commission considered to be historical, and intended to publish.[51]

In 2008, the Commission fined Pilkington, several companies belonging to the French Saint-Gobain group and the Japanese Asahi group, and Soliver for their participation in a cartel concerning the sales of glass for new vehicles and replacement parts for motor vehicles. The Commission's decision of November 12, 2008 was published in February 2010.[52] On April 28, 2011, the Commission notified Pilkington of its intention to publish a fuller non-confidential version of the original decision, and subsequently rejected Pilkington's request for confidential treatment of the August 2012 Decision. Pilkington sought interim measures suspending the August 2012 Decision.

An order for the suspension of an act or other interim measures may be rendered if such an order is (1) justified, *prima facie*, in fact and in law; (2) urgent; and (3)

[49] *Henkel AG & Co. KGaA and Henkel France v. Commission* (Case T-64/12), order of March 7, 2013, not yet published, para. 66.

[50] *Carglass* (Case COMP/39.125), Commission decision C(2012) 5718 of August 6, 2012.

[51] *Pilkington Group v. Commission* (Case T-462/12), judgment of March 11, 2013, not yet published.

[52] *Carglass* (Case COMP/39.125), Commission decision of November 12, 2008.

necessary to avoid serious and irreparable harm to the applying party's interests.

As regards the urgency of granting interim measures, the General Court took a balancing of interests approach. It found that, because the application for interim measures amounts to no more than maintaining, for a limited period, the *status quo* in existence since February 2010, Pilkington's interest must prevail. Interim measures would merely delay third parties' rights to an effective remedy, whereas absent interim measures Pilkington's rights would be undermined, as would the effectiveness of an annulment decision in the main proceedings. Given that the balance of interests was thus in Pilkington's favor, the General Court concluded that there would be a clear urgency to protect Pilkington's interests if the third condition was satisfied.

The General Court proceeded to address the third condition with respect to three categories of information: customer names, product names and descriptions etc. (Category I); the number of parts supplied, pricing calculations etc. (Category II); and information which might identify staff involved in the cartel's implementation (Category III).

The General Court considered that Category III information was not in need of urgent protection as court jurisprudence required the damage to be personal to Pilkington, and Pilkington failed to adduce evidence that its publication would cause serious and irreparable prejudice to the right to the protection of personal data protected under Article 8 of the Charter of Fundamental Rights of the European Union (the "Charter").

The General Court considered that the publication of Category I and II information could breach the applicant's fundamental right to the protection of its professional secrets, enshrined in Article 339 TFEU, Article 8 ECHR and Article 7 of the Charter, as well as the right to an effective remedy (Article 6 ECHR and Article 47 of the Charter) in the main application for annulment of the August 2012 Decision.

On the application's *prima facie* justification in law, the General Court first considered that the quantity of confidentiality requests (covering 334 recitals and 65 footnotes) and the Commission's rejection of the majority of these raised complex questions requiring detailed assessment in the main proceedings. Second, the hearing officer's classification of some of the information as "secret" meant that the information could not be considered *en bloc*, nor was its distribution amongst cartel participants sufficient to consider it widely known. Third, whilst five-year-old information is generally historical, because an interested party could show that it still constitutes an essential element of its commercial position. Given that Pilkington's arguments were not wholly irrelevant, the General Court could not exclude the possibility that the publication of Category I and II information could cause serious harm to Pilkington. Finally, weighing Pilkington's confidentiality claims against the public interest in the activities of EU institutions taking place as openly as possible would require assessment by the General Court adjudicating on the substance of the dispute.

The application for interim measures with respect to Category I and II information contained in the August 2012 Decision was thus upheld, while the application with respect to Category III information was dismissed.

Commission Decisions

E-Books (Case COMP/AT.39847)

On December 12, 2012, the Commission rendered legally binding the commitments offered by Hachette, Harper Collins, Holtzbrinck/MacMillan, Simon & Schuster (the "Four Publishers") and Apple to address concerns that these undertakings had implemented a concerted practice to convert the sale of e-books to consumers to an agency model in order to raise their prices.[53] This is the first EU antitrust case regarding e-books.

Until Spring 2010, publishers mostly sold e-books under wholesale agreements with retailers. In countries where the law did not require publishers to set the retail price of e-books, retailers were free to set the consumer sale price. Amazon, a significant e-book wholesale buyer, charged low prices in the United States for the electronic versions of New York Times best-sellers; this low price policy was expected to subsequently reach more nascent

[53] *E-Books* (Case COMP/AT.39847), Commission decision of December 12, 2012.

markets – particularly the United Kingdom, where consumers had started to acquire dedicated e-readers such as Amazon's Kindle and to buy e-books through the U.S. Amazon.com operating website.

In January 2010, just before the iPad was publicly announced, each of the Four Publishers, as well as Penguin, entered into a similar agency agreement with Apple for the sale of e-books in the United States. Under these agency agreements, the publishers set the price at which Apple would sell their e-books in the coming iBookstore. The agency agreements included a retail price most favored nation ("MFN") clause, under which publishers had to lower the price of the e-book on the iBookstore to match the lowest price at which this specific e-book was sold. The agreements contained maximum retail price grids for future e-books and gave Apple a 30% commission on the retail price. Before April 2010, Amazon and other retailers accepted switching to an agency model in the United States. The Four Publishers subsequently entered into similar agency agreements with Apple for e-books in the United Kingdom, and the publishers active in France and Germany entered into similar agreements with Apple for the French language and German language e-books.

The Commission took the preliminary view that the conclusion of these agency agreements resulted from a concerted practice. According to the Commission, the common global plan was to switch all retailers to an agency model at the same consumer price to increase prices or avoid reduced prices, especially with regard to Amazon. The Four Publishers engaged in talks with each other directly or through Apple. The Commission took the preliminary view that, absent knowledge that the other publishers were going to enter into the same agency agreement with Apple, none of the Four Publishers would have found it profitable to sign with Apple. Individually, none of the Four Publishers was strong enough to force Amazon to switch to an agency model. Once all Four Publishers knew they had all agreed to the same MFN clause with Apple, each of them could lean much more strongly on Amazon to force a switch to an agency model. The Four Publishers knew that Amazon could no longer insist on the wholesale model if it was threatened by the loss of all their e-book sales. The Commission's preliminary view was that the concerted practice was aimed at raising the retail prices of e-books (for the United Kingdom) or avoiding the arrival of Amazon's low price policy (in other EEA markets such as France or Germany).

To address these concerns, the Four Publishers and Apple offered commitments, which the Commission rendered legally binding on December 12, 2012 under Article 9 of the Regulation No 1/2003. The Four Publishers committed to terminate all EEA agency agreements that restricted the ability of retailers to offer discounts on e-books or contained an MFN clause. For two years, the Four Publishers cannot restrict the ability of retailers to offer discounts on e-books under a certain cap; for five years, the Four Publishers cannot enter into agreements with e-book retailers that contain a MFN clause. Apple committed to terminate all agency agreements with the Four Publishers and Penguin; for the next five years, Apple cannot stipulate or enforce MFN clauses with any e-books publisher in the EEA.

Penguin chose not to offer commitments as the same time as the other parties. The Commission announced in April 2013 that Penguin finally offered similar commitments, which the Commission could make binding in the course of the year 2013.

Reuters Instrument Codes (Case AT.39654)

On December 20, 2012, the Commission made binding the commitments offered by Thomson Reuters to address concerns of abuse of dominance in the market for consolidated real-time datafeeds ("CRDs").[54]

In its preliminary assessment, the Commission concluded that Thomson Reuters had engaged in abusive conduct by prohibiting its customers from using the Reuters Instrument Codes ("RICs") to retrieve data from CRDs from other providers and by preventing third parties from maintaining mapping systems that would allow interoperability with other providers. The commitments eventually accepted and made binding by the

[54] *Reuters Instrument Codes* (Case AT.39654), Commission decision C(2012) 9635 of December 20, 2012.

Commission were the third set of commitments offered by Thomson Reuters.

The Commission concluded that the relevant market was the market for CRDs. Real-time datafeeds are virtual pipelines that continually supply updated market information. They are generally used in applications developed by banks and other financial institutions. The RICs are numerical codes that identify securities and their trading locations and are used to retrieve information from the Thomson Reuters financial information database. Direct real-time datafeeds were not considered to be in the same relevant market because they differ from CRDs in speed, are used for different purposes, and do not cover the same data.

Thomson Reuters' customers were previously prohibited from using RICs to get data content from competing providers of real-time datafeeds. The Commission found this made it extremely difficult for Thomson Reuters' customers to switch to competing providers. Customers would need to extract all data in use, verify the full coverage of these by the rival provider, and test the new feed. Moreover, as Thomson Reuters had been the primary actor in the market, numerous customers had embedded its RICs in their IT systems, making switching even more difficult for them.

The final set of commitments essentially required Thomson Reuters to offer an Extended RIC Licence ("ERL") to any customer that, at the time of application, is subscribed to a Thomson Reuters CRD Service. This ERL gives licensees the right to use RICs to retrieve data from competitors for the purpose of switching, partially or completely, to alternative CRD providers.

Thomson Reuters also committed to provide regular updates of the relevant RICs. The commitments protect customers that will switch away from the Thomson Reuters datafeed: Thomson Reuters committed not discriminate against any customer that makes a partial switch for the terms of its CRD Service. Thomson Reuters also committed to continue making the ERL available for five years to customers that switch away from Thomson Reuters CRDs to an alternative CRD, and to those who subscribe to a third-party CRD in addition to Thomson Reuters's CRD.

To address certain concerns identified after Thomson Reuters proposed the first set of commitments, Thomson Reuters committed not to increase its fees for the ERL licenses to customers that make a partial switch (i.e., subscribe to a third-party CRD in addition to Thomson Reuter's CRD) for a period of at least 12 months from the signing of the ERL.

Under the terms of the commitments, Thomson Reuters must allow third party developers, subject to a monthly license, to use RICs in developing and maintaining a tool which will enable switching from Thomson Reuters' CRD Service. Thomson Reuters was also required to appoint a monitoring trustee to monitor compliance of the commitments for a period of seven years.

The Commission rejected calls by some respondents to the market investigation for even more far-reaching commitments, concluding that such commitments would go beyond what was necessary to remedy the competition concerns identified in the preliminary assessment. These included granting access to RICs to Thomson Reuters' competitors, including in the ERL the authorization to use RICs to retrieve data from direct real-time datafeeds, and including other data in the ERL, such as reference data or end of day data.

Commission Developments

Commission Revises Guidance on Dawn Raids Procedures Focusing on Seizure of Electronic Documents

On March 18, 2013, the Commission revised its explanatory note on dawn raids to reflect the increasing focus in such inspections on electronic documents.[55] It codifies and expands upon recent decisions and case law.

The revised guidance first reiterates the powers of Commission inspectors in general terms, then deals specifically with IT aspects of inspections before turning to briefly cover issues relating to confidentiality of documents.

[55] Explanatory Note to an authorisation to conduct and inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003, March 18, 2013.

The explanatory note reaffirms that undertakings are obliged to submit to an inspection ordered by decision under Article 20(4) of Regulation 1/2003. While inspectors cannot be obliged to justify the decision, they can be asked to explain procedural matters such as confidentiality or the consequences of refusal to submit to an inspection. Inspectors from the relevant NCA are entitled to "actively assist" the Commission inspectors and have the same powers as the latter. Inspectors are empowered, *inter alia*, to:

- Enter any premises, land or means of transport of the undertaking;
- Examine books and other records, irrespective of the medium, and take copies in any form;
- Seal any business premises and books or records; and
- Require on-the-spot oral explanations of any facts or documents relating to the inspection and record the answers in any form.

While an undertaking may consult a legal advisor, this is not a prerequisite for the legality of the inspection and the inspectors may enter the offices of the undertaking without waiting for legal representation to arrive. Any delaying of the commencement of the inspection "must be kept to the strict minimum."

Inspectors may search the IT environment and storage media, including laptops, tablets, mobile phones, USB-keys and so on. Reflecting current practice, the note explains that, in searching for and examining electronic data, inspectors may use not only any built-in (keyword) search tool but also their own "Forensic IT tools." These allow the inspectors to, *inter alia*, recover deleted data.

The note goes on to state that inspectors may require the undertaking to provide members of its IT staff to assist them, not only for explanations on the IT environment, but also for specific tasks such as: the temporary blocking of individual email accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers or providing 'administrator access rights' support

The undertaking must not interfere with any such measures, and it has the responsibility of informing affected employees accordingly.[56] Inspectors may ask to use hardware provided by the undertaking (hard disk, printer, etc.) and can keep borrowed storage media until the end of the inspection. At the end of the inspection, the Forensic IT tools are wiped of all data relating to the undertaking.

Inspectors have the right to take a copy of data still to be searched back to the Commission premises to continue the selection process. The copy must be placed in a sealed envelope and may only be reopened at the Commission premises in the presence of the undertaking.[57]

[56] *EPH and Others* (Case COMP/39.793), Commission decision of March 28, 2012.

[57] In *Nexans France SAS and Nexans SA v. Commission* (Case T-135/09) and *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v. Commission* (Case T-140/09), judgments of November 14, 2012, not yet published, an argument that this practice was illegal was rejected as inadmissible (not an attackable act). However, its legality has not been categorically affirmed.

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099