HORIZONTAL AGREEMENTS

ECJ Judgments

Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato **(Case C-136/12)**

On July 18, 2013, the European Court of Justice ("ECJ") issued its judgment following a reference for a preliminary ruling from the Council of State, Italy's highest administrative court. The proceedings before the Council of State concerned a second appeal against a decision by the Italian Competition Authority ("ICA") holding that the Consiglio Nazionale dei Geologi (the National Association of Geologists, "CNG") had infringed Article 101 TFEU because it had encouraged its members to apply a scale of professional fees.

The CNG is the professional body of geologists in Italy and is responsible for, *inter alia*, ensuring compliance with the regulations of that profession; it is empowered to adopt disciplinary measures for breach of those regulations. All geologists in Italy must be entered in a register administered by the CNG, and that register constitutes the membership of the CNG. At issue were various provisions of the CNG's Code of Conduct. In particular, Article 17 of the Code of Conduct (entitled "*Fee criteria*") refers to a scale of professional fees as a legitimate reference criterion in the determination of geologists' fees. Articles 18 and 19 impose general standards for setting fees: the fee must be commensurate with the scale and difficulty of the task to be performed, the dignity of the profession, and the technical knowledge and commitment required. The ICA found that these provisions encouraged members of the CNG to apply the scale, and could even lead to the assumption that the scale is compulsory, thereby infringing Article 101(1) TFEU.

The CNG challenged the ICA's decision. The Regional Administrative Court in Lazio dismissed the challenge, holding that the reference to the scale did induce geologists to apply that scale. It held, however, that the ICA had not submitted sufficient evidence that the reference to the dignity of the profession as a criterion for determining the remuneration of geologists implied that the scale of fees was binding. Both the CNG and the ICA appealed the judgment to the Council of State.

On appeal, the Council of State stayed the proceedings and referred the matter to the ECJ. The Council of State asked the ECJ to clarify whether Article 101 TFEU precludes a professional association from adopting rules of professional conduct regarding fee determination, where setting fees set below a certain level may be penalized on grounds of breach of those rules (due to the CNG's power to adopt disciplinary measures).

The ECJ found that the CNG was an association of undertakings within the meaning of Article 101 TFEU because the CNG was acting as the regulatory body of a profession whose practice constitutes an economic activity. The ECJ further found that the Code of Conduct was binding on geologists and that noncompliance with it could lead to penalties. It therefore held that the Code of Conduct constituted a decision by an association of undertakings under Article 101 TFEU. The ECJ left it to referring national court to assess whether the provisions regarding fees actually restricted competition. The ECJ explained that this assessment had to be carried out taking into account the overall context in which the Code of Conduct produces its effects, including the national legal framework and the way the Code of Conduct is applied in practice.

The ECJ further explained that a decision of an association of undertakings is not necessarily prohibited under Article 101(1) TFEU even if it restricts the freedom of action of the parties. Competition authorities and courts must look at the "overall context in which the decision […] was taken or produces its effects," taking into account any legitimate objectives and whether the restrictions it imposes are limited to what is necessary to ensure the implementation of the legitimate objectives.[1] The ECJ recognized a legitimate objective in "providing guarantees to consumers of geologists' services," but left for the referring court to "verify whether, in the light of all

[1] *Consiglio nazionale dei geologi v. Autorità garante della concorrenza e del mercato* (Case C-136/12), judgment of July 18, 2013, not yet published, para. 53.

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the relevant material before it, the rules of [the Code of Conduct], in particular in so far as they apply the criterion based on the dignity of the profession, may be regarded as necessary for the implementation of the legitimate objective."[2] This language may reflect doubts on the ECJ's part as to the relevance and therefore necessity of the "dignity of the profession"[3] as a criterion for geologists' remuneration.

Commission Decisions

Continental/United/Lufthansa/Air Canada (Case COMP/AT.39595)

On May 23, 2013, the European Commission ("Commission") adopted a decision under Article 9 of Regulation 1/2003[4] making binding the commitments offered by Air Canada, United Airlines Inc. ("United"),[5] and Deutsche Lufthansa AG ("Lufthansa"), the founding members of the Star Alliance, the world's largest airline alliance.[6] The decision concerned the 2008 agreement (the "A++ agreement") among Air Canada, United, Continental, and Lufthansa, establishing a revenue-sharing joint venture on passenger routes between Europe and North America. The A++ agreement provided for extensive cooperation among the parties, including on pricing, capacity, and scheduling coordination, and the sharing of revenues.

The Commission's preliminary view was that the A++ agreement was likely to infringe Article 101 TFEU because it would detrimentally affect competition on the premium market (i.e., passengers in first, business, and flexible economy classes) on the Frankfurt-New York route:

- First, the A++ agreement restricted competition by object because it eliminated competition among the parties on key parameters of competition, such as price and capacity. Although the agreement applied to a large number of transatlantic routes, the Commission focused on the Frankfurt-New York route because it was the least likely to meet the conditions of Article 101(3) TFEU.
- Second, the A++ agreement restricted competition by effect. In the absence of the cooperation, Lufthansa and Continental would have been actual competitors on the nonstop Frankfurt-New York route (as they were before the implementation of the A++ agreement), and the cooperation eliminated competition on all key parameters (including pricing, capacity, and service levels). Competitors of the parties were unlikely to counter the anticompetitive effects because of substantial barriers to expansion and entry, including airport slot constraints.

The parties argued that the A++ agreement should be exempted under Article 101(3) TFEU because it created efficiencies on both the Frankfurt-New York and on other related routes. Notably, in its examination of efficiencies, the Commission considered it appropriate to extend the test in the Article 101(3) Guidelines, which requires that the efficiencies assessment be "made within the confines of each relevant market to which the agreement relates."[7] The Commission broadened the test to include efficiencies produced on routes *related* to the route of concern (the "behind and beyond routes").[8] As a result, the Commission preliminarily accepted that the A++ agreement led to efficiency gains, satisfying the requirements of Article 101(3). However, the Commission also preliminarily concluded that the level of efficiencies was insufficient to outweigh the significant

[2] *Ibid.*, para. 56.

[3] *Ibid.*

[4] Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ 2003 L 1/1 ("Regulation 1/2003")

[5] Continental Airlines ("Continental") and United merged in 2010 (*United Air Lines/Continental Airlines* (Case COMP/M.5889), Commission decision of March 31, 2010). Continental was a party to the investigation in this case until the date of the merger's completion. References to United should be understood as references to Continental where appropriate.

[6] *Continental/United/Lufthansa/Air Canada* (Case COMP/AT.39595), Commission decision of May 23, 2013.

[7] Guidelines of the application of Article 81(3) of the Treaty, OJ 2004 C 101/8, para. 43.

[8] *Continental/United/Lufthansa/Air Canada* (Case COMP/AT.39595), Commission decision of May 23, 2013, para. 59. These "behind and beyond routes" included, for example, Prague-Frankfurt-New York and Frankfurt-New York-Seattle.

negative effects resulting from the elimination of competition between Lufthansa and Continental in the Frankfurt-New York premium market.

Therefore, the parties offered and the Commission accepted the following commitments to address its preliminary concerns:

- **Slot commitments.** To reduce barriers to entry created by slot shortages at airports, the parties committed to making landing and take-off slots available at Frankfurt and/or New York airports. They undertook to release sufficient slots to allow a competitor to up to one additional daily frequency on the Frankfurt-New York route.
- **Fare combinability commitments.** The parties also agreed to allow competitors to offer tickets on their flights (such that a premium passenger could travel one way with one of the parties, and return with a competitor) and to provide better access to the parties' connecting passengers.
- **Miscellaneous commitments.** The parties committed to submitting data concerning their cooperation to facilitate an evaluation of the alliance's impact over time. The commitments will be monitored by an independent trustee and will last for 10 years.

***E-Books* (Case COMP/AT.39847)**

On July 25, 2013, the Commission announced that it had decided under Article 9 of Regulation 1/2003 to render legally binding the commitments offered by Penguin to address competition concerns relating to the sale of e-books in the EEA. The announcement marks the end of the Commission's proceedings against Penguin, Simon & Schuster, HarperCollins, Hachette, Holtzbrinck/Macmillan (together, the "Five Publishers"), and Apple, initiated in March 2011.

In January 2010, each of the Five Publishers switched from a wholesale model, under which each retailer independently determined the retail price of the e-books it sold, to an agency agreement model, under which each retailer entered into an agreement with Apple for the sale of e-books in the United States, pursuant to which the publishers set the price at which Apple could sell their e-books in the then-coming iBookstore. Each of these agency agreements contained similar key terms, including a retail price most favored nation ("MFN") clause, under which publishers had to lower the price of the e-book in the iBookstore to match the lowest price at which the specific e-book was sold; maximum retail price grids; and a 30% commission payable to Apple. Some of the publishers subsequently entered into agency agreements with Amazon and other retailers in the United States, and with Apple for e-books in the United Kingdom, France, and Germany.

In December 2012, the Commission rendered legally binding the commitments offered by the other four publishers and Apple. However, Penguin had chosen not to offer commitments as the same time as the other parties. On March 1, 2013, the Commission adopted a preliminary assessment relating to Penguin's conduct. The Commission took the preliminary view that, by jointly switching the sale of e-books from a wholesale model to an agency model with the same key terms on a global basis, the Five Publishers and Apple may have engaged in a concerted practice with the object of raising retail prices of e-books in the EEA or preventing the emergence of lower prices for e-books in the EEA. The same key terms in the agency agreements with Apple meant that, to avoid lower revenues and margins for their e-books on the iBookstore, publishers had to pressure other major e-book retailers offering e-books to consumers in the EEA to adopt the agency model.

The commitments formally offered by Penguin in April 2013 are substantially similar to those made binding on the other four publishers in December 2012. In particular, Penguin committed to terminate ongoing agency agreements with retailers. In addition, for two years, Penguin cannot restrict the ability of retailers to offer discounts on e-books, subject to certain conditions. Finally, for five years, Penguin cannot enter into agency agreements with retailers that contain a price MFN clause. Following a market test,[9] the Commission concluded that the commitments would remedy the competition concerns it had identified.

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[9] Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/39.847/*E-BOOKS*, OJ 2013 C 112/9.

FINING POLICY

ECJ Judgments

Commission v. Aalberts Industries and Others **(Case C-287/11 P) and** ***Commission v. Verhuizingen Coppens*** **(Case C-441/11 P)**

In September 2013, Advocate General Wahl highlighted two divergent rulings of the ECJ in separate cartel matters, *Aalberts*[10] and *Coppens*,[11] in relation to the concept of a "single and continuous infringement,"[12] noting that "this will be a hot topic for 2014" and that the ECJ "simply has to decide which of the two is a leading case."[13]

The Commission uses the notion of a single and continuous infringement ("SCI") in cartel cases to link together into a single infringement of Article 101 TFEU various modes of conduct by an undertaking, in concert with other undertakings, across a period of time, each of which may be said to cover the same subject matter. This enables the Commission to hold an undertaking liable for all conduct over the whole period, without having to identify the precise extent of that undertaking's involvement in the various elements of the infringement over time. While this approach is less burdensome for the Commission, it disadvantages parties with limited involvement in a cartel – under the Commission's approach, such limited involvement will not necessarily prevent them from being held liable for a broader infringement over a longer time period. The (overly) broad application of this doctrine by the Commission has led to the annulment of six Commission decisions by the EU Courts since 1998.

According to settled case law,[14] three conditions must be satisfied to find that an undertaking has participated in a SCI under Article 101 TFEU, namely: (i) the existence of an overall plan pursuing a common objective; (ii) the intentional contribution by the conduct of that undertaking to the common objective pursued by all participants; and (iii) the awareness of that undertaking of the offending conduct of the other participants in pursuit of the common objective, or the reasonable foreseeability that the offending conduct would occur.

In the decisions under appeal in *Coppens* and *Aalberts*, the Commission followed this reasoning to hold the undertakings liable for a SCI (in the international removal services and copper fittings cartels, respectively). On appeal to the General Court, each undertaking successfully disputed that it had been involved in the SCI identified by the Commission (each of their conduct having been substantially more limited in scope than the SCI found in the relevant decision). Consequently, the General Court in each case annulled the entire infringement decision against the undertaking. In both cases, the Commission appealed to the ECJ on the basis that even had Coppens and Aalberts not been liable for the SCI, it was not appropriate to annul the entire decision against them. Instead, they should have been found liable for the portions of the infringement in which the General Court accepted each had been involved:

- In *Coppens*, the ECJ found that the Commission had successfully proved the undertaking's participation in one of the two constituent elements of the cartel. However, the ECJ concluded that the Commission had failed to prove that: (i) the undertaking intended, through its participation in the first constituent element, to contribute to the common objectives pursued by all the other participants in the cartel; and (ii) the undertaking was aware of the second constituent element of the cartel, or that it could reasonably have foreseen the second element and was prepared to take the risk. The ECJ referred to its judgment in *France v. Parliament and Council*,[15] holding that the partial annulment of an EU act is possible if the elements sought to be annulled can be severed from the remainder of the measure without altering the

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[10] *Commission v. Aalberts Industries and Others* (Case C-287/11 P), judgment of July 4, 2013, not yet published.

[11] *Commission v. Verhuizingen Coppens* (Case C-441/11 P), judgment of December 6, 2012, not yet published.

[12] *Ibid.*, para. 2.

[13] AG Wahl, Fordham 40th Annual Conference on International Antitrust Law and Policy, New York, September 26-27, 2013, reported by Mlex at http://www.mlex.com/EU/Content.aspx?ID=450650

[14] *Commission v. Anic Partecipazioni SpA* (Case C-49/92 P) 1999 ECR I-4125.

[15] *French Republic v. European Parliament and Council of the European Union* (Case C-244/03) 2005 ECR I-4021.

substance of the act. The ECJ found thast these conditions were met. Contrary to the General Court's judgment, the ECJ concluded that the Commission decision should have been only partially annulled. Thus, the ECJ held Coppens liable for part of the unlawful conduct.

- In *Aalberts*, the ECJ acknowledged the ruling in *Coppens*, but held that the Commission's copper fittings decision only held that *Aalberts* participated in a SCI. The Commission had not qualified the trade association meetings, which Aalberts had participated in, as elements of the SCI capable of being treated as a distinct infringement. Thus, the ECJ concluded that the undertaking's lawful activity could not be severed from the remainder of the act within the meaning of the case law. Accordingly, the ECJ upheld the General Court's annulment of the Commission decision against Aalberts in its entirety.

Thus, the ECJ judgments in *Coppens* and *Aalberts* have created some uncertainty as to the circumstances under which a finding that an undertaking did not participate in some of the conduct said to constitute a SCI will result in that undertaking being liable for a narrower infringement as opposed to no infringement at all. It remains to be seen whether this uncertainty will discourage the Commission from relying on the notion of a SCI, except in the clearest of cases, to avoid the risk that incorrect findings of a SCI mean its decisions are annulled in full rather than in part. Alternatively, the Commission might choose, instead, simply to spell out more clearly in its decisions that particular instances of conduct would amount to discrete infringements of Article 101 TFEU, as well as form part of a SCI.

***E.I. Du Pont de Nemours & Company v. Commission* (Case C-172/12 P) and *The Dow Chemical Company v. Commission* (Case C-179/12 P)**

On September 26, 2013, the ECJ dismissed appeals by E. I. DuPont de Nemours ("DuPont") and The Dow Chemical Company ("Dow") against the General Court judgments that upheld their liability in the chloroprene rubber cartel. The ECJ thus confirmed that even if a joint venture performs all the functions of an autonomous economic entity (i.e., if it constitutes a "full-function" joint venture under the EU Merger Regulation (the "EUMR")[16]), liability can still be imputed to its parents if they exercise decisive influence over the joint venture.

On December 5, 2007, the Commission imposed fines on six companies, including DuPont and Dow, for participation in the chloroprene rubber cartel.[17] The cartel had operated between 1993 and 2002, covered the entire EEA, and consisted of horizontal market-sharing and price-fixing agreements. DuPont had been active in the chloroprene rubber market until April 1, 1996, when it transferred all of its activities in the sector to DuPont Dow Elastomers ("DDE"), a full-function joint venture held in equal shares by DuPont and Dow. DDE participated in the cartel between April 1, 1996, and May 13, 2002. DuPont and Dow were held jointly and severally liable as parents for the behavior of the joint venture DDE during the period.

DuPont and Dow appealed the Commission's decision to the General Court. The General Court dismissed those appeals in their entirety on February 2, 2012, finding that DuPont and Dow had exercised decisive influence over DDE in the chloroprene rubber market,[18] DuPont, Dow, and DDE therefore formed a single undertaking for the purposes of Article 101 TFEU, and, accordingly, the unlawful conduct of the joint venture DDE could be imputed to its parents.

On appeal to the ECJ, DuPont and Dow argued that the General Court had erred in law in attributing liability to them as parents for DDE's unlawful conduct for the following reasons:

- First, where two parent companies jointly exercise influence over a joint venture, a finding that they, together with the joint venture, constitute a single economic unit and a single undertaking is incompatible with the notions of "single economic unit" and "single

[16] Article 3(4) of Council Regulation 139/2004 of January 20, 2004, on the control of concentrations between undertakings, OJ 2004 L 24/1.

[17] *Chloroprene Rubber* (Case COMP/38.629), Commission decision of December 5, 2007.

[18] *EI du Pont de Nemours and Company, DuPont Performance Elastomers LLC and DuPont Performance Elastomers SA v. Commission* (Case T-76/08); *The Dow Chemical Company v. Commission* (Case T-77/08).

undertaking."[19] Holding that they constitute a single undertaking would lead to the fundamental paradox that Dow, which has numerous co-controlled joint ventures, is a single undertaking with multiple different joint venture partners at the same time.

- Second, because DDE was a full-function joint venture with its own legal personality, and so was autonomous from its parents under Article 3(4) of the EUMR, neither DuPont nor Dow had the capacity to exercise decisive influence over it. The General Court had therefore erred in law by failing to observe the principle of personal responsibility of the autonomous economic entity, DDE, which had committed the infringement.
- Third, the General Court had failed to take into account the distinction in competition law between joint control over a full-function joint venture, and exclusive control exercised by a parent company over its wholly owned subsidiaries. The first type of control is characterized by the possibility of a "deadlock situation" resulting from the ability of each of the parents to veto strategic decisions; while the second type of control confers the power to determine the strategic decisions in a subsidiary.[20] Neither DuPont nor Dow exercised exclusive control of the *second* type over DDE.

The ECJ dismissed the arguments. It held that, where each of two parent companies has a 50% shareholding in a joint venture that infringes competition law, "it is only for the purposes of establishing liability […] that those three entities can be considered to form a single economic unit and therefore a single undertaking."[21]

The ECJ further held that the General Court had found the existence of DuPont's and Dow's decisive influence over DDE (having regard to the "economic, organizational and legal factors which tied DDE to its two parent companies"[22]) based on control exercised over its strategic business decisions. This was not incompatible with the EUMR because the fact that a joint venture has autonomy under Article 3(4) does not mean that the joint venture also has autonomy in relation to adopting strategic business decisions. The fact that either DuPont or Dow could veto strategic decisions was irrelevant, because the General Court had found that both had in fact exercised decisive influence over DDE.

The ECJ also dismissed the following arguments:

- **Limitation period.** DuPont argued that the Commission was time-barred from imposing a fine because the infringement it committed ended on April 1, 1996. The ECJ dismissed this argument because it was based on the false assumption that DuPont had no involvement in the cartel during its period of joint ownership of DDE.
- **10% deterrence.** Dow argued that the Commission infringed the principle of equal treatment by increasing its fine by 10% for deterrence purposes, while not increasing either DuPont's or DDE's respective fines. The ECJ held that the argument was inadmissible because it had not been raised before the General Court.

The ECJ therefore dismissed the appeals by DuPont and Dow in their entirety.

The Dow Chemical Company v. Commission ("Synthetic Rubber") **(Case C-499/11 P)**

On July 18, 2013, the ECJ dismissed an appeal by Dow and its wholly-owned subsidiaries, Dow Deutschland Inc., Dow Deutschland Anlegengesellschaft GmbH, and Dow Europe GmbH (together "the Dow Group"), against the General Court's judgment of July 13, 2011,[23] that largely upheld the Commission's decision of November 29,

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19 *See Akzo Nobel and Others v. Commission* (Case C‑97/08 P) 2009 ECR I‑8237, para. 59.

20 *E.I. Du Pont de Nemours & Company v. Commission* (Case C-172/12 P), para. 35.

21 *The Dow Chemical Company v. Commission* (Case C-179/12 P), para. 58.

22 *E.I. Du Pont de Nemours & Company v. Commission* (Case C-172/12 P), para. 49.

23 *Dow Chemical and Others v. Commission* (Case T-42/07) 2011 ECR II 4531.

2006,[24] imposing a fine on the Dow Group for participating in the synthetic rubber cartel.

In its decision, the Commission had imputed liability to the parent company, Dow, for the infringements of its subsidiaries. The General Court upheld the finding of infringement and the imputation of liability to Dow. The General Court also held that the Commission had erred in determining the duration of Dow Deutschland's participation in the cartel, but concluded that this error did not warrant a fine reduction. The Dow Group appealed the General Court's judgment on four grounds.

First, the Dow Group argued that the General Court had failed to determine whether and how the Commission had exercised its discretion in attributing liability to Dow for the conduct of its subsidiaries. The Dow Group also argued that imputing liability to Dow exposed that undertaking to the risk of unwarranted civil litigation in the United States. According to the Dow Group, such exposure would deter undertakings from applying for leniency, contrary to the Commission's policy in that area.

Second, the Dow Group claimed that the General Court had erred in upholding the differential treatment that the Commission had applied to the starting amounts of the fines. In particular, the Dow Group argued that there was a contradiction in the Commission's approach. According to the Dow Group, the Commission had failed to take into consideration the real impact on competition of each offending undertaking's conduct, even though it had declared that it was necessary to do so for the purposes of setting the starting amounts of the fines.

Third, the Dow Group submitted that the General Court had erred in confirming that the Commission was entitled to take Dow's turnover into account in determining the multiplier for deterrence.

Fourth, the Dow Group argued that the General Court had erred in confirming that the Commission had not applied the multiplier for deterrence in a discriminatory manner.

As to the first ground, the ECJ recalled that a parent company and its subsidiaries form a single economic unit for competition law purposes, entitling the Commission to fine a parent company for the conduct of its subsidiaries. The Commission may decide not to impute liability to a parent company for its subsidiaries' conduct only if two conditions are met. First, there must be "objective reasons capable of justifying a departure from the principles set out in Article 101 TFEU."[25] Such reasons include the Commission's inability to prove to the requisite standard that the parent company exercised decisive influence over its subsidiaries. Second, the decision not to impute liability to a parent company must not lead to preferential treatment of that parent company over the other parent companies involved in the same infringement. The ECJ found that these two conditions were not met.

The ECJ also dismissed the argument that the Commission's decision to hold Dow liable for the conduct of its subsidiaries exposed Dow to the risk of unwarranted civil litigation in the United States. That risk arose solely from Dow's involvement in anti-competitive conduct, not from the Commission's formal finding that Dow engaged in such conduct. Moreover, the Commission had found liable all the parent companies of the groups involved in the infringement. Accordingly, the Commission would have breached the principle of equal treatment by taking that risk into account only in the case of Dow.

As to the second ground, the ECJ found that there was no contradiction in the Commission's approach to setting the starting amounts of the fines. According to the ECJ, the Commission had established that the infringement had had a real effect on the market. Although this effect could not be measured, the Commission was entitled to differentiate the starting amounts of the fines based on each undertaking's effective capacity to restrict competition.

As to the third ground, the ECJ found that the Commission had been entitled to take Dow's turnover

[24] *Butadiene Rubber and Emulsion Styrene Rubber Industry* (Case COMP/F/38.638), Commission decision of November 29, 2006, OJ 2008 C 7/11.

[25] *The Dow Chemical Company v. Commission* (Case C-499/11 P), para. 47.

into account in calculating the multiplier for deterrence, reasoning that this ground was based on the first argument's false premise that the Commission should not have addressed its decision to Dow as the parent company.

As to the fourth ground, the ECJ recalled that the purpose of the multiplier for deterrence is to ensure that the fine's impact on the relevant undertaking is not negligible given, in particular, that undertaking's financial capacity. However, the Commission must refrain from increasing an undertaking's fine strictly based on the ratio of its turnover to that of the other cartel participants. This would result in the application of disproportionate multipliers for deterrence to larger undertakings. In exercising the discretion inherent in the calculation of fines, the Commission must thus give full effect to the EU competition rules by tailoring the fines to the conduct and characteristics of the undertakings concerned. Differentiated treatment of those undertakings is therefore inherent in the exercise of the Commission's fining powers.

As all four ground of appeal were rejected, the appeal was dismissed in its entirety.

General Court Judgments

***Total SA and Total Raffinage Marketing SA v. Commission* (Cases T-548/08 and T-566/08)**

On September 13, 2013, the General Court issued two judgments that broadly confirmed the Commission decision in the candle waxes cartel, but reduced the fine imposed on Total Raffinage Marketing SA.

By decision of October 1, 2008,[26] the Commission found that Total SA and its wholly owned subsidiary, Total Raffinage Marketing SA (together, "Total"), had infringed Article 101(1) TFEU by participating in a price-fixing and market-sharing cartel relating to paraffin wax and gatsch (a component of paraffin wax) that lasted from 1992 to 2005. According to the Commission, the companies had held regular meetings at hotels to discuss prices, allocate markets and customers, and exchange commercial information. The investigation started on the basis of a leniency application by Shell Deutschland Schmierstoff and resulted in a fine of €128.16 million for Total Raffinage Marketing SA, for which Total SA was held jointly and severally liable.

On appeal, Total's main arguments were that: (i) Total SA could not be held liable for the autonomous anticompetitive activities of its subsidiary; (ii) the Commission had not proven to the requisite standard the existence of a single continuous infringement; and (iii) the fine imposed breached the principle of proportionality.

As to (i), the General Court held that, in line with settled case law,[27] the Commission had rightly presumed Total SA to be liable for the anticompetitive activities of its subsidiary on the basis of its 98 % shareholding in the latter. Neither the fact that Total SA was a holding company without operations, nor that its subsidiary had its own local management team as well as its own resources was sufficient to rebut the above presumption, because they did not demonstrate the subsidiary's autonomy with regard to strategic decision-making. Total SA had itself admitted playing a role in the institutional coordination of activities within the group, and having some control over the strategic orientations and the most significant investments of its subsidiaries.[28]

As to (ii), the General Court confirmed that the Commission had sufficiently proved to the requisite standard its finding of a single and continuous infringement. Indeed, the Commission noted that the participants to each individual element of the infringement were essentially the same, that the various products concerned were closely related, and that those meetings had a common economic objective. On this basis, the Commission had correctly established that the

[26] *Candle Waxes* (Case COMP/39.181), Commission decision of October 1, 2008.

[27] A parent company can be held liable for the behavior of its subsidiary if the latter does not autonomously determine its overall course of conduct, regardless of the formal divide between the two undertakings, and regardless of the actual involvement of the parent company in the infringement under examination. Absence of autonomy should be presumed in the case of a wholly, or almost wholly, owned subsidiary (*Akzo Nobel* (Case C-97/08 P)).

[28] *Total SA v. Commission* (Case T-548/08) and *Total Raffinage Marketing SA v. Commission* (Case T-566/08), paras. 83 and 85.

parties were conscious of an overall anticompetitive strategy underlying each individual pattern of behavior.[29]

As to (iii), the General Court partially upheld Total's plea. Reflecting the General Court's focus on the exact duration of an infringement and its rejection of excessive rounding up to the nearest full year on the part of the Commission, it held that the Commission had not established Total's involvement to the requisite standard with respect to a period of 4 months and 3 days for the paraffin wax infringement, and of 5 months and 18 days for the gatsch infringement. Because the Commission did not put forward any objective justification in that regard, the General Court considered the amount of the fine against Total to be disproportionate. Moreover, given that the Commission had treated the other parties differently and had practically taken into account the real duration of their infringement, the General Court considered the fine to violate the principle of equal treatment.[30] As a result, the General Court reduced the amount of the fine from €128.16 million to €125.45 million.

Spanish Bitumen **(Cases T-462, 482, 495-497/07)**

On September 16, 2013, the General Court issued five separate judgments in the actions brought by penetration bitumen suppliers in Spain.[31] The Commission had found them liable for infringing Article 101(1) TFEU by participating in a complex series of market-sharing and price-coordinating agreements in the market for bitumen (a substance used for road construction and maintenance) in Spain between 1991 and 2002.[32] In its decision of October 3, 2007, the Commission had imposed fines totalling €186.3 million on 10 companies. Two Nynas entities ("Nynas"), three Petrogal Group entities ("Galp"), three Repsol entities, CEPSA SA and PROAS SA appealed against the Commission decision. The General Court dismissed all the actions in their entirety, except for the appeals from Nynas and Galp, resulting in a reduction of their fines.

As regards market sharing, both Nynas and Galp argued that they did not participate in the meetings that their competitors held twice a month to monitor the application of the "PTT," a document that reflected the market sharing agreement for a given year. Nynas and Galp also argued that they had never received the PTT. In addition, neither Nynas nor Galp was mentioned in the follow-up "monitoring charts" (which were summaries of theoretical sales, actual sales, and the difference between the two) or in the documents establishing the existence of a compensation mechanism, until 2001. The compensation mechanism was designed to correct any differences arising with regard to the market sharing agreement or PTT: when a difference that had a negative impact on one of the cartel participants (for example, when a participant was not able to sell its allocated volume) was detected, the number of tons that, in accordance with the volume allocation agreement, theoretically corresponded to that participant, was claimed from the participant that was over-selling (i.e., selling over the volume allocated to it by the market sharing agreement). Another way to compensate a participant that signaled that it had undersold was to add the unsold volume to the following year's volume allocation in order to compensate the cartel participant for a lack of sales. The compensation mechanism was no longer applied as of 2001, although the exchange of sales information for the purpose of monitoring the volumes and customers allocated to each participant continued.

The General Court upheld the claim of both Nynas and Galp that the Commission had failed to establish to the requisite legal standard their participation in the system of monitoring the market-sharing and customer allocation arrangements, as well as in the compensation mechanism and therefore reduced their fines.

In its pleadings before the General Court, the Commission relied on the following statement of an

[29] *Total Raffinage Marketing SA v. Commission* (Case T-566/08), para. 269-271.

[30] *Ibid.*, paras. 548-553, and 559-560.

[31] *Galp Energia Espana S.A., Petroleos de Portugal (Petrogal) S.A. and Galp Energia SGPS S.A. v. Commission* (Case T-462/07); *Nynas Petroleum AB and Nynas Petroleo S.A. v. Commission* (Case T-482/07); *Productos Asfalticos (PROAS) S.A. v. Commission* (Case T-495/07); *Repsol Lubricantes y Especialidades S.A, Repsol Petroleo S.A and Repsol S.A. v. Commission* (Case T-496/07); *Compania Espanola de Petroleos (CEPSA) S.A. v. Commission* (Case T-497/07).

[32] *Bitumen Spain* (Case COMP/38710), Commission decision of October 3, 2007, OJ 2009 C 321/15.

employee of Galp clearly showing that Galp was aware of the compensation system: "It is true that at a moment in time I realized that there was some sort of compensation system between the members of the asphalt table."[33] Galp submitted this statement in the proceedings before the General Court. However, the General Court concluded that, in reviewing a Commission decision, it was not permitted to substitute an entirely new statement of reasons for the erroneous statement originally used in the decision. Moreover, in proceedings for annulment, the role of the General Court is to verify the legality of the contested decision; the Commission was therefore not permitted to produce new inculpatory evidence not contained in the decision to support the decision's lawfulness.[34]

In reducing the fine imposed on Galp, the General Court accepted that Galp was aware of the existence of the compensation mechanism, and that it could have foreseen the existence of the monitoring system, but it "considers that the illegality which the Commission committed by [this] finding […] results […]in a further 4% reduction of the amount of the fine, that reduction thus being added to the reduction of 10% already granted in the contested decision."[35]

***Bathroom Fittings and Fixtures* (Cases T-364, 368, 373-382, 386, 396, 402, 408, 411, 412/10)**

On September 16, 2013, the General Court issued its judgments in the bathroom fittings and fixtures case.[36] By its decision dated June 23, 2010,[37] the Commission had found that 17 manufacturers in the bathroom fittings and fixtures sector had participated in an infringement of Article 101(1) TFEU in different periods between October 16, 1992, and November 9, 2004. The Commission's investigation was triggered by Masco Corp. Inc.'s application for leniency in 2004.

The Commission found that the cartelists had: (i) coordinated annual price increases and other pricing elements within the framework of meetings of industry associations; (ii) fixed and/or coordinated prices for specific events, for instance when raw material costs increased, when the euro was introduced, and when road tolls were introduced; and (iii) disclosed and exchanged sensitive business information. These practices covered three product sub-groups: taps and fittings; ceramic sanitary ware; and shower enclosures. The infringements were carried out in Austria, Belgium, France, Germany, Italy, and the Netherlands.

Various addressees of the decision appealed to the General Court. The General Court dismissed most of their pleas, but it did accept arguments raised by Wabco Europe, Wabco Austria GesmbH, Trane Inc., Ideal Standard Italia Srl and Ideal Standard GmbH (together "Wabco/Ideal Standard") as to the duration of their participation in the infringement, and reduced their fine accordingly. Keramag Keramische Werke AG, Koralle Sanitärprodukte GmbH, Koninklijke Sphinx BV, Allia SAS, Produits Céramique de Touraine SA, Pozzi Ginori SpA (all of which were subsidiaries of Sanitec Europe Oy) and Sanitec Europe Oy (together "Keramag/Sanitec"), Roca France and its parent Roca Sanitario SA (together "Roca"), also received small reductions in fines.

Substantial reduction of fines imposed on Wabco/Ideal Standard. The applicants were the only ceramics manufacturers present at certain meetings in Italy. With regard to the alleged anticompetitive information exchanges at those meetings, the General Court held that "[a] practice whereby an undertaking which is active on two distinct product markets provides

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[33] *Ibid.*, para. 294.

[34] *Ibid.*, paras. 295, 297, and 300.

[35] *Ibid.*, para. 635.

[36] *Duravit AG and Others v. Commission* (Case T-364/10), *Rubinetteria Cisal SpA v. Commission* (Case T-368/10), *Villeroy & Boch Austria GmbH, Villeroy & Boch AG, Villeroy et Boch SAS and Villeroy & Boch – Belgium v. Commission* (Joined Cases T-373, 374, 382 and 402/10), *Hansa Metallwerke AG and Others v. Commission* (Case T-375/10), *Mamoli Robinetteria SpA v. Commission* (Case T-376/10), *Masco Corp. and Others v. Commission* (Case T-378/10), *Wabco Europe and Others v. Commission* (Case T-380/10), *Aloys F. Dornbracht GmbH & Co. KG v. Commission* (Case T-386/10), *Keramag Keramische Werke AG, Koralle Sanitärprodukte GmbH, Koninklijke Sphinx BV, Allia SAS, Produits Céramique de Touraine SA and Pozzi Ginori SpA v. Commission* and *Sanitec Europe Oy v. Commission* (Joined Cases T-379 and 381/10), *Zucchetti Rubinetteria SpA v Commission* (Case T-396/10), *Roca Sanitario SA v. Commission* (Case T-408/10), *Laufen Austria AG v Commission* (Case T-411/10) and *Roca v. Commission* (Case T-412/10).

[37] *Bathroom Fittings and Fixtures* (Case COMP/39.092), Commission decision of June 23, 2010.

to its competitors – which are present on one market – commercially sensitive information which relates to a second market – on which those competitors are not present – is not capable, in principle, of having an impact on the second market."[38] The Commission had not advanced any argument or identified any evidence establishing that competition in the Italian ceramics market was affected by the fact that the applicants disclosed commercially sensitive information about their ceramics activities to taps and fittings manufacturers. The fact that the applicants had a large market share in the ceramics market did not alter that conclusion. The General Court concluded that the Commission erred in finding that there was illegal information exchange in the framework of some of the industry associations in Italy in which Wabco/Ideal Standard participated. As a result, the General Court quashed the Commission's decision insofar as it relied on the insufficient evidence of Wabco/Ideal Standard's participation in the whole duration of the cartel. Some evidence, which was left intact, substantiating the applicants' participation in the ceramics-related infringement over a very limited period of time led the General Court to find that Wabco/Ideal Standard had only participated in the ceramics-related infringement in Italy for 11 months, rather than the almost 12 years attributed to them by the Commission decision.

As a result, the General Court reduced the fine imposed on Trane Inc. from approximately €259 million to approximately €92.7 million; the fine imposed jointly and severally on Wabco Europe and Trane Inc. from approximately €45 million to approximately €15.8 million; and the fine imposed jointly and severally on Ideal Standard Italia, Wabco Europe and Trane Inc. from approximately €12.3 million to approximately €4.5 million. As such, Wabco/Ideal Standard's appeal resulted in one of the largest fine reductions in the history of the General Court.

Keramag/Sanitec. Keramag/Sanitec argued, in relevant part, that the evidence the Commission had relied upon to establish that it had participated in the infringement in France, Germany and Italy was insufficient. The General Court agreed with the applicants with respect to the infringement in France and Italy, and rejected their argument with respect to Germany.

As to the infringement in France, the Commission had put forward four items of evidence:

- Duravit's reply to the statement of objections: the General Court noted that this statement had not been disclosed to Keramag/Sanitec during the administrative proceedings, which was confirmed by the Commission during the hearing before the General Court. The General Court concluded that this piece of evidence was not admissible given that it is settled case law that "where a document was not disclosed to the undertaking concerned while the Commission drew conclusions from it, the information contained in that document cannot be used in the proceedings."[39]
- Ideal Standard's leniency application: the General Court found that it followed from the Commission decision that Ideal Standard's statements were contested by other undertakings, and that the case-law provides that if the accuracy of leniency statements is being contested by several other undertakings accused of the infringement, they "cannot be regarded as constituting adequate proof of an infringement committed by the latter undertakings unless it is supported by other evidence."[40]
- Ideal Standard's chart: this chart was submitted as an annex to Ideal Standard's leniency application: Given that the chart was undated, and did not mention the names of competitors or minimum/maximum prices which they should apply, the General Court concluded that the Commission could not have used the chart as documentary evidence that corroborated its allegation that prices were fixed at the February 25, 2004 meeting of *Association Française des Industries de Céramique Sanitaire* ("AFICS", one of the relevant industry associations).

[38] *Wabco Europe and Others v. Commission* (Case T-380/10), para. 79.

[39] *Keramag Keramische Werke AG, Koralle Sanitärprodukte GmbH, Koninklijke Sphinx BV, Allia SAS, Produits Céramique de Touraine SA and Pozzi Ginori SpA v. Commission* and *Sanitec Europe Oy v. Commission* (Joined Cases T-379 and 381/10), para. 116.

[40] *Ibid.*, para. 117.

- Roca's leniency application: the General Court notes that, even though Roca's application confirmed the exchange of minimum prices within AFICS in the period of 2002-2004 in general, Roca also claimed, in particular with respect to the February 25, 2004 AFICS meeting, that Ideal Standard's description of the coordination of minimum prices during that meeting has not been confirmed by other leniency applicants. In the absence of corroborating evidence, the Commission could therefore not rely on Roca's leniency application to prove the price coordination at this meeting.[41]

The Court concluded that the Commission incorrectly found that Allia SAS and Produits Céramique de Touraine SA ("PCT") participated in the alleged anticompetitive conduct at the February 25, 2004 AFICS meeting. As a consequence, it annulled the fine imposed jointly and severally on Allia SAS and Sanitec Europe Oy of approximately €4.6 million, and a fine imposed jointly and severally on PCT, Allia SAS and Sanitec Europe Oy of approximately €2.5 million. The total fines imposed on the applicants therefore amounted to approximately €50.5 million instead of approximately €57.7 million.

As to the alleged infringement in Italy, the applicants argued that the evidence on which the Commission based its conclusion that Pozzi Ginori SpA participated in the alleged infringement in Italy by *inter alia* coordinating future price increases through the industry association "Michelangelo" between May 14, 1996, and September 14, 2001, was insufficient.

As regards the Michelangelo meetings that took place prior to May 14, 1999, the applicants stated that no other addressee of the Commission decision attended any of these meetings, other than Pozzi Ginori SpA, and that, therefore, it could not be accused of having participated in an infringement at these meetings. The General Court rejected this argument, given the discretion that the Commission has in investigating potential infringements and infringers. With respect to the Michelangelo meetings which took place after May 14, 1999, the General Court agreed with the applicants that the Commission had not accurately established, for the first set of meetings, that they were anticompetitive in nature, or that Pozzi Ginori SpA was engaged in any anticompetitive conduct at these meetings (given that it was the only ceramics manufacturer present, and did not compete with the other attendees). However, for the second set of meetings, the General Court confirmed the Commission's assessment, based on handwritten notes, that discussions took place about future price increases, including for ceramics.

The General Court held that the cartel operated on the basis of annual cycles for coordinating price increases, which followed regular meetings in the previous year, that the Commission had established that Pozzi Ginori SpA participated in several meetings having an anticompetitive object, both before and after the set of meetings with respect to which no anticompetitive nature had been established, and that Pozzi Ginori SpA had never distanced itself publicly from what was discussed. Therefore, the Commission could conclude "even by inference"[42] that Pozzi Ginori SpA had taken part in the infringement, for the period until March 9, 2001. However, for the period after March 9, 2001, the Commission had not produced evidence with sufficient probative value, and the duration of the infringement of Pozzi Ginori SpA was therefore shorter than determined in the Commission decision. Even though the General Court reduced the basic amount of the fine imposed on Pozzi Ginori, the 10% ceiling avoided any final fine reduction.

Roca. The General Court held that the Commission had wrongly denied Roca France a fine reduction based on its leniency application, which contained evidence relevant to the Commission's investigation. Indeed, where a first piece of evidence already received by the Commission is contradicted by a second piece of

[41] Interestingly, it appears that the Court took a different approach towards Roca's leniency application in Villeroy & Boch Austria GmbH, Villeroy & Boch AG, Villeroy et Boch SAS, Villeroy & Boch – Belgium v. Commission. In that case the Court held that even though Roca's application was vaguer and more nuanced than Ideal Standard's application, the first confirmed substantively the period, venue, attendees and the topics of discussion during the meetings. *See* para. 290.

[42] *Keramag Keramische Werke AG, Koralle Sanitärprodukte GmbH, Koninklijke Sphinx BV, Allia SAS, Produits Céramique de Touraine SA and Pozzi Ginori SpA v. Commission* and *Sanitec Europe Oy v. Commission* (Joined Cases T-379 and 381/10), para. 241.

evidence (notably, when an applicant contests the probative value of evidence produced by another applicant), a third piece of evidence is needed to corroborate the first one. In this case, the evidence submitted by Roca France, although of a general nature and already known to a certain extent by the Commission, was of significant added value since the Commission could not have based its finding of an infringement based on the two other leniency applications it had already received. In addition, the General Court noted that the cooperation of Roca France was not undermined by the fact that it pointed to the insufficient probative value of evidence submitted by Ideal Standard. Accordingly, the General Court reduced the amount of the applicant's fine by 6% from €6.7 million to approximately €6.3 million. As regards Roca Sanitario SA, the General Court held that its liability as a parent company was purely derived from, accessory to and dependent on that of its subsidiaries, and therefore it should benefit from the same reduction granted to its subsidiary, if any, for the part of the fine for which it was held severally liable. Hence, the General Court also reduced the fine imposed on Roca Sanitario SA by 6%.

UNILATERAL CONDUCT

ECJ Judgments

EFIM v. Commission (Case C-56/12 P)

On September 19, 2013, the ECJ dismissed the European Federation of Ink and Ink Cartridge Manufacturers's ("EFIM") appeal challenging the General Court judgment upholding the Commission's rejection of its complaint against certain manufacturers of inkjet printers, and confirmed the criteria for assessing dominance in downstream aftermarkets. The case, which concerned the primary market for inkjet printers and the aftermarket for inkjet cartridges, illustrates that competition in the primary market may prevent a finding of dominance in an aftermarket where the two markets are closely linked.

In 2006, EFIM, an organization of generic inkjet cartridges producers, complained to the Commission that original equipment manufacturers ("OEMs") such as HP, Lexmark, Epson and Canon, were abusing their respective dominant positions with respect to inkjet printers by not granting access to aftermarkets for the inkjet cartridges for their printers. In its dismissal of the complaint for insufficient community interest, the Commission referred to its decisions in *Pelikan/Kyocera*[43] and *Info-Lab/Richoh*.[44] In these decisions, the Commission considered the same market and established criteria for excluding dominance in related aftermarkets.[45] Specifically, the Commission concluded that the inkjet printer market and the inkjet cartridge markets were interrelated and, accordingly, competition in the primary printer market resulted in effective discipline in the aftermarkets for inkjet cartridges. In particular, the Commission held that dominance in an aftermarket should not be found if (i) customers can make an informed choice including lifecycle pricing; (ii) customers can make an informed choice on this basis; (iii) a sufficient number of customers would alter their purchasing behavior in the primary printer market in the event of an exploitation policy in the secondary market; and (iv) customers would do so within a reasonable time. Applying these criteria to the EFIM's complaint, the Commission concluded that the primary market for inkjet printers and the aftermarkets for inkjet cartridges are closely linked, and that inkjet printer manufacturers could not be considered dominant in their respective aftermarkets.

On November 24, 2011, the General Court dismissed EFIM's appeal against the Commission's refusal of complaint.[46] The General Court held that the Commission had correctly observed that, where primary markets and aftermarkets are sufficiently closely related, competition in the primary market could effectively discipline the aftermarket. The General Court agreed with the Commission's reasoning in the *Pelikan/Kyocera* and *Info-Lab/Richoh* cases, holding that the relevant question was whether a customer: "[could] make an informed choice including lifecycle pricing . . . [and] is likely to make such an informed choice accordingly," and whether "in case of an apparent policy of exploitation being pursued in one specific aftermarket, a sufficient number of customers would adapt their purchasing behaviour at the level of the primary market within a reasonable time."[47]

On appeal to the ECJ, EFIM raised multiple procedural pleas regarding the Commission's reasoning[48] and one plea alleging an error of law related to the failure to find dominance. In this plea latter, EFIM argued that the printer market and the inkjet cartridge market were not interrelated in such a way that competition in the primary printer market effectively disciplined the aftermarket for inkjet cartridges. It claimed that the General Court had

[43] *Rejection of complaint Pelikan/Kyocera*, XXVth Report on Competition Policy (1995), pp. 41-44, 140

[44] *Info-Lab/Ricoh*, Competition Policy Newsletter, No. 1, February 1999, pp. 35-37.

[45] *EFIM* (Case COMP/C-3/39.391), Commission decision of May 20, 2009. For a summary of this decision please see CGSH, EC Competition Report, October-December 2009, p. 4-5, available at: www.cgsh.com.

[46] *EFIM v. Commission* (T-296/09), judgment of November 24, 2011. For a summary of this judgment please see CGSH, EC Competition Report, October-December 2011, p. 13-14, available at www.cgsh.com.

[47] *EFIM* (Case COMP/C-3/39.391), Commission decision of May 20, 2009.

[48] The procedural grounds of appeal were: (i) manifest error in assessment of priority criteria; (ii) misuse of powers; and (iii) incompatibility with Commission Notice on the handling of complaints. All please were rejected as unfounded.

erred in finding that the OEMs were not dominant in the aftermarket for inkjet cartridges.

In its September 19, 2013, judgment, the ECJ first considered the General Court's judgment that the Commission did not err in dismissing the complaint after applying the criteria established in *Pelikan/Kyocera* and *Info-Lab/Richoh*.[49] The ECJ then held that the existence of dominant positions in aftermarkets could potentially be excluded if (i) competition exists in the primary market; and (ii) the primary market and the aftermarkets are closely linked. Finally, the ECJ concluded that the existence of a link between the primary market and the aftermarkets could be determined based on the four cumulative criteria used in the Commission decision.

[49] *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v. Commission* (Case C-56/12 P), judgment of September 19, 2013, para. 37.

MERGERS AND ACQUISITIONS

First-phase Decisions Without Undertakings

***Telefónica/CaixaBank/Banco Santander/JV* (Case COMP/M.6956)**

On August 14, 2013, the Commission unconditionally cleared the creation of a joint venture between the Spanish telecommunications operator Telefónica SA ("Telefónica") and two Spanish banks, CaixaBank SA ("CaixaBank") (controlled by La Caixa–Caja de Ahorros ("La Caixa"), and Banco Santander SA ("Banco Santander"). Telefónica is a Spanish broadband and telecommunications provider with operations in Europe, Latin America, North America, and Asia. It is also the fifth largest mobile network provider in the world. CaixaBank and Banco Santander are two of Spain's largest financial institutions active in retail banking, corporate banking, and insurance. The transaction would create a full-function joint venture (the "Newco JV") which would provide services to a "virtual community" of merchants and consumers. The services to be provided by the Newco JV include digital advertising services, digital analytics services (focusing on analyzing consumers' habits and purchasing preferences), and mobile wallet services.

The Commission determined that the transaction would give rise to limited horizontal overlaps in digital advertising (in which Telefónica and Newco would be present) and in retail distribution of digital wallet services (in which CaixaBank and Newco would be present). The Commission considered whether there is a discrete market for the provision of digital advertising services and whether such a market could be further subdivided into mobile advertising and static online advertising. Ultimately, the Commission left the precise market definition for digital advertising services open, accepting that any potential market would be at least national in scope, and possibly worldwide. Moreover, the Commission determined that the retail distribution of digital wallet services, which allow consumers to upload their payment card details into a digital wallet and use their mobile handset, tablet, laptop or static PC to access their digital wallet and carry out financial transactions, forms a distinct market, one which is at least national and possibly worldwide in scope.

In its competitive assessment, the Commission determined first that, regardless of the exact market definition adopted, the transaction did not raise horizontal competition concerns in any potential market encompassing the provision of digital advertising services. The Commission reasoned that: (i) Telefónica has limited market strength in this segment; (ii) Telefónica is primarily focused on message advertising which is sold through aggregators; and (iii) post-transaction both Telefónica and Newco would face strong competition from providers such as Google, Yahoo!, Millennial Media, InMobi, Madvertise, Amobee, and Smaato.

The Commission also found that the transaction gave rise to no horizontal competition concerns in the (possible) market for retail distribution of digital wallet services. This is because, post-transaction, Newco would face competition from a number of well-established providers who offer similar services to those to be provided by Newco, as well as from future entrants to the sector.

With regard to potential vertical concerns, the Commission first examined the relationship between the parties in the market for issuing payment card services (in which CaixaBank and Banco Santander are active), and in the market for providing digital wallet services (in which Newco would be active). The Commission dismissed concerns relating to input foreclosure on the basis that there are sufficient credible alternative issuers of payments cards in Spain. The Commission also dismissed concerns relating to costumer foreclosure, finding that Newco would have a strong incentive to make digital wallet services interoperable with the payment cards of its parents' competitors, in order to develop as wide a customer base as possible.

Finally, the Commission assessed the relationship between the parties in the retail telephony market (in which Telefónica is active) and in the market for the retail distribution of digital wallet services (in which Newco would be active). The Commission dismissed input foreclosure concerns on the basis that Telefónica would

not be capable of restricting the access of mobile wallet service provided to its mobile network. The Commission also dismissed customer foreclosure concerns on the basis that Newco's digital wallet would not be linked on an exclusive or preferential basis to any mobile phone service provider.

First-phase Decisions With Undertakings

US Airways/American Airlines **(Case COMP/M.6607)**

On August 5, 2013, the Commission approved, subject to commitments, the merger of US Airways Group Inc. ("US Airways") and American Airlines Inc.'s ("American Airlines").

In line with its decisional practice, the Commission defined the relevant market for scheduled air transport services on the basis of the point of origin/point of destination or "O&D" approach, under which each airline route forms a distinct market. The Commission left open the questions of whether each O&D market should be further subdivided according to whether (i) the passengers served are time-sensitive/premium or non-time-sensitive/non-premium, and (ii) the flight services are non-stop or one-stop. While the question of destination airport substitutability was examined, the Commission did not reach any firm conclusions in this regard, finding that it would not have any impact on its competitive assessment.

The transaction gave rise to 67 overlap routes, but the Commission identified competition concerns on only one route, London-Philadelphia. The Commission found that, post-transaction the merged entity would have a monopoly on the London Heathrow-Philadelphia route; at the time of the investigation, US Airways and American Airlines were the only carriers offering non-stop flights, and almost all one-stop alternatives were provided by a joint venture between American Airlines, British Airways and Iberia ("the Transatlantic Joint Business"). The Commission determined that, on all other routes affected by the merger, the combined entity would continue to face strong competition, notably from other joint ventures such as the North Atlantic Joint Venture (a partnership including Delta, Air France/KLM, and Alitalia), and the A++ joint venture (a transatlantic partnership including Lufthansa, Air Canada, and United Airlines). The Commission also noted that, on certain other routes, the merged entity would face additional competition from Virgin Atlantic (now co-controlled by Delta),[50] and from other carriers not belonging to transatlantic joint ventures.

To address the Commission's concerns regarding the transaction's impact on the London Heathrow-Philadelphia route, US Airways and American Airlines submitted commitments aimed at facilitating entry on this route. Specifically, the parties undertook to make available slots to allow the operation of one daily frequency on the London Heathrow-Philadelphia route; a competitor airline would only be granted these slots on condition that it operate one daily frequency on the London Heathrow-Philadelphia for three consecutive years, after which the applicant airline would be free to reallocate the slots to another route. To make the slot commitment more attractive, the parties committed to allow the new entrant to enter into a special feed traffic agreement with the members of the Transatlantic Joint Business. Under this agreement, the new entrant must be given access to thirty behind/beyond routes (but no more than twenty at London Heathrow) on terms that are at least as favorable as the terms agreed on between the parties or their joint venture partners. The commitments contained other elements designed to entice an airline to apply for the divested slots, including a special prorate agreement (which would provide the entrant favorable rates for interlining) and access to the parties' frequent flyer programs. The commitments also provided for a fast-track dispute resolution mechanism and the appointment of a monitoring trustee.

The Commission found that the commitments offered resolved its competition concerns and accordingly cleared the transaction with the commitments acting as conditions and obligations.

[50] Commission Press Release IP/13/587, "Mergers: Commission clears proposed joint acquisition of Virgin Atlantic by Delta and Virgin Group," June 20, 2013.

Second-phase Decisions With Undertakings

***Western Digital Ireland / Viviti Technologies* (Case COMP/M.6203)**

On November 23, 2011, the Commission cleared the acquisition of Viviti Technologies Ltd ("Viviti") by Western Digital Corporation ("WD") subject to conditions. WD and Viviti both manufacture and market hard disk drives ("HDDs") and external hard disk drives ("XHDDs").

The Commission's investigation identified the following global markets: (i) 3.5" "mission critical" enterprise HDDs; (ii) 3.5" "business critical" enterprise HDDs; (iii) desktop HDDs; (iv) 2.5" mobile HDDs; (v) 3.5" consumer electronics ("CE") HDDs (used in games consoles and set top boxes); and (vi) 2.5" CE HDDs for smaller devices. In distinguishing these markets, the Commission noted the lack of demand-side substitutability between the various HDD types, highlighting differences in speed, reliability, and size. The Commission also identified a separate downstream market for XHDDs that was at least EEA-wide in scope.

The Commission determined that the transaction would give rise to serious competition concerns in the desktop 3.5" HDD, CE 3.5" HDD, and business critical 3.5" HDD markets. The Commission argued that WD and Seagate would be the only undertakings active on those markets post-transaction, and due to the need of customers to dual source, both remaining competitors (Seagate and Western Digital) would be free of competitive constraint for a significant proportion of demand. The Commission's finding was not disturbed by the fact that Toshiba was active in the production of 3.5" HDDs and was a credible third competitor.

The Commission found that the transaction gave rise to no concerns in the 2.5" mobile and 2.5" CE markets because the market share increment brought about by the merger would be minimal, and because in these markets, the merged entity would face robust competition post-transaction from Toshiba.

The Commission had no concerns with respect to the 3.5" mission critical enterprise HDD market; the Commission determined that even though there would only be two competitors left in this market post-transaction, the merger would have a negligible impact on WD's market share.

The Commission also held that the transaction would strengthen WD's leadership position in the XHDD EEA market because the merged entity's upstream position in upstream HDD markets would enable it to engage in input foreclosure (and because some foreclosure had occurred pre-transaction). Accordingly, the Commission concluded that the transaction may significantly impede effective competition in the XHDD market.

To address the Commission's concerns, WD offered to divest: (i) a plant capable of manufacturing 3.5" desktop, business critical and CE HDDs, as well as XHDDs; (ii) product designs for 3.5" HDDs and pipeline products (iii) distribution offices in America, Asia, and Europe; (iv) IP rights related to the manufacture of 3.5" HDDs; (v) a non-exclusive, perpetual, and royalty-free license for the IP rights to manufacture the 3.5" HDDs; (vi) plant personnel, marketing personnel, and certain R&D personnel; and (vii) an agreement to supply the divested business with certain HDD components at prevailing market prices for up to 3 years. The Commission carried out a market test on these remedies and concluded that WD would have to identify a suitable buyer for the divestment (which the Commission would have to approve) before the transaction could be implemented. In addition, the Commission held that WD would have to enter into broader IP licensing arrangements with the divestment business, and that WD would have to be firewalled from the divestment business prior to its purchase. WD modified its proposed commitments package accordingly, also providing for heightened involvement of a monitoring trustee. The Commission accepted this remedies package and conditional thereon cleared the transaction.

The decision is notable due to the Commission's treatment of Seagate's acquisition of Samsung's HDD business,[51] a transaction which was announced and pre-notified after the WD/Viviti transaction. WD and Viviti announced their deal publicly on March 7, 2011. They started pre-notification discussions with the Commission

[51] *Seagate / HDD Business of* Samsung (Case COMP/M.6214), Commission decision of November 19, 2011.

on March 10, 2011. Samsung and Seagate started pre-notification discussions a week later on March 14, 2011. Samsung and Seagate then made a formal notification and public announcement on April 19, 2011, one day before Western Digital and Viviti's notification. The Commission decided to prioritize Seagate/Samsung based on formal filing date, finding that to use any other date or reference point would be arbitrary, or would encourage pre-emptive contacts with the Commission to "reserve" merger priority in concentrated markets. The Commission also rejected the argument that it should attempt to take a "combined approach," as it believed this would limit its role to choosing which of the two concentrations to reject. The Commission and the relevant hearing officer also dismissed WD's complaint that the Commission should have informed the parties that another market player was considering a merger, as to do so could identify them, and this would be contrary to the Commission's duty of confidentiality.

As a result of filing second were that the WD/Viviti transaction was assessed on the assumption that Seagate and Samsung's HDD facilities had already merged, which, as indicated, led the Commission to view the WD/Viviti transaction as a 3-2 merger in respect of some markets.

***United Technologies/Goodrich* (Case COMP/M.6410)**

On July 27, 2012, the Commission cleared the acquisition of Goodrich Corporation ("Goodrich") by United Technologies Corporation ("UTC", and together the "Parties") subject to conditions. UTC operates through a number of subsidiaries, three of which are relevant to the transaction: (1) Hamilton Sundstrand, which produces components for aerospace industry; (2) Pratt & Whitney, which produces aircraft engines; and (3) Sikorsky, which produces helicopters. The Commission assessed the competitive impact of the transaction in respect of the following markets: (1) electrical systems; (2) aircraft engines and auxiliary powers units; (3) engine controls; (4) fuel nozzles; (5) actuation systems; (6) mechanical sub-assemblies for trimmable-horizontal-stabilizer-actuators ("THSAs"); (7) nacelles; (8) ice detection systems; (9) pressure transducers; (10) lighting; (11) helicopters; (12) helicopter rescue hoists; (13) air data probes; (14) spare parts and maintenance overhaul and repair ("MRO") services. The Commission identified competition concerns only in respect of electrical systems, engine controls, and fuel nozzles.

Electrical Systems. Aircraft electrical systems comprise power generators and distribution systems, which produce and deliver electrical power around the aircraft. The Commission held that power generators based on AC technology should be distinguished from those based on DC technology, and considered whether the AC generator market could be segmented between constant frequency ("CFAC") and variable frequency ("VFAC") generators. The Commission ultimately left this definitional question open, as well as the questions on whether the AC generator market should be segmented by the size of the deployment aircraft or mission profile (e.g., military, search and rescue, transport). The Commission defined the geographic market as global in scope. On the basis of the Commission's market definition, the transaction gave rise to a single horizontally affected market within electrical systems: AC generation.

The Commission noted that, regardless of exact product market definition, the combined entity would have very high market shares (generally between 80% and 100%) in AC generators post transaction. The Commission described Goodrich as a pioneer in VFAC technology and held that Goodrich represented the only credible competitor to Hamilton Sundstrand in the market for a generator type that was set to become standard for most new aircraft platforms. The parties submitted that historical market shares were of limited relevance given the bidding nature of the relevant market and that the relevant question was whether there was a sufficiently large number of alternative suppliers capable of competing for future tenders (the parties argued there were, including GE, Thales, and Honeywell). The Commission rejected this, finding that pedigree is one of the key factors in winning an AC generator tender and that historical market shares were a viable proxy for such pedigree. The Commission also determined that the merged entity would not be constrained by buyers, who could not threaten to switch suppliers (only two competitors have credibly participated, without success, in tenders to supply the power generator for large

commercial aircraft). The Commission also held that barriers to entry in aircraft power generation were high, in light of the substantial investments required in developing the necessary facilities and scientific knowledge, and in acquiring the relevant qualifications and certificates. The Commission therefore concluded that the transaction gave rise to serious competitive concerns in respect of AC power generation.

Engine Controls. Engine controls include on-board systems that regulate the flow of fuel, air, and other inputs into the aircraft engines. The Commission identified three distinct affected product markets within this broad category: electronic engine controls ("EECs"), fuel metering units ("FMUs"), and main fuel pumps ("MFPs"). While ultimately leaving open the question of whether the EEC, FMU, and MFP markets should be segmented, the Commission's assessment took account of the differences between engine controls for various platform sizes and mission profiles. Again, the Commission defined the geographic market as global in scope.

The parties submitted that the competitive environment in the markets for EECs, FMUs, and MFPs was characterized by alignments between engine controls manufacturers and engine manufacturers, with tenders generally won by manufacturers' preferred suppliers. The Commission appeared to accept these arguments for the supply of engine controls for large engines, where it accepted there was little competition between the parties at present. It further found that, while the parties had competed against each other in tenders for smaller engines, experienced and well-positioned competitors (e.g., Honeywell, Woodward, Eaton, Safran, and emerging smaller players) would be capable of effectively constraining the merged entity.

However, in terms of vertical effects, aircraft engine manufacturers Honeywell and Williams raised concerns during the market investigation that the merged entity would have the incentive and ability to engage in input foreclosure with respect to the supply of engine controls. UTC is active in the manufacture of aircraft engines and APUs, which are both downstream of Goodrich's engine controls business. Goodrich was historically the main supplier to Williams and Honeywell, and the Commission found that, while these engine manufacturers could conceivably switch to other suppliers in response to an input foreclosure strategy, the costs of doing so would be substantial and would take several years. The Commission's investigation further indicated that the merged entity would, based on a comparison of expected upstream losses and downstream gains, have the incentive to foreclose Williams and Honeywell. As such, the transaction was found to give rise to serious foreclosure concerns with respect to the engine controls markets.

Fuel nozzles. Fuel nozzles deliver fuel into an aircraft engine's combustion chamber. The Commission identified fuel nozzles as a distinct market, but did not divide the market further. The Commission held the geographic market to be global in scope. The Commission was concerned about the impact the transaction would have on a research and development agreement between Rolls Royce and Goodrich for the production of lean-burn engine fuel nozzle technology. Rolls Royce argued that it was crucial that its cooperation with Goodrich not be interrupted so that it would not miss a major technological breakthrough which would enable it effectively to compete for platforms with more stringent NOx requirements, such as the Boeing B777X. The Commission concluded that the transaction would enable the merged entity to foreclose access to new lean-burn technology and hinder Rolls Royce's competitiveness. It held that the merged entity also would have the incentive to foreclose, because winning an engine supply contract for a platform such as the B777X would be far more lucrative than winning a fuel nozzle supply contract. In light of the issues above, the Commission found that the transaction gave rise to serious foreclosure concerns in the market for fuel nozzles.

The Commitments. In order to address the concerns of the Commission in relation to AC generation, engine controls, and fuel nozzles, UTC committed to divest Goodrich's entire AC generation and engine controls businesses, and with respect to the Rolls Royce/Goodrich lean burn fuel R&D initiative, UTC undertook to grant Rolls Royce an option to purchase Goodrich's stake. On the basis of the commitments

offered, the Commission cleared the transaction pursuant to Article 8(2) of the EU Merger Regulation.

***Universal Music Group/EMI Music* (Case COMP/M.6458)**

On September 21, 2012, the Commission cleared Universal Music Group's ("Universal") acquisition of the EMI Music's ("EMI") recorded music business subject to substantial commitments, including the divestment of EMI's Parlophone label and other music rights and assets on a global basis.

Universal is the world largest music recording company. Its activities include discovering, developing, and promoting artists (the so-called artist and repertoire business ("A&R")), wholesale of recorded music, and music publishing and thereby related activities. EMI, which is the world's fourth largest music recording company, is also active in A&R and wholesale of recorded music, but has no presence in music publishing following the divestment of its publishing arm to Sony in 2012.[52]

The Commission identified separate markets for the wholesale distribution of physical music and the wholesale distribution of digital music, in which music recording companies license their music to digital retailers (such as iTunes and Spotify). The Commission found that the market for physical music is national in scope but left open whether the market for digital music was EEA-wide or national, explaining that its competitive assessment would be the same regardless of its approach to geographic market definition.

The Commission distinguished the four large global music recording companies (i.e., Universal, EMI, Sony, and Warner) (the "majors") from the smaller independent music recording companies (the "independents") because of the differences among them with respect to geographical presence, breadth of activity, and economic strength. The Commission found that the independents could not exert competitive pressure on the majors and consequently assessed the transaction as a four-to-three merger.

The Commission's initial investigation indicated that the transaction would raise competition concerns in the wholesale of physical and digital recorded music in numerous Member States as well as in the EEA as a whole. The Commission concluded that the transactions would lead to high combined market shares and the loss of a significant competitor in these markets.

In its Phase II investigation, the Commission focused on the markets for the wholesale distribution of digital music, noting that the sales of digital recorded music are expected to surpass the sales of physical recorded music over the coming years. The Commission found that the transaction would likely hinder competition in the markets for wholesale distribution of digital music on an EEA-wide level as well as in 24 Member States. The Commission was principally concerned that Universal's high market share post-transaction would enable it to exert undue pressure on digital platforms to secure preferential terms, which would result in increased licensing costs and potentially increased prices for consumers. The Commission found that there was a positive relationship between a record company's size and the prices obtained from digital platforms; by simply increasing its size, Universal would enjoy greater bargaining power. The Commission's investigation did not confirm that the digital platforms would be in a position to exert buyer power to prevent price increases post-transaction.

In particular, the Commission was concerned that the transaction would harm smaller innovative digital platforms, and thereby reduce their ability to expand or launch new music offerings, which would in turn limit consumers' choice for digital music and the cultural diversity in the EEA.

The parties insisted that piracy constituted a competitive constraint. The Commission, however, rejected this argument, concluding that digital platforms offered legitimate services despite the existence of pirate services. Universal's bargaining position vis-à-vis digital platforms would therefore remain unaffected by pirate services.

The Commission also assessed the extent to which the transaction would result in coordinated effects in the

52 *Sony/Mubadala/EMI Music Publishing* (Case COMP/M.6459), Commission decision of May 19, 2012.

digital music market, ultimately concluding that this market was not sufficiently transparent for coordination.

To address the Commission's concerns, Universal offered to divest significant worldwide rights and assets covering both digital and physical music. The divesture package included: EMI Recording Limited (including the Parlophone label which features famous artists such as Coldplay, David Guetta, and Pink Floyd); EMI in France, Spain, Portugal, Denmark, Sweden, Norway, Poland, and the Czech Republic; and EMI's 50 percent stake in the popular "*Now! That's What I Call Music*" compilation.

Universal also committed not to include most favored nation ("MFN") clauses in new or renegotiated contracts with EEA digital customers for a 10-year period. The MFN clauses that were in place pre-transaction obliged digital customers to grant Universal terms that were at least as favorable as those granted to competitors.

On the basis of the commitments offered, the Commission cleared the transaction.

Hutchison 3G Austria/Orange Austria **(Case COMP/M.6497)**

On December 12, 2012, the Commission cleared Hutchison 3G Austria's ("H3G") acquisition of Orange Austria ("Orange"), subject to H3G's commitment to divest radio spectrum and related rights to a new entrant in Austria and to provide wholesale access to its network for up to 30% to up to 16 new mobile virtual network operators (MNVOs) in the coming 10 years. In addition, H3G offered that it would not complete the acquisition until it entered into a wholesale agreement with at least one MNVO.

H3G and Orange are both mobile network operators ("MNOs") in Austria. The Commission focused its investigation on the overlapping market for mobile telecommunication services to end customers. The parties were also potential competitors on the wholesale markets for: (i) access and call origination on public networks, (ii) international roaming and (iii) mobile call termination.

Following its phase II investigation, the Commission concluded that the concentration would lead to competition concerns because it would remove a major MNO from an already highly concentrated market. The elimination of Orange as a competitor would reduce the number of players on the market from four to three, and create the third largest player in Austria after Telecom Austria ("TA") and T-Mobile Austria ("T-Mobile"). Although the post-merger market shares were below [20-30%], the HHI and delta values (measures of concentration) were high enough to indicate possible competition concerns.

The Commission found that H3G and Orange imposed considerable competitive constraints on one another pre-transaction, and that H3G was one of the most important competitive forces on the Austrian market. The Commission was concerned that the transaction would reduce H3G's incentives to compete as strongly as it had done before.

Notably, this case is the first case in which the Commission based its competitive assessment on the Gross Upward Pricing Pressure Index (the so-called "GUPPI" or "UPP") test. GUPPI is used to assess the risk that a merger will result in unilateral anticompetitive effects. The test requires an analysis of consumer switching data (diversion ratios) and profit margins, and has been used before in the United States[53] and the UK.[54] The Commission mainly relied on the test to determine the likelihood and magnitude of any post-merger price increases in the post-paid private segment of the market. In this case, the price increase was estimated to be between 10% and 20%. Because of the availability of reliable switching data, the Commission deemed the test to be robust enough to use in this particular case.

The Commission also found that the market was characterized by high barriers to entry, the absence of significant buyer power and the likelihood that any price increase would be followed by competitors. The Commission concluded that market entry by a new operator was unlikely given the significant time and investment it would require to enter the Austrian market. Any new entrant would have to await suitable spectrum

[53] AT&T/T-Mobile

[54] See OFT ME/4571/10, Zipcar/Streetcar, August 27, 2010.

allocation, invest in physically building up its network and start to roll out service to customers. Individual customers, including businesses and individuals, were considered too small and fragmented to exercise significant countervailing buyer power. Finally the Commission concluded that competitors would have strong incentives to follow price increases relying on standard oligopolistic models of price competition.

In the other identified markets, the Commission did not find any considerable competition concerns, even though it did find some indications that the concentration might raise network access issues for MNVOs. The Commission did not pursue this because it found the commitments offered by H3G were sufficient to address any concerns.

In response to the Commission's competition concerns, H3G offered a set of final commitments. H3G committed to grant wholesale access to 30% of its network to up to 16 MNVO's in the 10 years following the final decision and proposed to enter into an agreement with an MNVO before completing the concentration. It also agreed to divest spectrum and other rights to a new market entrant, including conditions for national roaming on H3G's network.

Prohibition Decisions

Ryanair/Aer Lingus III **(Case COMP/M.6663)**

On February 27 2013, the Commission prohibited Ryanair's third attempt to acquire control over Aer Lingus. The Commission prohibited Ryanair's first takeover attempt in 2006, while Ryanair abandoned its second attempt in 2009. Ryanair has appealed the Commission's decision before the General Court.[55]

In line with its decisional practice, the Commission defined the relevant market for scheduled air transport services on the basis of its customary O&D approach. The Commission also examined the substitutability of certain destination airports based on a 100 km distance and 1-hour driving time criteria, as well as certain other factors (e.g., how the routes were marketed). Applying the definitional methodology outlined above, the Commission determined that the transaction would give rise to 46 overlap routes.

The Commission found that the merged entity would have a monopoly in 28 routes and very high market shares in the remaining overlap routes. The Commission considered Ryanair and Aer Lingus to be very close competitors, finding that they had similar business models, presence in the Irish market, and fare levels (at least as compared to other competitors; the Commission noted that Aer Lingus' fares were generally higher than those of Ryanair). The Commission stressed that the fact that Ryanair's and Aer Lingus operate from large bases in Ireland gives them additional operational advantages compared to airlines without such bases (e.g., to operate at certain hours and to react to demand shocks). The Commission also identified concerns with regard to the elimination of potential competition between Ryanair and Aer Lingus on six non-overlap routes.

The Commission found that entry was unlikely to constrain the merged entity, identifying the following barriers to entry: (i) the parties' base advantages at Irish airports; (ii) the importance of brand recognition in the relevant markets and the difficulty for an entrant of developing a brand of sufficient strength (the Commission found the brands of the parties to be very strong); (iii) the high level of airport charges and taxes at Dublin Airport; (iv) congestion at Dublin Airport (mainly slot constraints at peak hours); and (v) risk of aggressive retaliation by Ryanair against entrants.

Ryanair did not contest the Commission's substantive assessment and focused instead on constructing remedies to address the Commission's concerns. Four successive remedy packages were submitted. The final package included a proposal unprecedented in the airline sector to divest a significant part of Aer Lingus' short-haul business to two up-front buyers, Flybe and IAG. The Commission nevertheless rejected this proposal, contending that it was overly complex and uncertain of being capable of being implemented.

Ryanair's minority interest in Aer Lingus was also the subject of an investigation of the UK Office of Fair Trading and the Competition Commission. On August 28, 2013, the Competition Commission ordered Ryanair

55 *Ryanair Holdings v. Commission* (Case T-260/13)

to reduce its shareholding to 5%. Ryanair has appealed the Competition Commission's decision to the Competition Appeals Tribunal.[56] The Competition Commission found that Ryanair's minority shareholding in Aer Lingus had led, or may be expected to lead, to a substantial lessening of competition between the two airlines on routes between Great Britain and Ireland in that Ryanair's minority shareholding was likely to affect Aer Lingus' commercial policy and strategy by restricting Aer Lingus' ability to: combine with other airlines; issue shares and raise capital; and manage its portfolio of Heathrow slots.

Commitment Review Decisions

Newscorp/Telepiu **(Case COMP/M.2876)**

On August 27, 2013, the Commission published the non-confidential version of its decision of July 20, 2010, releasing Sky Italia from its commitment given in the 2003 *Newscorp / Telepiu* merger.

On April 2, 2003, the Commission cleared the merger of News Corporation Limited ("Newscorp"), Telepiu SpA, and Stream SpA, resulting in the creation of Sky Italia. At that time, the Commission had found that the merger would lead to a near-monopoly in the Pay TV market in Italy, particularly with respect to premium film and sporting rights. To address the Commission's concerns, Newscorp offered the following commitments (on the basis of which the Commission cleared the transaction): (i) Newscorp would be restricted in the scope and duration of any contracts it entered into that involved football and movie rights; (ii) Newscorp would allow other market participants access to its network; and (iii) Newscorp would not operative pay TV services outside of its direct-to-home (DTH) satellite system. The commitments were set to expire on December 31, 2011.

Part of Newscorp's commitments under (iii) involved Digital Terrestrial Television broadcasting ("DTT"). Newscorp had agreed to divest its existing DTT services, and agreed not to re-enter the DTT market as a network operator or as a Pay-TV provider. This was done due to the increasing availability of DTT channel frequencies as Italy continued to convert from analog to digital television. As the switch progressed, old analog spectrum was auctioned for use as DTT multiplexes ("muxes"), enabling new competitors to enter the market. On November 7, 2009, Newscorp requested that the Commission modify its commitments and allow it to participate in a bid on an upcoming mux allocation.

The Commission carried out a new market investigation and found that: (i) since 2003 the Pay-TV market on DTT has developed significantly; (ii) DTT was now the main source of television overall for Italian consumers; and (iii) that consumers and regulators in Italy believed that an improved free-to-air (FTA) competitor would be beneficial to competition. The Commission held that Newscorp's entry into DTT as a Pay-TV operator would likely result in the foreclosure of its competitors, but that FTA content, which it defined as a separate market, would benefit from the competition.

After taking into account the changed market circumstances and noting that the structure of the spectrum auctions meant that Newscorp may be unable to obtain an allocation in the future, the Commission amended Newscorp's commitments to allow it to bid on one of five muxes allocations, subject to Newscorp agreeing not to use the mux for Pay-TV services for a period of five years.

The decision demonstrates that the Commission is willing to amend commitments in response to changed market circumstances. However, note that, in modifying the commitments, the Commission also extended them: Newscorp's original commitments expired at the end of 2011, but the modified commitments over DTT were extended until July 20, 2015. Newscorp had little choice but to wait due to the need to participate in the mux auction.

[56] *Ryanair Holdings PLC v. Competition Commission*, CAT, Case 1219/4/8/13.

STATE AID

ECJ Judgments

P Oy **(Case C-6/12)**

On July 18, 2013, the ECJ issued a preliminary ruling in the dispute between the company P Oy and the Finnish authorities responsible for corporate income tax regarding their refusal to authorize P Oy to deduct losses incurred in previous years and to carry such losses forward to later tax years.

Finnish income tax law provides that losses sustained by a company are not deductible if, during the year in which they arise or thereafter, more than half of the company's shares have changed ownership.[57] The law, however, enables the competent tax office to authorize the deduction of such losses in these circumstances where doing so is necessary for the continuation of the activities of the company.[58]

In the main proceedings, P Oy was refused authorization to deduct losses incurred between 1998 and 2004 because the ownership of the company had changed in 2004. The Finnish authorities argued that P Oy had not demonstrated that it could not continue its activities without such authorization.

The ECJ's analysis focused on two issues. First, the ECJ considered whether a tax system such as the one at issue satisfied the condition of selectivity as an element of the concept of 'state aid,' within the meaning of Article 107(1) TFEU (meaning, whether it could be deemed to provide a selective advantage to a specific company). Second, the ECJ analyzed whether the prohibition on putting aid into effect laid down in Article 108(3) TFEU would preclude the application of this tax regime due to the lack of notification and authorization (this article prohibits Member States from granting aid until this has been authorized by the Commission).

As regards selectivity, the ECJ stated that it was necessary to begin by identifying the common or 'normal' tax regime applicable in Finland, and then to determine whether the Finnish tax measure granted a selective advantage. The ECJ was unable to carry out this assessment, due to a lack of information concerning the content and scope of the relevant legal provisions.

The ECJ explained that the Finnish tax regime could satisfy the selectivity condition were it established that the 'normal' tax regime applicable in Finland generally prohibited deducting losses in the case of a change of ownership of the taxpayer company, in relation to which the provisions at issue in this case provided an exception. This exception could then still hypothetically be justified by the nature or general scheme of the tax system of which the provisions form a part. In this case, the exception would not fulfill the condition of selectivity. However, such exception would not be justified by the nature or general scheme of the tax system if the competent national authorities were granted discretion enabling them to base decisions authorizing derogation from the prohibition on the deduction of losses based on criteria unrelated to such tax system (e.g., on regional development or social policy considerations).

As regards the prohibition in Article 108(3) TFEU, the ECJ observed that, were this tax regime classified as 'new aid' under Article 108 TFEU, it would need to be notified to the Commission and may not be implemented until the Commission adopts a final decision. On the other hand, were it classified as 'existing aid,' it could be lawfully implemented as long as the Commission made no finding of incompatibility.

The ECJ suggested that the tax regime may be considered 'existing aid' because it was established before the Agreement on the European Economic Area entered into force and before Finland joined the EU.

However, the ECJ also explained that, in some circumstances, the amendment of an aid regime may lead to classifying such a regime as 'new aid.' The ECJ clarified that it was for the referring court to verify whether the detailed arrangements for the implementation of this tax regime had been amended. If any amendments had extended the scope of the regime, the tax regime could be deemed 'new aid,' and the notification procedure set out in Article 108(3) TFEU would apply.

[57] Finnish Law 1535/1992 of December 30, 1992, on income tax, para. 122, sub-para. 1.

[58] *Ibid.*, para. 122, sub-para. 3.

ECJ Advocate General Opinions

Vent de Colère e.a. **(Case C-262/12)**

On July 11, 2013, Advocate General Niilo Jääskinen rendered an opinion in a reference for a preliminary ruling procedure concerning the categorization as state aid of the French system for financing the purchase obligation of electricity generated by wind turbines.

According to the amended French law, electricity network distributors, i.e., Électricité de France and non-nationalized distributors, must purchase electricity generated by wind turbines at a price higher than the market price. Those additional costs are to be fully offset by charges paid by all end consumers located in France. The underlying dispute concerns an action by Vent de Colère!, a national federation opposed to the wind-power industry, and other individuals brought before the French Conseil d'État, claiming that this funding mechanism constitutes state aid and should therefore be annulled.

The Conseil d'État requested interpretation of the first of the conditions that a measure must meet to be qualified as state aid, namely the intervention by the state or through state resources. For a measure to meet this condition, it must grant an advantage directly or indirectly through state resources and be imputable to the state.

First, AG Jääskinen found that the measure is imputable to the state because the charge paid by consumers is imposed by French law.

As to the requirement of the utilization of state resources, AG Jääskinen observed that the concept of state resources covers both advantages that are granted directly or indirectly by the state and those granted by a public or private body designated or established by the state. This includes all financial resources that remain under control of the state and therefore are available to its authorities. AG Jääskinen concluded that the financing mechanism at issue is properly considered aid granted through state resources in the sense of Article 107 TFEU for the following reasons. First, the state plays an important role in the mechanism: the level of the charge imposed on consumers is set by a ministerial order; the state guarantees full recovery of the additional costs, thereby backing the entire reimbursement mechanism; and the law provides for administrative sanctions for non-payment of the charge. Second, the resources collected through the charge are redistributed by a body established under public law, namely the Caisse des depots et des consignations, and can therefore be distinguished from the facts in *Essent Netwerk Noord e.a.*[59] and *Pearle e.a.*[60] where the autonomy of the body needed to be examined in detail. Finally, unlike the measures at issue in the *Preussen Elektra*:[61] case, French law provides for the purchase obligation to be funded by charges payable by all consumers, irrespective of whether they want to purchase electricity generated by wind turbines or not.

AG Jääskinen's opinion in this case adds to the case law on the concept of aid granted through state resources under Article 107 TFEU. The detailed scrutiny of the national measure emphasizes the necessity of a case-by-case analysis of aid measures in favor of purchasers of green energy.

General Court Judgments

France v. Commission **(Case T-366/13 R)**

On August 29, 2013, the General Court rejected a request for interim measures in an appeal by France against a decision by the Commission ordering the recovery of unlawful state aid granted to shipping service providers.

Société Nationale Corse-Méditerranée (SNCM) and Compagnie Méridionale de Navigation (CMN) are maritime transport service providers operating routes between Marseille and Corsica. Following a complaint by a competitor, the Commission rendered a decision finding that the compensation granted to those two undertakings for their additional service during the holiday season constitutes unlawful state aid that needs to be recovered and for which further payments must cease. France appealed this decision and filed a request for interim measures to suspend the operation of the decision until the final judgment is rendered.

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[59] *Essent Netwerk Noord e.a.* (Case C-206/06) 2008 ECR I-5497.

[60] *Pearle e.a.* (Case C-345/02) 2004 ECR I-7139.

[61] *Preussen Elektra* (Case C-379/98) 2001 ECR I-2099.

Pursuant to Article 278 TFEU, the judge hearing an application for interim measures can in exceptional circumstances order a Commission's decision to be suspended until the final judgment. Such a suspension order must be justified *prima facie* in fact and in law and urgent, i.e. necessary to avoid irreparable and serious harm to the applicant's interests, and must be granted and become effective before a decision in the main action is rendered.

The General Court's analysis focused on the condition of urgency. France argued that the recovery of more than €220 million in aid and the halting of any further payments would lead to the liquidation of SNCM which would, in turn, have harmful consequences for territorial continuity with Corsica, the social climate in Corsica, and the port of Marseille (leading to danger for the public order and social peace) and the economic activity in those areas. The General Court thus examined whether this harm was sufficiently certain to justify granting an interim measure. It found that SNCM's liquidation constituted a *conditio sine qua non*[62] for the alleged harm, and that it was therefore up to France to prove that the operation of the Commission's decision would inevitably lead to the liquidation of SNCM.

In this regard, the General Court held that the decision was addressed to France and therefore only has binding effect on France and not on SNCM. Because France had not implemented any definitive measures to recover the aid[63] or to stop paying further aid,[64] SNCM was not at imminent risk of being put into liquidation. Furthermore, the General Court pointed out that SNCM could file a legal action against the recovery of the aid before national courts in order to avoid irreparable and serious harm. Therefore, the General Court rejected the request for interim measures due to lack of urgency.

This order sheds light on the strict standard applied by the General Court as regards the requirements for granting interim measures. The order makes clear that, to satisfy the requirement of urgency, the applicant must prove with sufficient certainty that serious and irreparable harm will occur if the interim measure is not granted. A merely hypothetical harm – even if very likely and carries the possibility of potentially grave consequences – does not suffice.

[62] An indispensable condition in the sense that the alleged harm would only occur if SNCM was liquidated.

[63] It only sent informative letters.

[64] Evidence shows that it intended to continue paying the aid until the end of 2013.

POLICY AND PROCEDURE

ECJ Judgments

***Commission v. Pilkington Group Ltd* (Case C-278/13)**
On September 10, 2013, the ECJ upheld the General Court's order[65] suspending the Commission's decision of August 6, 2012 ,[66] rejecting Pilkington Group Ltd's ("Pilkington") confidentiality claims over information that the Commission considered to be historical.

In 2008, the Commission fined Pilkington, Soliver NV ("Soliver") and several companies belonging to the French Saint-Gobain group and the Japanese Asahi group for their participation in a cartel concerning the sale of glass for new vehicles and replacement parts for motor vehicles.[67] Two non-confidential versions of the fining decision were published: the provisional decision (November 12, 2008), and the final decision (February 2010).

On August 6, 2012, the Commission decided to publish a fuller non-confidential version of the original decision, rejecting Pilkington's request for confidential treatment in respect of three categories of information: (i) customer names, product names and descriptions of the products that could identify individual customers ("Category 1"); (ii) the number of parts supplied by Pilkington, shares of the business it had with certain car manufacturers, and pricing calculations ("Category 2"); and (iii) information which may identify certain members of Pilkington's staff who were allegedly involved in the cartel itself ("Category 3"). Pilkington sought interim measures suspending the August 2012 decision. The President of the General Court granted Pilkington's petition on March 11, 2013 and the Commission appealed to the ECJ.

An order for the suspension of an act or other interim measures may be rendered if (1) such an order is justified, *prima facie*, in fact and in law; (2) it is urgent; and (3) it is necessary to avoid serious and irreparable harm to the applying party's interests.

The ECJ disagreed with the General Court's decision and found that the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union (the "Charter") did not put into question established case law according to which a breach of the fundamental rights to protection of professional secrecy and to effective judicial remedy are not in themselves sufficient to establish the likelihood of a serious and irreparable harm occurring. The President of the ECJ, however, upheld the General Court's conclusion that the publication of the Category 1 and 2 information would cause Pilkington such harm. In particular, the ECJ dismissed the Commission's arguments that such harm would be reparable by way of financial compensation. It held that, due to the uncertainty as to the number and status of persons who might acquire knowledge of the information, the impact of such publication could not be adequately identified or quantified and was consequently irreparable.

The ECJ also confirmed the General Court's ruling that, as regards disputes concerning interim protection for information alleged to be confidential, there is no *prima facie* case only where the information in question is obviously not confidential. Such conclusions were not affected either by the fact that the information was known to other members of the cartel or by its age (the relevant information being more than 5 years old).

General Court Judgments

***Deutsche Bahn AG & Others v. Commission* (Cases T-289/11, T-290/11 and T-521/11)**
On September 6, 2013, the General Court held that the Commission's decisions authorizing unannounced inspections at Deutsche Bahn AG ("DB")'s premises did not violate its rights of defense.

On March 14, 2011, the Commission adopted a decision under Article 20(4) of Regulation 1/2003 authorizing an inspection at the premises of the DB group in Germany. This inspection related to an investigation into suspicions that, in breach of Article 102 TFEU, DB Energie may have been using a discriminatory rebate scheme favoring DB entities in the supply of electromotive power and

[65] *Pilkington Group v. European Commission* (Case T-462/12), order of March 11, 2013.

[66] Commission decision C(2012) 5718 final of August 6, 2012, not available to the public.

[67] *Carglass* (Case COMP/393125), Commission decision of November 12, 2008.

traction current. During this inspection, the Commission discovered evidence of another potential breach of Article 102 TFEU, relating to the "strategic use of infrastructure"[68] administered by DB entities and thus adopted two subsequent inspection decisions, on March 30 and July 14, 2011, respectively. On October 5, 2011, DB appealed the three decisions authorizing these inspections.

In reviewing DB's appeal, the General Court first ruled that the lack of prior judicial authorization of the contested decisions did not breach DB's fundamental right to inviolability of premises. The General Court explained that the TFEU and Regulation 1/2003 provide for five categories of guarantees: (i) the obligation for the Commission to state reasons for the inspection in the decision; (ii) the limits imposed on the Commission during the inspection, as regards the documents that can be seized or the protection against self-incrimination; (iii) the fact that it is impossible for the Commission to impose an inspection by force; (iv) the intervention of national authorities when an undertaking opposes an inspection, under the control of the national judicial authority; and (v) the existence of *ex post* control by the European judge. It concluded that, in the present case, the Commission complied with all five categories of guarantees.

The General Court further noted that the lack of *ex ante* judicial review of the contested decisions did not breach DB's fundamental right to an effective legal remedy, because the *ex post* judicial control is sufficient to ensure the protection of this right.

In assessing DB's claim that the second and third inspections were based on information unlawfully obtained by the Commission, the General Court concluded that the Commission could lawfully perform a comprehensive search including documents and premises, as long as some elements suggest, even if without a clear indication, that information about the matter under investigation can be found there. In the instant case, given that the executive whose office was subject to inspection was the director with responsibility for, *inter alia*, negotiation of electromotive power supply contracts and procurement, valid reasons for a detailed search existed. Similarly, the low number of documents at issue (11) by comparison with the total number of documents copied (around 1000) indicated that there was not a systematic inspection of documents unrelated to the scope of the first decision.

The General Court concluded that the subject matter of the first inspections was not disproportionately broad because the inspection decision clearly indicated the essential characteristics of the suspected infringement, including the market supposedly affected and the nature of the suspected restrictions of competition (in that case "price discrimination"). In particular, the General Court held that the Commission was under no obligation to restrict the geographical scope of the inspection to Germany, nor was it obliged to indicate a particular time period during which it believed the infringement had occurred. The second and third investigations, which referred to the "strategic use" of DB's infrastructure in the market for "rail transport," were also sufficiently precisely described.

Finally, the General Court finally that the Commission did not breach the principle of proportionality. This is because, to better determine the scope or duration of an infringement, the Commission is permitted to choose inspection over a less invasive request for information, regardless of either the seriousness of the infringement, or the fact that it already had some evidence in its hands. The fact that DB's contracts for power supply were available on the internet did not change the fact that the elements needed to establish the alleged infringement, such as the detail of the preferential rebates at issue and DB's commercial strategy, could be obtained only by way of inspection.

Following the successful appeals in *Nexans* and *Prysmian,*[69] the General Court's judgment makes clear that, as long as the particular circumstances of the case

[68] *Ibid.*, paras. 15 and 22

[69] *Nexans France SAS and Nexans SA v. Commission* (Case T-135/09) and *Prysmian and Prysmian Cavi e Sistemi Energia v. Commission* (Case T-140/09), judgments of November 14, 2012. In both cases, the General Court partially annulled Commission decisions relating to unannounced inspections in the electrical cables cases on the ground that the Commission did not delimit precisely enough the product market concerned by the dawnraids.

justify it, the scope of a Commission inspection decision can be very broad.

***Netherlands v. Commission* (Case T-380/08)**

On September 13, 2013, the General Court dismissed the Netherlands' appeal against the Commission's decision denying access to the full version of the *Dutch Bitumen* cartel decision. The Netherlands, which had suffered serious losses as a result of the cartel's conduct, claimed that access to the unredacted decision would be of great assistance in its attempts to recover losses through claims for follow-on damages.

On September 13, 2006, the Commission fined several companies for infringing Article 101 TFEU by participating in a price-fixing cartel in the road bitumen sector in the Netherlands. To recover losses suffered as a result of the cartel, the Netherlands requested that the Commission grant it access to the confidential version of the decision, pursuant to Regulation 1049/2001 regarding public access to the documents of the EU institutions.[70] The Commission rejected this application on June 30, 2008.[71] The Netherlands appealed this decision on September 9, 2008.

Under Regulation 1049/2001, any natural or legal person residing in a Member State has a right of access to EU institutions' documents. Such access, however, can be refused where, *inter alia,* it would undermine the commercial interests of natural or legal persons, or court proceedings and legal advice or the purpose of inspections, investigations and audits, unless there is an overriding public interest.

The General Court first recognized a general presumption that the disclosure of documents collected by the Commission in the course of competition law proceedings can undermine both the public interest in protecting the conduct of investigations and the private commercial interests of companies. Generalized access could jeopardize the balance struck by the legislator in Regulation 1/2003 between, on the one hand, the obligation on the "undertakings concerned" to send the Commission possibly sensitive commercial information and, on the other, the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission. Such generalized access would also deter potential leniency applicants. It was therefore for the Netherlands to demonstrate that a given document is not covered by the general presumption, or that a higher public interest justifies its disclosure.

The General Court further ruled that no overriding reasons of public interest would justify disclosure. In particular, the interest in obtaining damages as a result of anticompetitive behavior is sufficiently protected by the obligation on national courts to give full effect to the rights conferred by EU law on individuals when applying national disclosure rules. Additionally, in this case, the general interest in the application of competition law was already satisfied by the adoption of the Commission's *Dutch Bitumen* decision.[72]

The General Court also held that by publishing a non-confidential version with redactions only of material covered by the exceptions set out in Article 4(2), the Commission had acted in accordance with the principle of proportionality. The Commission was therefore under no obligation to grant at least partial access – for example by providing an indicative range of values for financial or numerical information.

The General Court's decision follows the same approach as already taken in the context of state and aid and merger control proceedings.[73] It makes clear that Regulation 1049/2001 cannot be used to circumvent disclosure rules, as provided for by Regulation 1/2003, or national law in order to obtain access to confidential information in support of private damages actions.

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

[71] Decision not available to the public.

[72] *Bitumen – NL* (Case COMP/38.456), Commission decision of September 13, 2006

[73] *Commission v. Technische Galswerke Ilmenau GmbH* (Case C-139/07 P), judgment of June 29, 2010; *Commission v. Éditions Odile Jacob* (Case C-404/10 P), judgment of June 28, 2012.

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