FINING POLICY

ECJ Judgments

***SIEMENS AG, MITSUBISHI ELECTRIC CORP., AND TOSHIBA CORP. V. COMMISSION* (JOINED CASES C-239/11 P, C-489/11 P, AND C-498/11 P)**

On December 19, 2013, the ECJ rejected the appeals brought by Siemens, Mitsubishi, and Toshiba against the General Court's judgments of March[1] and July[2] 2011 in the gas insulated switchgear ("GIS") cartel. Following a leniency application by ABB Ltd., denouncing market sharing practices among European and Japanese producers of GIS, the Commission started an investigation into these producers' practices and carried out inspections at various companies' premises. On January 24, 2007, it adopted a decision finding that eleven groups of companies had infringed Article 101 TFEU, including Siemens, Mitsubishi, Toshiba, Alstom, Areva, Fuji Electric, Hitachi and Schneider Electric.[3] These companies had mainly engaged in market sharing and had also manipulated bidding procedures, fixed prices for certain GIS projects, and exchanged strategic information.

On appeal, the General Court rejected all of the claimants' arguments, except the arguments concerning the fines imposed on Mitsubishi and Toshiba. It concluded that the Commission had infringed the principle of equal treatment by calculating the basic amount of the fines for these Japanese producers by reference to global sales in 2001, while using the year 2003 for the European producers. As a result, the Commission adopted a new decision imposing fines on Mitsubishi and Toshiba in June 2012. The ECJ followed the General Court's approach, and examined three categories of claims relating to: (1) the proof of the infringement; (2) the calculation of the fine; and (3) the observance of fundamental procedural rights.

With respect to (1), the parties raised a number of arguments, including the lack of opportunity to question witnesses and access undisclosed documents, the failure to prove the existence of a single and continuous infringement, and the misapplication of the rules of evidence with regard to statements of the leniency applicant and to elements running counter to the interests of the declarant. The ECJ dismissed those arguments. It recalled the prevailing principle of the unfettered evaluation of evidence, under which lawfully obtained evidence is always admissible and its probative value depends only on its credibility.

This implies, for example, that a statement by one accused undertaking does not constitute adequate proof of a cartel infringement committed by another, unless it is supported by additional evidence. By contrast, statements which run counter to the interests of the declarant have high probative value. Hence, depending on the circumstances, the statements made by employees of a leniency applicant admitting the existence of an infringement may constitute important evidence, given the risks they entail, including in particular, follow-on claims for damages. Further, the ECJ concluded that there was no specific rule requiring that only evidence contemporaneous with the facts at issue may corroborate other evidence. Thus, exculpatory evidence contemporaneous with the facts will not necessarily be given more weight than retrospective statements by leniency applicants.

The first category of claims also covered the question of single and continuous infringements. In this respect, case law establishes that any participant in an anticompetitive agreement is liable for the whole infringement insofar as it intended to contribute to the common objective pursued by the participants, which it had knowledge of or could reasonably have foreseen. In the present case, the ECJ

[1] *Siemens AG v. Commission* (Case T-110/07) 2011 ECR II-477.

[2] *Mitsubishi Electric Corp. v. Commission* (Case T-133/07) 2011 ECR II-4219; *Toshiba Corp. v Commission* (Case T-113/07) 2011 ECR II-3989.

[3] *Gas Insulated Switchgear* (Case COMP/F/38.889), Commission decision C(2006) 6762 final of January 24, 2007.

agreed with the General Court that regularly receiving the results of calls for tenders during 12 of the 17 years of the infringement period could support the argument that the appellant was aware of the anticompetitive agreement during its entire duration and therefore participated in the overall pattern of unlawful conduct.

As to (2), the ECJ recalled that the particular situation of each undertaking must be considered in the determination of an appropriate fine amount. As long as the Commission's calculation method is objectively justified, logical, and coherent, it does not need to resort to arithmetical formulae only or be exactly proportionate among the parties. The Commission therefore retains its own power of assessment, and may choose to emphasize deterrence only for some of the parties.

As to (3), the ECJ tackled various procedural issues governing witness examination and access to files. Referring to settled case law, the ECJ concluded that the parties to proceedings do not have a right to examine the witnesses heard by the Commission. They may however submit a request for such examination to the Commission and the General Court, both of which retain a discretionary power to refuse. The ECJ also confirmed the standard applicable to access undisclosed documents in the Commission's file: the applicant must show that these could have been useful for its defense, but it does not have to prove that the content of the Commission's decision would have been different.

In any case, the undertaking may not claim access to further undisclosed evidence if already familiar with its content by means of other documents, or with regard to statements by which other parties merely contest the existence of the infringement.

***Gascogne Sack Deutschland, Kendrion, and Groupe Gascogne v. Commission* (Cases C-40/12 P, C-50/12 P, and C-58/12 P)**

On November 26, 2013, the ECJ delivered three parallel judgments, dismissing the appeals by three companies against judgments of the General Court[4] and thus confirming the Commission's decisions in the industrial bags cartel.

In 2005, the Commission found that 16 companies had infringed competition rules by participating in a series of agreements and concerted practices in the industrial plastic bags sector, fining the companies a total of over €290 million euros.[5] It concluded that, in violation of Article 101 TFEU, the companies had: (i) fixed prices and established common price calculation methods; (ii) shared markets and allocated sales quotas; (iii) assigned customers, deals, and orders; (iv) submitted concerted bids in certain tenders; and (v) exchanged individualized information. Most of the companies appealed the decision, in some cases obtaining relief. Three companies—Groupe Gascogne SA ("Groupe Gascogne"), its wholly-owned subsidiary Gascogne Sack Deutschland GmbH ("Gascogne Sack"), and Kendrion NV ("Kendrion")—appealed the General Court's judgments dismissing their appeals to the ECJ.

The three companies' arguments concerned primarily: (1) issues of parent-subsidiary liability; (2) the excessive length of the proceedings before the General Court; and (3) for the Gascogne entities, their inability to pay the fine.

As to (1), Groupe Gascogne and Gascogne Sack raised various arguments, including the following:

(i) Both companies argued that the presumption allowing the parent company to be held responsible for the anticompetitive conduct of its wholly-owned subsidiary infringed the presumption of innocence guaranteed by the Charter; and

(ii) Groupe Gascogne submitted that the General Court had misinterpreted the term "undertaking" and confused it with the concept of "personal

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[4] *Sachsa Verpackung GmbH v . Commission* (Case T-79/06) 2011 ECR II-406; *Kendrion NV v. Commission* (Case T-54/06) 2011 ECR II-393; *Groupe Gascogne SA v. Commission* (Case T-72/06) 2011 ECR II-400.

[5] *Industrial Bags* (Case COMP/F/38.354), Commission decision C(2005) 4634 final of November 20, 2005.

responsibility," by calculating the 10% fining cap based on the turnover of the entire Gascogne group.

The ECJ rejected the argument regarding the presumption of innocence, simply referring to previous case law confirming the compatibility of the parent company presumption with the principle of presumption of innocence. The entry into force of the Lisbon Treaty was not a relevant new matter of law in this respect. The ECJ also upheld the General Court's interpretation of the concept of an undertaking: it confirmed that attributing liability to a parent company for its subsidiary's infringement and the 10% of a group's turnover fining cap are separate issues. Once the infringement is attributed to a parent company, the Commission has to assess the financial resources of the undertaking in order to determine the fine. For that purpose, the ECJ held that it is justified to take into account the turnover of all the companies in respect of which the parent company has the opportunity to exercise a decisive influence, because it "is the best indicator of the ability of the undertaking concerned to mobilise the funds needed to pay the fine."[6]

Kendrion argued that:

(i) The General Court had erred in law in the distribution of the burden of proof as to whether Kendrion exercised a decisive influence over its subsidiary; and

(ii) The General Court had misconstrued the concept of joint and several liability by confirming the Commission's decision to impose a higher fine on Kendrion than on its subsidiary.

The ECJ rejected the first argument. It held that the General Court had correctly concluded that, to rebut the presumption of decisive influence exercised by a parent company over its wholly-owned subsidiary, the parent company must first introduce evidence regarding the links between the subsidiary and itself; the Commission must then assess any evidence showing that the subsidiary operated independently. The ECJ also confirmed that, as the Commission had also referred to four additional factors, "it was appropriate to examine whether the appellant had succeeded in rebutting those four additional factors."[7] Because Kendrion had rebutted only one of the additional pieces of evidence (and had not succeeded in rebutting the presumption), the ECJ concluded that the General Court had not erred in law in confirming the Commission's finding that Kendrion and its subsidiary formed a single economic entity.

Regarding the difference in the fines imposed on Kendrion and its subsidiary, the ECJ recalled that their liability was based on the fact that both formed a single economic entity and that their joint and several liability "[could not] be reduced to a type of security provided by the parent company in order to guarantee payment of the fine imposed on the subsidiary."[8] The differing amounts of their fines resulted from the application of the 10% cap of Article 23(2) of Regulation 1/2003.[9] As Kendrion and its subsidiary no longer constituted an undertaking on the date of the decision imposing the fines, "each of them [was] entitled to have the 10% ceiling applied individually."[10]

As to (2), Gascogne Sack, Gascogne Group, and Kendrion all invoked arguments related to the excessive length of the proceedings before the General Court, in violation of Article 47 of the Charter. While Gascogne Sack and Groupe Gascogne had not raised the argument at the hearing before the General Court, the ECJ held that it did not render their pleas inadmissible. The parties were not required to raise

[6] *Groupe Gascogne SA v. Commission* (Case C-58/12), judgment of November 26, 2013, not yet published, para. 53.

[7] *Kendrion NV v. Commission* (Case C-50/12), judgment of November 26, 2013, not yet published, para. 30.

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

[9] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

[10] *Supra* note 7, para. 57.

the breach of procedure "at a stage where the full effects of that breach [were] not yet known."[11]

The General Court had rejected Kendrion's plea as ineffective because its jurisdiction did not extend beyond the review of the legality of the Commission's decision. The ECJ confirmed this, holding that the review of the adverse consequences of the excessive length of the proceedings: (i) has a different purpose than that of annulment proceedings; and (ii) entails the examination of different facts.

As to the substance, the ECJ recalled that a failure to adjudicate within a reasonable time gives the party concerned an entitlement to an effective remedy. Where there are no indications that the excessive length of proceedings affected their outcome, the remedy cannot be the setting aside of the judgment. Diverging from a previous judgment where it had granted a reduction of a fine as compensation for financial damage sustained as a result of excessively lengthy proceedings, the ECJ held that the appropriate sanction for a breach of Article 47 of the Charter "must be an action for damages brought before the General Court, since such an action constitutes an effective remedy."[12] While leaving the matter for the General Court to adjudicate, the ECJ found that the length of the proceedings before the General Court had been excessive, and thus breached Article 47 of the Charter.

Finally, as to (3), Groupe Gascogne and Gascogne Sack made submissions at the hearing before the ECJ concerning their financial position, claiming that they were unable to pay their fine. The ECJ rejected these arguments. Reviewing their ability to pay the fine would have required it to make an assessment of facts, overstepping its jurisdiction. The ECJ further held that it could not substitute, on grounds of fairness, its assessment for that of the General Court.

[11] *Supra* note 6, para. 70.

[12] *Ibid.*, para. 83.

Kone Oyj and Others (Case C-510/11)

On October 24, 2013, the ECJ dismissed an appeal by Kone Oyj and two of its subsidiaries, Kone GmbH and Kone BV (together, "Kone"), against the General Court's judgment of July 13, 2011,[13] upholding the Commission's decision of February 21, 2007,[14] imposing a fine on Kone for its involvement in the lifts and escalators cartel.

In its decision, the Commission levied fines totaling €992 million on 17 subsidiaries of the KONE, ThyssenKrupp, Otis, and Schindler groups for fixing prices and agreeing or concerting to allocate contracts and tenders for the sale, installation, modernization, and maintenance of escalators and lifts in the Netherlands, Luxembourg, Belgium, and Germany. Kone was granted full immunity from fines under the 2002 Leniency Notice[15] for the infringements in Belgium and Luxembourg. However, the Commission found that the information provided was insufficient to justify granting immunity in relation to the infringements in Germany and the Netherlands and levied fines totaling €142.48 million on Kone. The General Court subsequently dismissed Kone's action for annulment of the Commission's decision.

Kone appealed the General Court's judgment on six grounds, primarily maintaining that the General Court had failed to conduct a "full review"[16] of the Commission's decision and had thus infringed Kone's right to a fair trial under Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms ("ECHR") and Article 47 of the Charter of Fundamental Rights of the European Union ("Charter"). Kone also contended that the General Court had misinterpreted the

[13] *Kone Oyj, Kone GmbH and Kone BV v. Commission* (Case T-151/07) 2011 ECR II-5313.

[14] *Elevators and Escalators* (Case COMP/E-1/38.823), Commission decision C(2007) 512 final of February 21, 2007.

[15] 2002 Commission notice on immunity from fines and reduction of fines in cartel cases, 2002 OJ C 45/3.

[16] *Kone Oyj, Kone GmbH, and Kone BV v. Commission* (Case C-510/11 P), judgment of October 24, 2013, not yet published, para. 19.

2002 Leniency Notice and breached the principles of proportionality and the protection of legitimate expectations.

In its preliminary considerations, the ECJ recalled that the right to effective judicial protection enshrined in Article 6 of the ECHR "does not preclude a 'penalty' from being imposed by an administrative authority"[17] such as the Commission, provided such penalty is subject to subsequent review by a judicial body with full jurisdiction. Such judicial body must have jurisdiction to review and annul the administrative body's decision in all respects, on both questions of fact and law.

The ECJ has consistently found the European courts' standard of review to be in line with the principle of effective judicial protection and the right to a fair trial guaranteed by Article 47 of the Charter for three reasons. First, the European courts have unlimited jurisdiction allowing them to substitute their own appraisal for that of the Commission. Accordingly, the European courts may cancel, reduce or increase fines levied by the Commission. Second, the European courts must review the legality of Commission decisions based on the evidence adduced by the appellants in support of their pleas in law. Conversely, the European courts may not invoke the Commission's discretion to evade their obligation to carry out an in-depth review of both the law and facts. Third, the review provided for by the Treaties covers both the law and the facts, and empowers the European courts to assess the evidence, quash the contested decision, and alter the amount of a fine.

The ECJ explained that it is not the purpose of judicial review to replace a full investigation in the context of an administrative procedure. This would be tantamount to encroaching upon the Commission's discretion when assessing complex economic circumstances. Rather, the European courts must verify the factual accuracy, reliability and consistency of the evidence relied on by the Commission in order to assess a complex situation. They must also determine whether such evidence contains all information necessary to assess a complex situation and substantiate the Commission's conclusions. Furthermore, the principle of effective judicial review does not require the General Court to conduct of its own motion a new comprehensive investigation of the file. Rather, the General Court must analyze all grounds of appeal raised by the applicants and review both the facts and the law.

Against this background, the ECJ examined Kone's allegation that the General Court had breached the right to a fair trial by unduly deferring to the Commission's discretion and thus failing to review fully the contested decision. In particular, Kone contended that the General Court had erred in holding that it could only criticize the Commission's assessment of an undertaking's cooperation under the 2002 Leniency Notice where such assessment manifestly goes beyond the bounds of the Commission's margin of assessment. The ECJ disagreed, noting that Kone was merely criticizing the General Court's erroneous but abstract and declaratory description of the applicable legal rules. For the purposes of assessing whether the General Court appropriately applied the correct standard of review, what mattered was the review that the General Court had in fact carried out. Since Kone had not specifically criticized the General Court's actual review, the ECJ ruled that this ground of appeal was ineffective.

Having also rejected Kone's other grounds of appeal as either unfounded, inadmissible, or ineffective, the ECJ dismissed the action in its entirety.

ABUSE OF DOMINANCE

Commission Decisions

DEUTSCHE BAHN (CASE COMP/AT.39678, 39731 AND 39915)

On December 18, 2013, the Commission accepted binding commitments from Deutsche Bahn ("DB") to address concerns that it had abused its dominance through its pricing systems for traction current electricity. The Commission's

[17] *Supra* note 4, para. 22.

investigation commenced following dawn raids on DB and its subsidiaries' premises between March and July, 2011.[18]

DB's subsidiary, DB Energie, is the sole provider of traction current in Germany. Traction current is a specific supply of electricity used to power locomotives, and is an essential input for all German railway companies.

The Commission's preliminary assessment found that, as the sole supplier in Germany, DB Energie was dominant. Since 2003, DB Energie had sold traction current – both to DB Group entities and competitors – using an all-inclusive pricing system that combined a fee for the use of electricity and a fee for access to the traction current network. The Commission's preliminary assessment set out two theories of harm. First, by offering discounts based on factors such as duration and volume, DB Energie unfairly benefited larger operators, which were mostly part of the DB Group. The Commission concluded that this behavior may have hampered competition in the freight and long-haul passenger markets. Second, the spread between the prices charged by DB Group rail operators to consumers and to competitors resulted in a margin squeeze, preventing competitors from realizing profits, and/or artificially reducing their margins.

DB did not accept that its conduct had breached Article 102, but nevertheless offered commitments to address the Commission's concerns. The final commitments package provided that: (i) from July 1, 2014, DB Energie will allow other electricity providers access to its traction current network, allowing providers to supply power directly to competitors; (ii) from July 1, 2014, DB Energie will implement a new pricing system that uniformly and separately markets traction current and network access. Due to German regulatory reforms, the network access price will also be regulated by the German Federal Network Agency (*Bundesnetzagentur*); (iii) starting in July 2014, DB Energie will grant a one-time discount of 4%, to all non-DB Group companies, based on their previous year's invoices; and (iv) DB Energie will stop offering discounts to its supply of electricity.

Compliance with the commitments will be monitored by a monitoring trustee and, if DB fails to comply with the commitments, the Commission may fine DB up to 10% of its worldwide turnover without having to establish a breach of Article 102.

MERGERS AND ACQUISITIONS

General Court Judgments

CISCO SYSTEMS INC. V. COMMISSION (CASE T-79/12 C)

On December 11, 2013, the General Court dismissed the action brought by Cisco Systems Inc. and Messagenet SpA against the Commission's decision to clear the acquisition of Skype Global Sàrl ("Skype") by Microsoft Corp [19] ("Microsoft"). The General Court confirmed the Commission's clearance decision in its entirety, striking down the applicants' main pleas concerning the transaction's anticipated adverse: (i) horizontal effects on the consumer communications market, and (ii) conglomerate effects on the enterprise communications market.

With respect to the consumer communications market, the Applicants claimed that the Commission had failed adequately to scrutinize the impact of the parties' combined post-merger market share of over 80% in the (narrowly defined) market for "video calls on the consumer communications market on Windows-based PCs." [20] Specifically, the applicants contended that: (i) the combination of high market shares and a high concentration ratio warranted additional scrutiny; (ii) the Commission did

[18] In a separate action (commenced prior to the Commission accepting DB's commitments), DB alleged that the manner in which the Commission had carried out inspections of DB's premises breached DB's fundamental rights. The General Court dismissed DB's complaint on September 6, 2013. See *Deutsche Bahn and Others v. Commission* (Joined cases T-289/11, T-290/11 and T-521/11), judgment of September 6, 2013, not yet published. DB has appealed to the Court of Justice.

[19] *Microsoft / Skype* (Case COMP/M.6281), Commission Decision of October 7, 2011.

[20] *Cisco Systems Inc. v. Commission* (Case T-79/12 C), paras. 51-53.

not take into account network effects; and (iii) the Commission incorrectly assessed the competitive pressure that would be exerted by existing competitors post-transaction.

- **Market shares**. The General Court confirmed that, in fast-growing sectors with short innovation cycles, large market shares can be a temporary phenomenon and do not necessarily indicate market power. It concluded that the Commission had correctly analyzed the effects of strong recent growth in the demand for consumer video call services on other devices such as tablets and smartphones, where the merged entity would continue to face strong competition from, *inter alia*, Apple and Google. Moreover, the fact that consumer video call services are offered for free significantly constrains the ability of the merged entity to raise prices, and there are no barriers for consumers to switch to alternatives.
- **Network effects.** The General Court confirmed the Commission's assessment that many consumers multi-home, i.e., use several communications programs on their devices. This significantly constrains the ability to foreclose access through increased network effects.
- **Competitive harm.** Finally, the General Court dismissed the arguments that the merged entity would have the ability and incentive to raise prices or reduce the quality of its services (including linked communication services such as the paid SkypeOut service) or increase prices for advertisers. The General Court found that these arguments disregarded: (i) the fact that consumer video call services are offered for free; (ii) the competitive pressure from, *inter alia*, traditional telecommunication services and other online voice services; and (iii) the finding that consumer communication services are highly dependent on innovation and that reducing quality or innovation would induce consumers to switch. Regarding the merged entity's alleged ability to increase prices for advertisers, the court found that the applicants had failed to show that advertising on video call service programs constituted a separate antitrust market.

With regard to the enterprise communications market, the applicants claimed that: (i) the Commission had failed to explain its failure to address certain arguments by third parties in its decision relating to the merged entity's ability to foreclose competitors in the enterprise communications market, and (ii) that the Commission had made a manifest error of assessment regarding Microsoft's ability and incentive to foreclose competitors by leveraging Skype's consumer user base by integrating Skype with Microsoft Lync. In essence, the applicants contended that that the merged entity could foreclose the enterprise communications market by creating exclusive or preferential interoperability between the Lync products and Skype's large customer base.

- **Statement of reasons.** The General Court confirmed that it is sufficient for the Commission to set out the facts and legal reasoning that are of *decisive importance* for its decision. Although the statement of reasons relating to certain of the applicants' arguments was succinct, it was sufficient to comply with this requirement, especially in light of the short review deadlines in merger decisions and the relatively abstract submissions relating to conglomerate effects.
- **Market foreclosure in related markets.** When assessing the likelihood of foreclosure due to conglomerate effects, the General Court held that an impediment to competition must be the *direct* and *immediate* effect of a concentration. According to the evidence, making Lync and Skype interoperable would require a long and complex process. To foreclose competitors by creating an integrated product, the merged company would have needed a successful marketing campaign that would *immediately* tip the entire enterprise communications market towards Lync – which was highly unlikely given that Lync's market share in the enterprise market was only 16%, compared to Cisco's 32%, at the time of the decision. The General Court found no evidence that an integration of Skype's user base in the

consumer market and Lync's user base in the enterprise market would offer a significant advantage that would foreclose competitors, and in fact found no evidence that there was a market for such an integrated product. Moreover, the General Court concluded that Lync's competitors had significant time to develop their own commercial strategies, or integrate with other services such as Facebook or Google.

First-phase Decisions With Undertakings

GE/Avio (Case COMP/M.6844)

On July 1, 2013, the Commission conditionally cleared an acquisition of the aviation business of Avio SpA ("Avio") by the General Electric Company ("GE"), subject to GE's commitment to eliminate any potential conflicts of interest between GE and Eurojet Turbo GmbH ("Eurojet"). GE is a highly diversified technology and services company active in the manufacture of jet engines and aircraft components. Avio produces a wide array of aircraft components, including jet engine modules, control and automation systems, and electrical systems.

The Commission found that the transaction did not give rise to any horizontal concerns because the parties' combined shares did not exceed 20% in any affected market. The Commission's investigation focused on the transaction's vertical aspects.

The transaction affected markets for aircraft components and aircraft engines. In line with previous decisions, the Commission viewed each aerospace component as a separate market because "each component performs a distinct and vital function in the operation of the aircraft type it is used for, and is airframe specific."[21] The Commission determined that the relevant aircraft component markets are global in scope. The Commission did not take a view on the geographic market for the supply of maintenance, repair, and overhaul services for military aircraft, in which the transaction did not raise any serious doubts. With respect to aircraft engines, the Commission left the precise market definition open, noting that "the assessment of the vertical effects of the transaction in relation to engines does not depend on the precise scope of the engine market" and that "the competitive assessment will therefore focus on [specific aircraft] platforms."[22] In line with the Commission's previous decisions, all civil aircraft engine markets were found to be worldwide in geographic scope.

The Commission found that the transaction did not give rise to any horizontal concerns, on the basis that in no affected market did the parties combined shares exceed 20%.

Pre-transaction, GE purchased a considerable number of engine components from Avio. The Commission raised concerns that the transaction could lead to the foreclosure of competing engine producers. The Commission found that such foreclosure could occur at two levels: (i) with respect to aircraft platforms for which multiple engines can be certified, GE could restrict supplies of Avio's components to rival engine producers, encouraging aircraft manufacturers to prefer GE's offerings over those of its competitors; (ii) with respect to aircraft platforms that already use non-GE engines, GE could divert sales away from such aircraft to platforms that use GE engines, thereby damaging the sales of rival engine producers. With respect to most vertically affected markets, the Commission found that, post-transaction, GE could not engage in any effective foreclosure strategies. However, the Commission did identify vertical concerns with respect to the following engine platforms:

PW1100G and Trent 900. The PW1100G, manufactured by Pratt & Whitney, is a yet to be certified engine (to be deployed on, *inter alia*, the Airbus' A320neo passenger jet). The Trent 900 is a family of engines produced by Rolls Royce (deployed on, *inter alia*, the Airbus A380 passenger jet). Avio produces key components for both engines. Engines produced by CFM International and the Engine Alliance (both joint ventures in which GE is a 50% partner) compete with the PW1100G and Trent 900, respectively.

[21] *GE/Avio* (Case COMP/M.6844), Commission decision of July 1, 2013, para.17.

[22] *Ibid.*, para.74.

The Commission was concerned that GE could use Avio's existing supply relationship with Pratt & Whitney and Rolls Royce to disrupt production of each of the PW1100G and Trent 900, as well as hinder the testing and certification procuss of the PW1100G. With respect to the PW1100G, the Commission's concerns were addressed by the conclusion of a confidential commercial assurances agreement among GE, Avio, and P&W. With respect to the Trent 900, the Commission's concerns were addressed by the execution of amendments to the pre-transaction supply agreement between Avio and GE, which *inter alia*, ensured that (i) GE would be unable to harm Rolls Royce by raising prices, and (ii) Rolls Royce would have enough time to develop an alternative supplier to Avio.

Eurojet. Avio is part of the Eurojet Turbo Consortium, a group which designs and manufactures the EJ200 engine used by the Eurofighter Typhoon military aircraft (which itself is made by the Eurofighter Consortium). Avio is responsible for 20-30% of the engine's workshare, producing the gearbox, afterburner, and a part of the low pressure turbine. In assessing the competitive affects of the transaction on the EJ200, the Commission identified five separate geographic markets for the sale of the engine one for each of the EU Member States that formed the Eurofighter program – Germany, the UK, Spain, and Italy – and a fifth for international exports). The Commission found that the most important competitor to the Eurojet EJ200 in international markets is GE's F414 engine that powers the Boeing F/A-18E/F Super Hornet series. Accordingly, the Commisssion was concerned that GE would use Avio to damage the competitiveness of the EJ200. With respect to sales within participating Member State markets, the Commission noted that competition for powering the Eurofighter had run its course (as the engine platform for the Eurofighter Typhoon had been selected), and with Avio already contractually bound, GE may not have the ability or the incentive to engage in foreclosure in the short term. However, the Commission's market investigation indicated that GE could restrict investment in product updates, required modifications, and continuous improvements, thereby damaging the long-term competitiveness of the EJ200 engine in the Member State markets. With respect to international sales, the Commission concluded that GE would likely have an incentive and ability to disrupt or delay the development and success of the Eurojet program, with the aim of diverting sales towards its F414 engine. As a result, the Commission concluded that the transaction raised serious foreclosure concerns with respect to Eurojet (and therefore Eurofighter as well – see above re foreclosure potentially occuring at both the engine platform level and the aircraft platform level), both within the Member States and for international sales.

To address the Commission's concerns regarding Eurojet, GE submitted commitments which provide, *inter alia*, that Avio's decision-making ability in the Eurojet project will be limited to protecting its investment and GE will not have access to sensitive Eurojet information. After consulting the Eurojet and Eurofighter consortia the Commission concluded that the commitments adequately addressed its concerns and conditionally cleared the transaction.

MARINE HARVEST/MORPOL **(CASE COMP/M.6850)**

On September 30, 2013, the Commission conditionally cleared an acquisition of a majority stake in the Norwegian seafood company Morpol ASA ("Morpol") by another Norwegian producer of seafood, Marine Harvest ASA ("Marine Harvest"), subject to Marine Harvest's commitment to divest Morpol's farming operations in Shetland, Scotland, and the Orkney Islands. Both parties are active across the salmon supply chain, including farming, primary processing, secondary processing, and sales to other processors, distributors, and retailers.

Even though Marine Harvest had already acquired a 48.5% shareholding in Morpol in December 2012, it notified the transaction to the Commission only after submitting a mandatory public offer for Morpol's remaining shares, which resulted in Marine Harvest holding 87.1% of the shares in Morpol. The Commission found that Marine Harvest's initial acquisition of 48.5% in Morpol already conferred on it *de facto* sole control over Morpol. As a result, the Commission had reserved its right to examine in a separate procedure whether Marine Harvest may have infringed the stand-still

obligation and whether it should be subject to a fine for a failure to notify the transaction earlier.

The Commission defined the relevant markets by distinguishing between farmed and wild salmon production and between farming and primary processing of salmon products – both localized activities with high barriers to entry – and secondary processing of salmon products, which could be decentralized and was easily accessible. Because it concluded that frozen salmon and fresh salmon constituted separate relevant markets, the Commission excluded any competitive pressure from salmon harvested outside the EEA, which usually had to be frozen for importation into the EEA. The Commission also differentiated between salmon of Scottish and Norwegian origins because Scottish salmon was deemed to be of better quality, commanded a price premium of 10% on average, and was associated with distinct technical accreditation such as Protected Geographical Indication and *Label Rouge*[23] in France, as evidenced by the fact that several retailers adopted a "Scottish only" sourcing policy. The Commission also relied on an econometric analysis using price correlation techniques, which supported its finding that only a limited substitutability exists between Scottish and Norwegian salmon.

The Commission found that, whereas the market for Norwegian salmon is quite competitive and includes many strong suppliers, the market for Scottish salmon is much less competitive. The Commission concluded that the transaction raised serious horizontal concerns in the farming market for Scottish salmon in which the parties would have a combined share of 30-40% overall, and 70-80% in certain sub-segments, such as salmon bearing the French *Label Rouge* accreditation. Due to their large market share in the upstream market for the farming of Scottish salmon, the Commission concluded that the parties would be able to foreclose competitors by limiting their access to raw salmon, which is used as in input in downstream processing markets. The Commission found that other upstream competitors could not offset these negative effects because they were already producing at full capacity, and that the industry has not seen a significant increase in capacity over the past 20 years.

To address the Commission's concerns, the parties proposed commitments that initially consisted of a divestment of some of Morpol's farming operations in Shetland and Scotland. After the Commission rejected this proposal based on the proposed divestment's insufficient capacity, the parties also committed to divest Morpol's significant farming capacities on the Orkney Islands, which were to be sold to an active competitor in the Scottish salmon market. The Commission accepted this revised commitments package.

***Swissport/Servisair* (Case COMP/M.7021)**

On December 18, 2013, the Commission cleared the acquisition by Swissport France Holding SAS ("Swissport") of Servisair SAS ("Servisair") subject to commitments to divest Swissport's ground handling activities at Birmingham airport and Servisair's ground handling activities at Helsinki, London Gatwick, and Newcastle airports. Both Swissport and Servisair are active in the provision of airport ground handling, cargo handling, and related services to airlines at a number of airports in the EEA.

In line with its decisional practice, the Commission identified separate markets for: (i) ground handling services, consisting of ramp, passenger, and baggage handling services, as well as airside cargo handling services, and (ii) landside cargo handling, which includes, e.g., cargo terminal operations, warehousing and inventory control, cargo security, and handling of dangerous goods.[24] The Commission considered whether self-handling by airlines should be part of the ground handling market, but ultimately left this issue open, concluding that it would not materially

[23] *Label Rouge* is a French technical accreditation that certifies the quality of a product and is awarded by the French Ministry of Agriculture.

[24] The Commission also considered, but ultimately left open, whether offline cargo handling, i.e., services for freight which will not be or was not loaded at the airport where it is handled, could constitute a separate market.

change the assessment. As to the geographic market, the Commission concluded that for both ground handling and landside cargo handling, the geographic market would most likely be local and would not extend beyond a single airport (or neighboring airports), but ultimately left the question open.

The transaction created horizontal overlaps in 16 markets for ground handling services[25] and in three markets for cargo handling services, but the Commission ultimately expressed concerns about the transaction's impact on ground handling in only four markets: Birmingham, Helsinki, London Gatwick, and Newcastle.

The merging parties contended that ground handling was a "bidding market"[26] and, due to the tendency of airlines to award large contracts to a single provider, market shares fluctuate significantly and are not a meaningful proxy for market power. Therefore, according to the parties, rather than focusing on historical market shares, the competitive assessment should take into account the number of likely and viable future bidders. The Commission's market investigation confirmed that airlines tend to award large contracts to a single provider at a given airport, and that market shares tend to fluctuate significantly as a result. Nonetheless, in light of high renewal rates of ground handling services contracts, the Commission also found that incumbent providers were subject to only limited competitive constraints.

Based on its market investigation, and contrary to the merging parties' contention, the Commission found that the universe of credible competitors does not include ground handling providers not already active at the airport or active in other services at the same airport, airlines switching to or from self-handling, or airports providing ground handling services. The Commission also concluded that barriers to entry and expansion were relatively high, because a number of factors limited competitors' ability to enter an airport, namely: (i) cost of acquiring ground handling equipment; (ii) investment in training and overhead; (iii) the necessity to have a certain amount of contracts; and (iv) limited space available at airports. As to whether airlines hold sufficient buyer power to outweigh the negotiating power of ground handling providers, the Commission stated that the market investigation had been inconclusive and that no clear conclusion could be drawn in this regard.

The merger would have resulted in a monopoly at Newcastle airport, a near monopoly at Helsinki airport, and would have reduced the number of incumbent ground handling providers at Birmingham airport and London Gatwick from three to two. With respect to Birmingham, London Gatwick, and Newcastle, the Commission found that due to the significant "incumbency advantage"[27] enjoyed by both parties, the merger would remove an important competitive constraint. With respect to each of the four airports, the Commission assessed the viability of the merging parties' claim that the threat of airlines switching to self-handling would constrain the merged entity, but ultimately dismissed the claim as unsupported. Although the Commission's market investigation had indicated that for each of the four airports, one or more ground handling providers had expressed interest in entering the market, it ultimately concluded that there was insufficient evidence that such entry would be likely, timely, and sufficient.

To address the serious competition concerns identified by the Commission with respect to the four airports, Swissport committed to divest Swissport's ground handling activities at Birmingham airport, and Servisair's ground handling activities at Helsinki, London Gatwick, and Newcastle airports. Each divestment business included customer contracts, ground handling assets, equipment, and employees, as well as supply contracts. To ensure the viability and competitiveness of the divestment business,

[25] Of the 16 horizontally affected ground handling markets, six were "liberalized" airports, i.e., where market access is open to third-party ground handling providers. The other ten airports were "restricted" (or "closed") airports. *See* Council Directive 96/67/EC on access to the ground handling market at Community Airports, OJ 1996 L 272.

[26] *Swissport/Servisair* (Case COMP/M.7021), Commission decision of December 18, 2013, paras. 40, 65, 86-87.

[27] *Ibid.*, paras. 112, 117, 132, 142, 154.

Swissport committed to guarantee a "minimum size"[28] of the divestment business for a certain period – i.e., if, post-divestment, the divested business lost ground handling contracts Swissport would make up for the lost contracts divesting alternative ground handling contracts.

Second-phase Decisions With Undertakings

***Refresco Group/Pride Foods* (Case COMP/M.6924)**

On October 4, 2013, the Commission cleared the acquisition of Pride Foods Ltd. ("Pride Foods"), a UK company trading under the name "Gerber Emig," by Refresco Group B.V. ("Refresco"), a Dutch company, subject to Refresco's commitment to divest one of Pride Foods' production and bottling plants in Germany. Refresco and Pride Foods both produce and bottle private label non-carbonated soft drinks ("NCSDs") for retailers and contract manufacture branded NCSDs for brand owners in a number of EEA Member States. The Commission had jurisdiction over the transaction because it was capable of being reviewed under the national competition laws of five EU Member States (France, Germany, the Netherlands, Poland, and the United Kingdom).

In line with its decisional practice, the Commission confirmed the distinctions between carbonated soft drinks ("CSDs") and NCSDs, aseptic and non-aseptic production processes, and carton and PET packaging. With regard to different types of NCSDs, the Commission concluded that ready-to-drink ("RTD") teas and water belong to separate markets from other NCSDs (fruit juices, juice drinks, nectars, and still drinks). The Commission also distinguished between ambient and chilled NCSDs. Also, the Commission assessed for the first time the bottling of NCSDs for third parties and took the view that the production and bottling of private label NCSDs for retailers and the contract manufacturing of branded NCSDs for brand owners form separate product markets. The Commission analyzed the competitive impact of the transaction in the market for the production and bottling of independent private label ambient RTD tea in aseptic PET packaging and in the following four markets for the manufacturing of ambient NCSDs excluding water and RTD teas: (i) independent private label production and bottling in carton packaging; (ii) independent private label production and bottling in aseptic PET packaging; (iii) contract manufacturing in carton packaging; and (iv) contract manufacturing in aseptic PET packaging. These markets were found to be national in their geographic scope.

The Commission determined that the transaction would give rise to serious competition concerns in two markets: (i) private label ambient NCSDs (excluding water and RTD teas) bottled in aseptic PET in France, Germany, and Belgium, and (ii) private label ambient RTD teas bottled in aseptic PET in Germany. The Commission found that, post-transaction, Refresco and Pride Foods would have a high combined market share of 40-60% and, due to the absence of competitors with sufficient spare capacity, the merged entity would face limited competition. The Commission noted that Refresco and Pride Foods were close competitors, as indicated in retailers' responses to the market investigation and evidenced by the submitted tender data. It is notable that the Commission's market reconstruction data suggested higher combined market shares (up to 80%) than the ones provided by the parties themselves, mainly because the former did not take into account the suppliers that partnered with a certain retailer or that were vertically integrated with retail groups and, therefore, could not be viewed as posing a competitive constraint to the merged entity.

Importantly, the Commission's market investigation indicated that demand for aseptic PET packaging services had increased in France, Germany, and Belgium, and is expected to continue increasing as a result of the shift in demand from carton packaging to aseptic PET packaging. The Commission concluded that the merged entity would not be constrained by PET suppliers located outside France, Germany, and Belgium because these suppliers had a very limited presence outside their national markets, largely due to transport costs. The Commission also noted that capacity

[28] *Ibid.*, para. 250.

expansion by existing or potential competitors is unlikely given the existence of high barriers to entry due to the significant costs of building new aseptic PET lines, established commercial relationships, the need to comply with the applicable regulatory regimes, and the need for experienced personnel.

The Commission found that the transaction would not give rise to concerns in the market for the supply of private label NCSDs (excluding RTD teas and water) in carton to retailers because the parties' combined share would remain modest (20-30% in France and 30-40% in Germany), and because the merged entity would face robust competition from a number of competitors from either within or outside the relevant national markets. In the Commission's view, in Germany, Belgium, and France, the merged entity would be constrained by competitors, in particular by German suppliers who experienced a significant overcapacity.

The Commission identified no competition concerns with respect to the market for private label ambient NCSDs bottled in both carton and aseptic PET in the Netherlands. Despite the large combined market shares post-transaction (70-80% for carton and 40-50% for aseptic PET packaging), the parties would continue to be subject to particularly strong competitive constraints from Dutch competitors with substantial market power and from German-based suppliers.

To address the Commission's concerns, Refresco offered to divest either Refresco's Grünsfeld plant in Germany or Pride Foods' Waibstadt plant in Germany. The Commission concluded that the former would not remove competition concerns due to its limited capacity in aseptic PET and high productions costs. The Commission also concluded that only the Waibstadt plant had capacity to bottle sufficient volumes to constrain the merged entity in France, Germany, and Belgium. Refresco submitted revised commitments that were limited to the divestment of the Waibstadt plant, but excluded from the divested business certain contract manufacturing and private label contracts, as well as IT, R&D, master planning, sales and financial accounting support. In the Commission's view, the revised commitments did not ensure the ability of the divested business to compete effectively on a lasting basis because, *inter alia*, they did not include customer records and private label contracts and the purchaser criteria were not sufficient to ensure that Refresco would be able to find a suitable buyer that would operate as a viable competitor. Refresco modified its proposal, and the Commission accepted the final commitments package that included the private label contracts, customer orders, and additional restrictions in relation to purchaser criteria.

Outokumpu/Inoxum (Case COMP/M.6471)

On October 21, 2013, the Commission's decision of November 7, 2012, was published, clearing, subject to commitments, the acquisition of Inoxum GmbH ("Inoxum") by Outokumpu Oyj ("Outokumpu") following a Phase II investigation. Both parties are active in the manufacture, sale, and distribution of a variety of stainless steel products.

The Commission identified horizontal overlaps in the production of: (i) intermediate "slabs"; (ii) hot rolled ("HR") products; (iii) cold rolled ("CR") products; and (iv) precision strips (a subset of CR products). The Commission also found that the parties' activities overlapped in the market for distribution of stainless steel goods. The Commission concluded, on the basis of its market investigation, that the geographic scope of the relevant markets could not be any wider than the EEA, owing to price differences that could not be explained by distribution and transport costs alone.

The Commission identified competition concerns only in the CR market. The Commission considered whether this market could be further subdivided on the basis of: (i) grade purity; (ii) surface finish; and (iii) end-use of grade, but ultimately left this question open. The Commission found that the transaction was a four-to-three merger in the CR market, where the combined entity would have market shares of 50-60%. In addition, the Steel Parties' two largest competitors each had only 10-20% shares, with other EEA producers' and foreign competitors' shares not exceeding 5%. Furthermore, the Commission determined that the

combined entity would have over 50% of industrial capacity in the CR market.

The Commission considered whether, despite its high market shares, the combined entity would be effectively constrained by (i) entry; (ii) imports from outside the EEA; (iii) existing competitors; and (iv) excess capacity in the sector. The Commission determined that entry was unlikely to constrain the merged entity because an entrant would not be profitable unless it could quickly capture a substantial share of the market, which the Commission found unlikely given the maturity of the stainless steel market.

The Commission's market investigation indicated that imports from outside the EEA were not equivalent to EEA-sourced products in terms of consistency and quality. Accordingly, the Commission concluded that these imports would not constrain the merged entity. Similarly, the Commission found that the parties' existing competitors would not constrain the merged entity: because CR customers generally source product from multiple manufacturers, they would have no choice but at least partially to source from the merged entity in the future. In addition, the Commission concluded that the parties' competitors do not have sufficient capacity to provide an alternative for the parties existing customers should the combined entity raise prices.

To address the Commission's concerns, the parties submitted four sets of commitments. The Commission rejected the initial proposal, which would have seen several unrelated plants divested, because it did not believe that the plants constituted a viable business. The second, third, and fourth commitment proposals provided for: (i) the divestment of Inoxum's stainless steel production, sales, and marketing assets at Terni in Italy; (ii) servicing centers in Italy (pre-transaction owned by Inoxum) and Germany (pre-transaction owned by Outokumpu); (iii) an option for the purchaser to acquire additional servicing centers in France (pre-transaction owned by Inoxum) and the UK (pre-transaction owned by Outokumpu), along with warehousing across Italy (pre-transaction owned by Inoxum); and (iv) an option for the purchaser to acquire the Terni site's forging business. The fourth set of commitments also gave the divestiture purchaser the option of excluding from the divestment package Outokumpu's additional production line at Temi, which Outokumpu considered unrelated to the Commission's concerns, but which the Commission considered to be of potential use to the purchaser. . The Commission accepted the fourth commitments package, and cleared the transaction accordingly.

An unusual aspect of this case was a parallel state aid complaint. During the Commission's merger investigation, it was alleged that Outokumpu had received capital from the Finnish state and that these funds were used in connection with Outokumpu's acquisition of Inoxum. The Commission concluded that, without prejudice to the question of whether the Finnish state's behavior constituted state aid, there was no resulting effect on Outokumpu's market power in the present case.

Procedural Issues

European Commission Package Aimed At Simplifying Its Procedures Under The EU Merger Regulation

On December 5, 2013, the Commission published a package of measures (the "Merger Review Package") designed to simplify the EU merger review process.[29] In particular, the Merger Review Package seeks to: (i) expand the types of concentration eligible for treatment under the simplified procedure (under the Short Form CO); (ii) reduce the amount of information that notifying parties must provide; and (iii) streamline the pre-notification process.

The revisions, effective as of January 1, 2014, update the Notice on Simplified Procedure[30] and the Implementing Regulation.[31] The Merger Review Package also revised the

[29] *See* Commission Press Release IP/13/1214, "Mergers: Commission cuts red tape for businesses," December 5, 2013.

[30] *See* Commission Notice of 5 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ 2013 C 366.

[31] *See* Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the

Commission's model texts for divestiture commitments[32] and trustee mandates,[33] and introduced a new set of explanatory guidelines on best practices for divestiture commitments.[34]

The simplified procedure was already available for: (i) joint ventures with negligible EEA activities; (ii) transitions from joint to sole control; (iii) concentrations that involve no horizontal or vertical relationships between the parties; and (iv) concentrations that involve horizontal overlaps with combined market shares of less than 15% and/or vertical relationships where the individual or combined market shares of parties in each relevant upstream or downstream market is/are less than 25%. The Merger Review Package broadens the application of the simplified procedure by: (i) raising the combined market share threshold for horizontal overlaps to 20%; (ii) raising the market share threshold for vertical relationships to 30%; and (iii) providing that horizontal mergers that involve a combined market share of up to 50% can qualify where they lead to only a small increase in pre-existing concentration levels (they must result in a Herfindahl-Hirschman Index ("HHI") delta of under 150). The Merger Review Package also introduces a "super-simplified" notification process for joint ventures that are not active in Europe.

Although the Merger Review Package removes certain formalistic information requirements that previously applied to the normal procedure (e.g., providing paper copies of annual reports, complete subsidiary lists and HHI calculations), it also expanded the applicable documentary requirements to include: (i) minutes of board and shareholder meetings at which the notified transaction has been discussed; (ii) board and shareholder documents that discuss alternative acquisitions; and (iii) board and shareholder analyses from the last two years that assess any of the affected markets under review. The simplified procedure now also requires the provision of board and shareholder presentations that analyze the notified transaction.

The revised forms are still centered on the identification of markets featuring horizontal or vertical relationships but now stress the need for notifying parties to submit information not only on the markets they consider to be relevant, but "all plausible alternative product and geographic market definitions . . . [which] can be identified on the basis of previous Commission decisions and judgments of the Union Courts and (in particular where there are no Commission or Court precedents) by reference to industry reports, market studies and the notifying parties' internal documents."[35] For obvious reasons, the requirement to explore *all plausible alternative markets* will be particularly burdensome in complex transactions. This might be an attempt to codify the Commission's practice, as it has increasingly required parties to submit information on a broad range of potential markets.

In addition to these changes in the substantive requirements, the Merger Review Package seeks to 'streamline' the pre-notification process. Pre-notification contacts with the Commission were already encouraged under the old rules, but, in recent years, there have been an increasing number of complaints about the length and burden of this process. The Merger Review Package provides examples of cases where pre-notification is considered avoidable, such as for transactions involving no horizontal or vertical overlaps. The Merger Review Package also emphasizes the possibility of requesting waivers from the obligation to provide certain types of information during pre-notification.

control of concentrations between undertakings, OJ 2013 L 336 ("Implementing Regulation").

[32] *See* the Template of Commitments to the European Commission, http://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf.

[33] *See* the Template of the Trustee Mandate, http://ec.europa.eu/competition/mergers/legislation/trustee_mandate_en.pdf.

[34] *See* Commission Explanatory Note: "Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation," December 5, 2013.

[35] Implementing Regulation, Annex 1, section 6.

It remains to be seen whether the Merger Review Package will materially reduce the burden of notifying transactions where there are more significant horizontal or vertical relationships between the merging firms. While the Commission has streamlined certain aspects of its notification forms, the majority of the removed requirements did not present a significant burden on notifying parties. Moreover, the increased focus on internal documents and information on *all plausible alternative markets* could increase the notification burden for concentrations that have the potential to raise substantive issues.

STATE AID

ECJ Judgments

***Association Vent De Colere! Federation nationale and Others v Ministre de l'Écologie, du Developpement durable, des Transports et du Logement and Ministre de l'Économie, des Finances et de l'Industrie* (Case C-262/12)**

On December 19, 2013, the ECJ issued a preliminary ruling finding the French mechanism for the support of electricity generation from wind turbines to constitute an intervention through state resources under Article 107(1) TFEU, *inter alia,* distinguishing the case from the seminal ruling in *PreussenElektra.*[36]

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. Vent de Colère!, a national federation opposed to the wind-power industry, and other individuals brought the underlying action before the French Conseil d'État, claiming that this funding mechanism constitutes state aid and should therefore be annulled. The Conseil d'État requested that the ECJ confirm whether this measure constitutes "intervention by the state or through state resources" for the purposes of Article 107(1) TFEU.

The ECJ reiterated that, to be classified as state aid, first, the advantage under review must be granted directly or indirectly through state resources and must be attributable to the state.

As regards state attribution, the ECJ observed that the measure in question was established by the French state under French law, and is thus attributable to the state. The ECJ recalled that the concept of "intervention through state resources" is intended also to cover advantages granted through a public or private body appointed or established by the state to administer the aid. This would include all financial resources that remain under control of the state and thus available to state authorities.

Turning to the French measure at hand, the ECJ found that the state had an important role in the functioning of the mechanism: the level of the charge collected from final consumers is set by a ministerial order; the law provides for an administrative penalty for non-payment of the charge, and the French state guarantees full recovery of additional costs, should charges collected from final consumers turn out to be insufficient. Furthermore, the ECJ emphasized that the sums collected are centralized by a body established under public law ("*Caisse des depots et des consignations*"), which provides administrative, financial, and accounting management services to the French energy regulatory authority, and which acts as an intermediary in the management of those funds without deriving any profits from that activity. Therefore, the ECJ concluded that the funds managed by *Caisse des depots et des consignations* remained under public control.

The ECJ thus distinguished the facts of the case under review from those of *PreussenElektra*. In that case, the ECJ found that the funds involved did not constitute state resources, because the relevant Member State did not appoint the relevant private undertakings to manage state resource; instead, such undertakings were bound by an obligation to purchase by means of their own financial

[36] *PreussenElektra AG v. Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* (Case C-379/98) 2001 ECR I-2099.

resources. Consequently, the funds in *PreussenElektra* were not at any time under public control.

The ECJ therefore concluded that the French mechanism constitutes an intervention through state resources.

***Telefónica SA v. Commission* (Case C-274/12 P)**

On December 19, 2013, the ECJ upheld the General Court's decision dismissing Telefónica's action to annul a 2009 Commission decision that a Spanish taxation measure breached EU state aid rules. The ECJ clarified which parties may challenge Commission decisions before the EU courts.

The Spanish scheme provided that, under certain circumstances, the acquisition of a shareholding in a company not established in Spain could result in financial goodwill that was capable of being amortized over up to 20 years, reducing the acquiring company's tax burden. Telefónica had used this scheme in connection with its acquisition of two shareholdings in the UK and the Czech Republic. However, in 2009, the Commission concluded that this measure constituted unlawful state aid. Accordingly, in line with the Commission's decision, Telefonica would have been required to repay the advantages obtained since December 21, 2007, the date on which the Commission formally opened its investigation into the matter.

A key question before the ECJ was whether Telefónica could rely on changes, introduced in the Lisbon Treaty, to the rules on which parties are deemed to have standing (i.e., sufficient legal interest) to challenge acts of the EU institutions before the EU courts. The ECJ was asked to interpret the scope of the phrase "regulatory act which is of direct concern to them and does not entail implementing measures."[37]

The ECJ explained that Telefónica could not take advantage of this new aspect of the standing test in this instance. The ECJ held that the prohibition decision was not a "regulatory act [that did] not entail implementing measures" because it was addressed to Spain; accordingly, the consequences for those who had benefitted from it necessarily had to be contained in a national administrative notice. The ECJ underlined that Telefónica would be able to contest the measures giving effect to the Commission decision before national courts. For this reason, the ECJ also held that the decision of the General Court did not breach Telefónica's EU law right to effective judicial protection.

The ECJ also confirmed that undertakings cannot in principle contest Commission decisions prohibiting aid schemes if their only claim to being concerned by it is by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. The ECJ concluded that this did not rise to the level of the requisite "direct concern," as required under the relevant legislation.

This decision shows that the ECJ is continuing to interpret the new limb of the standing test introduced with the Lisbon Treaty restrictively and that Commission decisions prohibiting state aid are unlikely to fall within its ambit. The ECJ has confirmed that the appropriate routes for undertakings to challenge such decisions is through national courts, which can, by referring the matter to the ECJ, assess the substance of the legal challenge.

General Court Judgments

***MOL v. Commission* (Case T-499/10)**

On November 12, 2013, the General Court annulled a Commission decision declaring that aid granted by Hungary to the energy company MOL was incompatible with the internal market and had to be recovered. The General Court established that the contested measure was not selective, i.e., it did not grant MOL preferential treatment, and was therefore not in breach of Article 107 TFEU.

In its decision of June 9, 2010,[38] the Commission analyzed the combined effect of two measures adopted by the Hungarian authorities in light of the EU norms on state aid. The first measure was a 2005 agreement between the

[37] Article 263(4) TFEU, OJ 2010 C 83/162.

[38] Commission decision of June 9, 2010 on State Aid C 1/09 (ex NN 69/08) granted by Hungary to MOL Nyrt.

minister in charge of mining issues and MOL, extending MOL's mining rights, fixing the mining fees to be paid by MOL to the state over a fifteen-year period, and providing that such rates could not be changed. The second measure was a 2008 amendment to the Hungarian Mining Act, which resulted in a general increase of mining fees. According to the Commission, these measures conferred an unfair selective advantage on MOL who, due to the 2005 agreement, was exempted from the 2008 fee increase, while its competitors were not.

The General Court concluded that these measures were not selective, and therefore did not amount to unlawful state aid, for the following reasons.

First, the legal framework governing mining rights extension agreements is not selective. The Hungarian Mining Act allows any mining undertaking to apply for the extension of its mining rights and the criteria laid down by the Mining Act for the conclusion of an extension agreement are objective and apply to any potential interested operator that fulfills those criteria.

Second, the fact that, in practice, MOL was the only undertaking in the hydrocarbons sector to have concluded an extension agreement with the Hungarian government was deemed irrelevant. Indeed, this may be explained by the fact that other operators did not apply for an extension of their mining rights, or by the failure to reach an agreement on the rates of the mining fees.

Third, the fact that the Hungarian authorities have a margin of discretion as regards the level of increase of the mining fees cannot automatically be regarded as conferring a selective advantage on certain undertakings, in particular, on MOL. In this case, such margin of discretion was deemed objectively justified because it enabled the authorities to preserve equal treatment between companies when fixing fees, by adjusting them depending on the characteristics of each extension application.

Fourth, the Hungarian Mining Act establishes that in the event of an extension of mining rights, the rates of the mining fees are to be determined exclusively by the extension agreement. Thus, the fact that, pursuant to the 2005 agreement, such fees would remain unchanged in spite of subsequent fee increases constituted a mere application of this rule.

Fifth, the fact that the rates were set through a negotiation does not suffice to render the agreement "selective." Indeed, this would only be so if the Hungarian authorities had exercised their discretion during the negotiations resulting in the 2005 agreement in such a way as to favor MOL by unjustifiably agreeing to a low fee level.

The General Court therefore annulled the Commission's decision of June 9, 2010, on state aid granted by Hungary to MOL, due to the lack of selectivity.

POLICY AND PROCEDURE

ECJ Judgments

***Elf Aquitaine v. Commission* (Case C-521/09 P-DEP)**

On October 1, 2013, the ECJ issued an order setting the total amount of costs to be reimbursed by the Commission to Elf Aquitaine following the annulment of the Commission decision issued in the monochloracetic cartel case.

On January 19, 2005, the Commission fined Arkema, a subsidiary of Elf Aquitaine, for its participation in the monochloracetic cartel.[39] Following an unsuccessful appeal before the General Court,[40] Elf Aquitaine turned to the ECJ, which set aside the General Court's judgment, annulled the Commission's decision, and ordered the Commission to pay the costs of proceedings at first instance.[41]

The ECJ's Rules of Procedure specify that recoverable costs include (a) sums payable to witnesses and experts and (b) "expenses necessarily incurred by the parties for the purposes of the proceedings, in particular the travel and

[39] *MCAA* (Case COMP/E-1/37.773), Commission decision C(2004) 4876 final of January 19, 2005.

[40] *Elf Aquitaine v. Commission* (Case T-174/05) 2009 ECR II-183.

[41] *Elf Aquitaine v. Commission* (Case C-521/09) 2011 ECR I-8947.

subsistence expenses and the remuneration of agents, advisers or lawyers."[42] Elf Aquitaine and the Commission, however, could not agree on the amount of the recoverable costs. The Commission concluded that Elf Aquitaine's application for a total of €251,097.99 of lawyers' fees, representing over 1,000 hours of work carried out by 19 lawyers, far exceeded what could be considered necessary expenses. Elf Aquitaine disagreed, and applied to the ECJ for the taxation of recoverable costs, i.e., it asked the ECJ to determine the costs to which it is lawfully entitled.

The ECJ first made clear that it had jurisdiction to rule on an application for taxation of recoverable costs of the proceedings before the General Court because its judgment on Elf Aquitaine's appeal annulled the General Court's judgment and terminated the proceedings at first instance.

The ECJ then recalled that recoverable expenses are limited to those necessarily incurred for the purpose of the proceedings. The ECJ is thus authorized to determine the amount that may be recovered from the party ordered to pay the costs. To do so, the ECJ must take account of the subject matter and nature of the dispute, its importance from the point of view of EU law and the difficulties presented by the case, the amount of work that the contentious proceedings generated for the agents or counsel involved, and the economic interests which the dispute presented for the parties.

In assessing these criteria, the ECJ agreed with Elf Aquitaine that the case raised complex questions that were important for a proper understanding and the correct application of EU law and that, given the amount of the fine involved (€45 million), the economic interest was, at the least, "not inconsiderable."[43] It therefore did not fix the recoverable amount of the lawyers' fees as low as the Commission requested (€24,400). However, it also found that the part of the lawyers' work that was attributable to extensive legal research of little relevance for the purposes of the case was not "necessarily incurred" for the purposes of the proceedings and was not recoverable. The ECJ therefore fixed the recoverable amount of lawyers' fee at €90,000, much lower than what Elf Aquitaine claimed.

ECJ Advocate General Opinions

Commission v. EnBW (Case C-365/12 P)

On October 3, 2013, Advocate General Cruz Villalon advised the ECJ to set aside the General Court's judgment annulling the Commission decision refusing EnBW access to the case file in the gas insulated switchgear cartel.

After the Commission fined a number of companies for having participated in a cartel in the market for gas insulated switchgear,[44] EnBW sought full access to the documents relating to the proceedings under the Transparency Regulation[45] to strengthen its damages claim. The Transparency Regulation gives a right of access to all documents held by an institution of the EU, subject to some exceptions, *inter alia* where disclosure would undermine the protection of (i) commercial interests of a natural or legal person; (ii) court proceedings and legal advice; or (iii) the purpose of the inspections, investigations and audits.

The Commission classified the requested documents into five categories: (1) documents provided in connection with an immunity or leniency application; (2) requests for information and the parties' replies to those requests; (3) documents obtained during inspections; (4) statement of objections and the parties' replies thereto; and (5) internal documents such as documents relating to the facts and procedural documents. The Commission then refused to grant access to any of these categories of documents on the ground that each of the five categories fell within the exceptions provided for by the Transparency Regulation,

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[42] Rules of Procedures of the Court of Justice, JOCE, OJ 2012 L 265/1, Article 144.

[43] *Elf Aquitaine v. Commission* (Case C-521/09 P-DEP), order of October 1, 2013, para. 21.

[44] *Gas Insulated Switchgear* (Case COMP/38.899), Commission decision of January 24, 2007.

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

and that there was no overriding interest in granting access.[46]

The General Court found that the Commission wrongly relied on a general presumption that access should be refused and should have undertaken an individual examination of each of the documents concerned. The General Court also found that categories 1, 2, 4, and 5 were not useful because no real difference could be detected between the types of documents allocated to each category. The General Court therefore concluded that the protection of the purpose of the investigations and of commercial interests of the undertakings concerned could not justify the refusal of access to the documents and annulled the Commission's decision. The Commission appealed the General Court's judgment before the ECJ.[47]

AG Villallon agreed with the Commission that the interpretation of the Transparency Regulation should take into account other specific EU rules, such as article 57(2) of Regulation 1/2003[48] that grants the parties concerned limited access to the Commission's file. Contrary to the Commission's position, however, he concluded that the General Court did in fact interpret the Transparency Regulation taking into account other EU rules, including the rules on access to documents generated or used in cartel proceedings.

AG Villalon went on to conclude that, due to the existence of specific rules on access to documents involved in cartel cases, a general presumption that disclosure of these documents may affect the purpose served by cartel proceedings should apply. This presumption should apply even where the specific rules grant partial access on a conditional basis and should be fully effective vis-à-vis parties that have in principle no right to access documents in cartel proceedings, such as EnBW in the present case. These parties should, however, still have the opportunity to show that a given document is not covered by that presumption or that there is a greater public interest in justifying its disclosure.

As regards access to leniency documents, AG Villalon applied the same reasoning as in *Donau Chemie*[49] and *Pfleiderer*[50] and concluded that it is necessary to strike a balance between, on the one hand, the public interest in leniency programs, and on the other, the right of individuals to bring actions for damages. In the present case, the Commission did not invoke reasons which related to possible detrimental effects on a specific leniency program, but general and abstract reason relating to generic 'leniency proceedings'.[51] This amounts to a refusal in principle that makes it impossible for a specific request to be assessed on a case-by-case basis. AG Villalon therefore agreed with the General Court that the Commission had failed to justify its refusal to grant access to leniency documents.

The Commission argued that the General Court wrongly limited the scope of application of the first presumption, designed to protect commercial interests (i.e., business secrets). AG Villalon stated that the General Court had erred in refusing to even consider the possibility that there might be a protectable commercial interest simply because of the age of the documents, and should therefore have applied the presumption that their disclosure might undermine the interests protected by cartel proceedings.

Finally, AG Villalon found that the General Court should have applied the third presumption, designed to protect the decision-making process, to category 5 documents, even

[46] Commission Decision SG. E.3/MV/psi D(2008) 4931 of June 16, 2008.

[47] *EnBW v. Commission* (Case T-344/08), judgment of May 22, 2012, not yet published.

[48] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJ 2003 L 1/1.

[49] *Donau Chemie and Others* (Case C-536/11), judgment of June 6, 2013, not yet published.

[50] *Pfleiderer* (Case C-360/09) 2011 ECR I-5161.

[51] *Commission v. EnBW Energie Baden-Wurttemberg* (Case C-365/12 P), opinion of AG Cruz Villalon, para 76.

though the proceedings were over. Applying the ECJ's reasoning in *Odile Jacob*,[52] he concluded that, because a decision concluding proceedings in a given matter is reviewable by the EU courts, said proceedings are not closed. The disclosure of the documents containing internal opinions would therefore likely undermine the decision-making process in relation to new decisions in these proceedings if pending legal challenges, even concerning decisions other than those relating specifically to undertakings against which EnBW was proceeding, were successful.

AG Villalon therefore proposed that the ECJ set aside the General Court's judgment. Should the ECJ follow the opinion of AG Villalon, it would limit private plaintiffs' ability to use the Transparency Regulation to access documents produced or submitted in cartel proceedings, in particular leniency documents, while ensuring that the same balancing exercise as the one first defined in *Pfleiderer* will also be conducted when applying the Transparency Regulation to leniency documents.

[52] *Odile Jacob* (Case C-404/10), judgment of June 28, 2012, not yet published.