HORIZONTAL RESTRAINTS

ECJ Judgments

Ballast Nedam NV v. Commission (Case C-612/12 P)

On March 27, 2014, the Court of Justice upheld Ballast Nedam NV's ("Ballast Nedam") appeal against the General Court's 2012 refusal to set aside certain aspects relating to Ballast Nedam of the Commission's September 13, 2006, decision, finding that, between 1994 and 2002, several bitumen suppliers and road builders had regularly fixed prices for road pavement bitumen in the Netherlands.[1] The Commission imposed fines totaling €266.7 million on 14 companies, including three undertakings from the Ballast group: the parent company, Ballast Nedam, its wholly-owned subsidiary Ballast Nedam Infra BV ("Ballast Infra"), and Ballast Infra's wholly-owned subsidiary Ballast Nedam Groud en Wegen ("BNGW"). The companies involved in the Commission's decision, including Ballast Nedam[2] and Ballast Infra, appealed to the General Court.

The General Court had dismissed all the actions in their entirety, except for the appeals by Shell[3] and Ballast Infra.[4] The General Court had found that the Commission had violated Ballast Infra's rights of defense by failing to indicate in its statement of objections ("SO") that it considered attributing liability to Ballast Infra not only for Ballast Infra's direct involvement in the cartel starting in October 2000, but also for the previous actions of Ballast Infra's wholly-owned subsidiary BNGW. (In the SO, the Commission referred only to Ballast as a direct participant in the cartel.) The General Court explained that the Commission could not just refer in general terms to the concept of "undertaking" within the meaning of Article 101 TFEU and to the presumption of liability for parent companies having a 100% shareholding in a subsidiary. Instead, the Commission was required to indicate clearly in the SO its intention to apply the presumption of the actual exercise of influence by the parent company over its subsidiary. In more concrete terms, the SO must be addressed to the parent company on the ground that it exercised decisive influence over its subsidiary's conduct.

Because the Commission had not done so, the General Court concluded that Ballast Infra could not defend itself against this allegation and reduced the fine imposed on Ballast Infra from €4.65 million to €3.45 million. While the General Court dismissed Ballast Nedam's similar appeal, it acknowledged that the wording used by the Commission in its SO could have been clearer.

On appeal, the Court of Justice held that the General Court had erred in law in finding that Ballast Nedam's rights of defense had not been infringed. The Court of Justice found that the Commission did not indicate that the SO was addressed to Ballast Nedam because it exercised decisive influence over BNWG. Accordingly, the General Court could not conclude that Ballast Nedam knew that it was likely to be the addressee of the Commission's final decision. The Court of Justice also emphasized that the SO's wording was ambiguous, and no SO was sent to BNGW.

Accordingly, the Court of Justice annulled the Commission decision to the extent that it concerned Ballast Nedam during the period from June 21, 1996 to September 30, 2000 and reduced the fine imposed on Ballast Nedam from €4.65 million to €3.45 million.

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

[2] *Ballast Nedam v. Commission* (Case T-361/06), not yet published.

[3] *Shell v. Commission* (Case T-343/06), judgment of September 27, 2012, not yet published.

[4] *Ballast Nedam Infra v. Commission* (Case T-362/06), judgment of September 27, 2012, not yet published.

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ECJ Advocate General Opinions

Kone AG & Others (Case C-557/12), Opinion of AG Kokott

On January 30, 2014, Advocate General ("AG") Kokott advised the Court of Justice on the previously unsettled question in EU law of whether cartel members can be liable for damages resulting from "umbrella pricing." AG Kokott explained umbrella pricing as follows: "There is said to be umbrella pricing when undertakings that are not themselves party to a cartel, benefitting from the protection of the cartel's practices (operating 'under the cartel's umbrella', so to speak), knowingly or unknowingly set their own prices higher than they would otherwise have been able to under competitive conditions." In AG Kokott's view, EU law requires that customers of non-cartel members be able to claim compensation for their losses before national courts.[5]

The AG's opinion was on request for a preliminary ruling from the Austrian Supreme Court. A customer of a non-cartel member sued four companies that participated in the elevator cartel. Austrian law categorically excludes such umbrella pricing claims. The Austrian Supreme Court wanted to know whether EU law precluded such a categorical exclusion of liability.

First, the AG opined that the issue of civil liability of cartel members for umbrella pricing is a matter of EU, not national, law. The principle that any individual is entitled to claim compensation for loss sustained that is caused by an infringement follows from EU law itself – specifically, from the prohibition in Article 101 TFEU.[6] Holding otherwise would run counter to the fundamental objective of EU competition law (which is to create a "level playing field"), and would invite "forum shopping."[7] However, details of applications of claims and their rules for actual enforcement (*e.g.*, jurisdiction, procedure, time-limits) are dictated by national law.[8]

Second, the AG set out the necessary conditions for a finding of a causal link between a cartel and umbrella pricing, stating that a direct causal link can be assumed if the cartel was at least a "contributory cause"[9] of the umbrella pricing, provided two conditions are met:

- The loss resulting from umbrella pricing is reasonably foreseeable to the cartel members. The AG noted that it is common business practice for undertakings to keep a close eye on market trends and to take those trends into consideration when making commercial decisions.[10] Accordingly, loss resulting from umbrella pricing is not an occurrence "which is always atypical or unforeseeable by the members of the cartel."[11]
- Compensation is consistent with the objectives of competition law. The AG opined that an obligation to afford compensation is both "part and parcel" of the enforcement of competition rules and capable of correcting the negative consequences caused by infringements.[12]

Because umbrella pricing claims can meet both of these conditions, categorical exclusion of umbrella pricing claims by national law from the outset would run counter to the practical effectiveness EU competition rules.

Finally, the AG explained that, under the proposed approach, cartelists would not automatically be liable for umbrella pricing claims. Rather, it would always be necessary to carry out a comprehensive assessment of the circumstances. This shifts the issue from the level of pure theory to that of production of evidence, and, in her opinion,

5 AG Kokott Opinion, para. 2.

6 *See Courage and Crehan* (Case C-453/99) 2001 ECR I-6297, paras. 25-26.

7 AG Kokott Opinion, para. 29.

8 *Manfredi* (Joined Cases C-295/04 to C-298/04) 2006 ECR I-6619.

9 AG Kokott Opinion, para. 36.

10 *Ibid.*, para. 46.

11 *Ibid.*, para. 52.

12 *Ibid.*, paras. 57-82.

is the best way to contribute to the effective enforcement of competition rules.

MasterCard and Others (Case C-382/12 P), Opinion of AG Mengozzi

On January 30, 2014, AG Mengozzi advised the Court of Justice to dismiss MasterCard's appeal against the General Court's judgment of May 24, 2012,[13] upholding the Commission's decision of December 19, 2007, finding that MasterCard's intra-EEA fallback multilateral interchange fee ("MIF") infringed EU competition law.[14]

An interchange fee is a fee charged by the cardholder's bank to the merchant's bank for processing a payment card transaction. Such fees may be set multilaterally or bilaterally between individual banks. MasterCard's is MIF is binding on all banks that participate in the MasterCard scheme, in the absence of bilateral arrangements between the cardholder's and merchant's banks.

Card transactions subject to a MIF thus operate as follows. First, the merchant's bank charges the merchant a fixed fee for processing the transaction. Second, that fee is deduced from the price the merchant receives from the consumer. Third, the cardholder's bank pays the merchant's bank the retail price less the agreed MIF. Fourth, the merchant's bank recoups the MIF from the fixed fee it charges to the merchant. The fixed fee paid by the merchant for processing a card transaction may be passed on to consumers in retail price goods or services.

The Commission found that the arrangements of the MasterCard payment organization in relation to the setting of the MIF constituted an anticompetitive decision by an association of undertakings. The Commission did not fine MasterCard for breaching Article 101 TFEU because MasterCard's predecessor had duly notified the arrangements in question to the Commission in 1992 and 1995 pursuant to Regulation 17/62.[15] The Commission did, however, order MasterCard to end the infringing conduct within six months subject to a daily penalty payment. The General Court confirmed the Commission's decision.

MasterCard appealed the General Court's judgment to the Court of Justice. Lloyds TSB Bank plc and Bank of Scotland plc. (together, "LBG") and Royal Bank of Scotland plc ("RBS") cross-appealed. The appellants argued that the General Court: (i) incorrectly found that MasterCard constituted an association of undertakings; (ii) applied an incorrect legal test for assessing whether an ancillary restriction is objectively necessary; and (iii) incorrectly applied Article 101(3) TFEU by disregarding the fact that the MIF's benefits to consumers outweighed any negative effects on competition.

Association of undertakings. Relying on the criteria applicable to public bodies with a mainly professional mission, MasterCard submitted that an entity cannot qualify as an association of undertakings unless it is composed of a majority of representatives of the undertakings concerned and is free to take its decisions in their exclusive interest under applicable rules of national law.

AG Mengozzi dismissed these criteria as irrelevant with regard to private law bodies with a principally commercial aim, such as MasterCard. MasterCard's position was overly restrictive and difficult to reconcile with the broad interpretation of the concept of association of undertakings under the relevant case law: an entity constitutes an "association of undertakings" if it constitutes the framework in which (or the instrument whereby) the undertakings concerned coordinate their conduct on the market, provided that coordination or the results achieved are not imposed by the public authorities.

AG Mengozzi concluded that the General Court was entitled to find that MasterCard was an association of undertakings. MasterCard's IPO in 2006—following which

13 *MasterCard and Others v. Commission* (Case T-111/08), judgment of May 24, 2012.

14 *MasterCard* (Case COMP/34.579), *EuroCommerce* (Case COMP/36.518), and *Commercial Cards* (Case COMP/38.580), Commission decision of December 19, 2007. *See also* the summary of *Visa MIF* (Case AT.39398), Commission decision of December 8, 2010, which concerns similar issues.

15 Council Regulation 17/62/EEC, First Regulation implementing Article 85 and 86 of the Treaty, 1962 OJ L 13/204.

the participating banks could no longer directly take part in the decision-making process for setting the MIF—did not alter this conclusion, because MasterCard's decisions still reflected the collective interest of the participating banks.

Objective Necessity. The AG concluded that the General Court had correctly assessed the objective necessity criterion. AG Mengozzi observed that, to determine whether an ancillary restriction is objectively necessary, European courts have inquired whether a transaction or scheme would not be possible, effective or viable "but for" the restriction in question. Accordingly, an ancillary restriction is objectively necessary only where it is indispensable for the agreement to fully satisfy its legal and economic function and/or where its absence would seriously jeopardize or render impossible the agreement's implementation. The mere fact that the absence of the MIF would have adverse consequences for the functioning of the MasterCard system was not sufficient for the MIF to be regarded as being objectively necessary, so long as that system was capable of functioning without it.

Application of Article 101(3) TFEU. AG Mengozzi found that the General Court did not err in holding that the advantages flowing from the MIF had to be established with regard to merchants specifically (*i.e.*, the category of consumers affected by the MIF's restrictive effects).

AG Mengozzi concluded that, under Article 101(3) TFEU, the benefits resulting from a restrictive agreement must compensate in full *all* the consumers directly or indirectly affected by that agreement. Accordingly, benefits accruing to only one category of consumers of certain services cannot compensate for the negative effects on another category of consumers of other services on a different market. Competition law is not intended to favor one category of consumers to the detriment of another.

Having also rejected the appellants' other arguments, AG Mengozzi recommended that the Court of Justice dismiss the appeal in its entirety.

Groupement des cartes bancaires v. Commission (Cases C-67/13 P), Opinion of AG Wahl

On March 27, 2014, AG Wahl handed down an opinion addressing the boundaries between a restriction by object and a restriction by effect.[16] Leading academics such as Professor Richard Whish have recently criticized the Commission and the courts for overcomplicating the issue.[17]

In 2007, the Commission found that certain tariff measures adopted by Groupement des Cartes Bancaires ("GCB")[18] on the issuing of bank cards were anticompetitive.[19] These tariffs were targeted at only specific new members of GCB (such as internet banks and retail banks) which proposed to issue cards at lower prices. Because of the tariffs, the targeted banks were not able to issue cards at the anticipated lower prices. The Commission therefore concluded that the measure had both the object and effect of restricting competition.

GCB appealed the Commission's decision. On November 29, 2012, the General Court dismissed GCB's appeal and confirmed the Commission's analysis. GCB subsequently appealed the General Court's judgment, arguing that the General Court had erred in the application of the concept of restriction of competition by object.

AG Wahl set out the framework for classifying a restriction of competition by object. To breach Article 101 TFEU, an agreement must have as it object *or* effect the prevention, restriction, or distortion of competition. Therefore, if an agreement has as its *object* the prevention, restriction, or distortion of competition, there is no need to take into

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16 *Groupement des Cartes Bancaires* (Case C-37/13P), Opinion of AG Nils Wahl of March 27, 2014.

17 *See, e.g.*, "Panellists disagree on simplicity of object infringements", International Forum on EU Competition Law, GCR, April 3, 2014, available at http://globalcompetitionreview.com/news/article/35686/panellists-disagree-simplicity-object-infringements/.

18 GCB is an economic interest group comprised of 148 banks and managed by the largest French banks.

19 *Groupement des Cartes Bancaires* (COMP/D1/38606), Commission decision of October 17, 2007.

account its actual effects. Furthermore, certain forms of restriction—such as price-fixing, bid rigging, and market sharing—can be regarded, by their very nature, as injurious to normal competitive conditions and their anticompetitive effect is presumed. Such restrictions are generally deemed to be restrictions by object. By contrast, other forms of restriction—such as, in certain circumstances, distribution agreements—may or may not have a similarly harmful effect and their effect needs to be examined more closely. Accordingly, the key question is whether, given the context in which an agreement is concluded, the agreement has such a degree of harmfulness that its anticompetitive effect can be presumed. Only those agreements that have no credible redeeming virtues in light of experience and economics are deemed to restrict competition by object. The parties' actual subjective intent is immaterial to this analysis.[20]

Applying these principles to the GCB case:, the AG concluded that the measures' aim was to enhance the development of the acquisition activity; the measures applied to all GCB members; and the measures implied a financial contribution from GCB's members but with a direct profitability at the issuance activity level. As a result, AG Wahl found that it was not possible to conclude that the measures had such a degree of harmfulness that their anticompetitive effect could be presumed. AG Wahl therefore advised that the judgment be annulled and the case referred back to the General Court.

Commission Decisions

Visa MIF (Case AT.39398)

On February 26, 2014, the Commission announced that it had accepted commitments offered by Visa Europe ("Visa") to address its concerns regarding Visa's MIF for credit cards. Visa agreed to cut its MIF to 0.3% of the value of the transaction (a reduction of 40%-60%).[21]

The Commission's original concern[22] was that fixing the level of the MIF artificially increased the fixed fee charged by merchant's banks to merchants. This effectively set a floor below which this fixed fee would not be reduced.[23] To address these concerns, Visa proposed reducing the maximum weighted average MIFs applicable to transactions with *debit cards* to 0.2% of transaction cost.

The Commission then expressed the following additional concerns relating to MIFs:

First, MIFs set by Visa for transactions with *credit cards* reduce price competition between merchant banks, inflate the cost of accepting payment via a credit card, and ultimately increase prices for consumers.

Second, rules of "cross-border acquiring" limit the possibility for merchants to benefit from better conditions offered by banks in other countries in the EEA. The rules oblige banks to apply the MIFs of the country where the merchant is located, even if the fees in their home country are lower. As a result, cross-border competition remains limited, the internal market is artificially segmented, and merchant fees for accepting payment by card varies widely across the EEA.

In response, Visa agreed to cap the weighted average MIF for *credit cards* at 0.3% per transaction for all transactions where it sets the fee. It also agreed to apply a reduced cross-border MIF (0.3% for credit and 0.2% for debit transactions) for cross-border clients. The Commission concluded that these measures are expected to introduce competition in MIFs and lead to considerably lower fixed

[20] AG Wahl Opinion, para. 56 ("Ne devraient donc être considérés comme restrictifs de concurrence par objet que les comportements dont le caractère nocif est, au vu de l'expérience acquise et de la science économique, avéré et facilement décelable, et non les accords qui, au vu du contexte dans lequel ils s'insèrent, présentent des effets ambivalents sur le marché ou qui sont porteurs d'effets restrictifs accessoires nécessaires à la poursuite d'un objectif principal non restrictif de concurrence").

[21] For a detailed explanation of how transactions subject to MIFs operate, *see* the summary of *Mastercard and Others* (Case C-382/12P), Opinion of AG Mengozzi.

[22] Set out in its SO of April 2009.

[23] *See also MasterCard* (Case COMP/34.579), *EuroCommerce* (Case COMP/36.518), and *Commercial Cards* (Case COMP/38.580), Commission decisions of December 19, 2007.

fee rates for merchants in the EEA, thus benefitting final consumers.

Following publication of the draft commitments, the Commission adopted a proposal for a draft Regulation on MIFs.[24] The legislative process is on-going.

[24] *See* Proposal for Regulation on interchange fees for card-based payment transactions, available at http://ec.europa.eu/internal_market/payments/docs/framework/130724_proposal-regulation-mifs_en.pdf.

INTELLECTUAL PROPERTY AND LICENSING

Revised Regime For Assessment Of Technology Transfer Agreements

On March 21, 2014, the Commission adopted a revised regime for the assessment of technology transfer agreements ("TTAs") under EU competition law, consisting of two instruments: the Technology Transfer Block Exemption Regulation ("TTBER")[25], and the Technology Transfer Guidelines ("Guidelines")[26].

Background

A TTA is a licensing agreement where one party (the licensor) authorizes another party (the licensee) to use its technology, such as patent, know-how, or software license, for the production of goods and services. TTAs can be concluded between competitors (horizontal agreements) or non-competitors (vertical agreements) and they can be bilateral or multilateral (*e.g.*, patent pools). Companies need to self-assess whether agreements they conclude with competitors are anti-competitive and thus prohibited by Article 101 TFEU. The TTBER helps simplify this assessment by exempting licensing agreements between companies that either do not have anticompetitive effects or whose procompetitive benefits outweigh any anticompetitive effects.

The TTBER, introduced in 2004, was set to expire on April 30, 2014.[27] In connection with re-evaluating and extending the 2004 TTBER, the Commission launched two public consultations: the first consultation was launched in December 2011, and the second consultation in February 2013. The new regime introduces a number of changes, which in some cases may require a reassessment of agreements currently in place. A one-year transitional period applies to agreements already in force which do not satisfy the conditions for exemption provided for in the new Regulation, but satisfied the conditions for exemption of the 2004 TTBER. The new regime will apply from May 1, 2014 until April 30, 2026. The main changes are set out below.

Main Changes to the TTBER

The revised regime clarifies that the TTBER does not apply to licensing that occurs in the context of agreements covered by block exemption regulations regarding research and development (R&D)[28] or specialisation agreements.[29]

To determine whether the purchase of raw material or equipment from the licensor, or the use of the licensor's trademark, was exempted together with the TTA itself, the 2004 TTBER assessed whether such provisions were less important than the actual technology licensing and whether they were directly related to the application of the licensed technology. The new test no longer focuses on the relative importance assessment and requires only that the purchase of raw material or equipment from the licensor or the use of the licensor's trademark be "directly related" to the production or sale of the contract products produced with the licensed technology.

Passive sales restrictions, *i.e.*, restrictions on sales in response to unsolicited requests from individual customers including delivery of goods or services to such customers, and sales generated by general advertising or promotion in the media or on the Internet, were considered "hardcore restrictions" under the 2004 TTBER. As a result, those provisions, together with the entire agreement in which they appeared, were excluded from the safe harbor of the

[25] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ 2014 L 93/17.

[26] Communication from the Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ 2014 C 89/3.

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

[28] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements.

[29] Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements.

TTBER because such restrictions may partition the market and hinder market integration. However, the 2004 TTBER contained an exception to this rule and protected a licensee against the passive sales of another licensee during the first two years of the license. Under the revised TTBER, and in line with the block exemption regulation for vertical restraints,[30] this exception has been removed. This type of restriction now needs to be assessed on a case-by-case basis. The Guidelines state that this type of passive sale restriction can still be allowed if the restraints are objectively necessary for the licensee to penetrate a new market.

Under an exclusive grant-back provision, a licensee must license any improvements it makes to the licensed technology to the licensor on an exclusive basis, and cannot use such improvements for the duration of the agreement. The 2004 TTBER distinguished between severable and non-severable improvements, excluding from the safe harbor exclusive grant-back provisions concerning severable improvements on the grounds that the licensee should be free to exploit improvements that did not require using the underlying licensed technology. Under the revised TTBER, all exclusive grant-back provisions are excluded from the safe harbor and will need to be assessed on a case-by-case basis. However, the rest of the agreement containing exclusive grant-back provisions can still benefit from the safe harbor provided by the TTBER assuming the agreement does not contain other "blacklisted" clauses that would exclude the application of the TTBER to the agreement.

Under the 2004 TTBER, while no-challenge clauses (precluding the licensee from challenging the validity of the licensed intellectual property rights ("IPR")), did not benefit from the safe harbor, termination clauses (allowing the licensor to terminate the license in response to such a challenge) did. Under the revised TTBER, no-challenge clauses still do not benefit from the safe harbor, and only termination clauses in certain exclusive licensing agreements continue to benefit from the safe harbor. The safe harbor for termination clauses in exclusive licensing agreements will be available only when the parties have limited market power, *i.e.*, when the parties' combined market share does not exceed 20% on the relevant market for agreements between competitors and 30% for agreements between non-competitors. Termination clauses in non-exclusive licensing agreements will fall outside the safe harbor and will need to be assessed on a case-by-case basis.

The Commission's reasoning for distinguishing between exclusive and non-exclusive licenses is that, in an exclusive license, the licensee generally does not have an incentive to challenge the validity of IPR, but may use the threat of a challenge to improperly "put pressure on a smaller innovating licensor."[31] By providing for an automatic exemption of termination clauses in exclusive licenses, the Commission seeks to obtain a balance between the licensor's incentive to innovate and license out its technology, and ensuring the removal of invalid IPR. Even though termination clauses in non-exclusive licensing agreements are no longer protected, the rest of the agreement containing a termination clause can still benefit from the safe harbor provided by the TTBER, assuming the agreement does not contain other "blacklisted" clauses that would exclude the application of the TTBER to the agreement.

Main Changes to the Guidelines

The Guidelines were updated to reflect the changes in the new TTBER, and introduce two substantive changes.

While the Guidelines clarify that agreements between a technology pool (such as a patent pool) and third parties fall outside the scope of the TTBER, they provide a safe

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[30] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

[31] Commission Press Release of March 21, 2014, "Commission adopts revised competition regime for technology transfer agreements – frequently asked questions," available at http://europa.eu/rapid/press-release_MEMO-14-208_en.htm.

harbor for technology pools that meet all seven conditions set out in the Guidelines, including open participation in the pool creation process; adoption of sufficient safeguards to ensure that only essential technologies are pooled and to limit exchanges of sensitive information; licensing of the pooled technologies into the pool on a non-exclusive basis and to all potential licensees on fair, reasonable, and non-discriminatory ("FRAND") terms; and no restriction on the pool contributors' or licensees' ability to develop competing products or technologies or challenge the validity or essentiality of the pooled technologies.

Second, the Guidelines explain that settlement agreements may be prohibited under Article 101 TFEU if they delay or otherwise limit the ability of the licensee to launch the product ("pay-for-delay"). If the parties are actual or potential competitors and there has been a "significant value transfer" from the licensor to the licensee, the Commission will be "particularly attentive" to the risk of market allocation or market sharing. The Guidelines further clarify that, although non-challenge clauses are generally considered to be inherent in settlement agreements (and thus typically do not violate Article 101(1) TFEU), they may, under specific circumstances, be caught by Article 101(1) TFEU. In particular, scrutiny may be warranted if the licensor induces the licensee, financially or otherwise, to agree not to challenge the validity of the technology rights.

Implications of the Changes

As the revised regime for assessment of TTAs limits the availability of the TTBER's safe harbors, parties to TTAs will need to review those agreements and self-assess, in particular, the compatibility with Article 101 TFEU of any exclusive grant-back provisions concerning non-severable improvements and any termination clauses in non-exclusive agreements.

The transitional exemption in the revised TTBER provides that agreements already in force and compatible with the 2004 TTBER will be exempt until April 30, 2015.

MERGERS AND ACQUISITIONS

Commission Decisions

Approval of Purchaser of Divestment Business – Thermo Fisher Scientific/Life Technologies (Case COMP/M.6944)

On January 31, 2014, the Commission approved General Electric as the purchaser of Thermo Fisher Scientific, Inc.'s ("Thermo Fisher") cell culture (media and sera), gene silencing, and polymer-based magnetic beads businesses, which Thermo Fisher had committed to divest as a condition for the Commission's November 26, 2013 approval of its acquisition of Life Technologies Corp. ("Life Technologies"). Thermo Fisher produces analytical instruments and laboratory consumables for experimental science fields, including life sciences, chemistry, and physics. Life Technologies is the overall market leader in analytical instruments and laboratory consumables for life sciences.

While the Commission is yet to publish its conditional clearance decision, its press release explains that it was concerned about the acquisition's effects in the three segments identified below:

Media and sera for cell culture. Media and sera cell culture are, respectively, water-based and blood-based liquids used to supply nutrients to human, animal, insect and plant cells growing in vitro. In cell culture media markets, the Commission found that, post-transaction, the merged entity would have a large market share. The Commission also noted important barriers to entry in these markets, such as the significant time and investments needed to establish the necessary track record and reliability as a supplier. As regards cell culture sera markets, the Commission concluded that the merged entity would occupy too strong a position relative to its competitors, especially for the supply of sera from Australia and New Zealand, the safest and therefore most expensive origins. The Commission also observed that cell culture sera markets are characterized by high barriers to entry and limited availability of the required material (blood).

Gene silencing products. Gene silencing products are used in research to inhibit the expression of a particular gene to better understand that gene's function. The Commission had concerns that the merged entity would have a strong position in small interfering RNA ("siRNA") and microRNA ("miRNA") reagents, given the limited number of remaining significant competitors and the barriers to entry resulting in particular from existing patents.

Polymer-based magnetic beads. Polymer-based magnetic beads are particles used mainly in immunology and molecular biology instruments and sold by the parties to a number of original equipment manufacturers ("OEMs") of such instruments. The Commission concluded that the parties were close competitors and, post-transaction, the merged entity would have a strong position worldwide in the supply of polymer-based magnetic beads to OEMs. According to the Commission, post-transaction, only a limited number of competitors would remain. The Commission also noted high barriers to entry associated with intellectual property rights, technical know-how, and established commercial relationships.

To address the Commission's concerns with respect to the above listed products, General Electric has now been approved to acquire: (i) Thermo Fisher's HyClone business regarding media and sera for cell culture (excluding single use technologies, where the parties' activities do not overlap); (ii) Thermo Fisher's gene modulation business (including gene silencing) in Lafayette, Colorado, US, including the Dharmacon and Open Biosystems brands, equipment, staff, and its license to the Tuschl patents; and (iii) Thermo Fisher's polymer-based magnetic beads business (including the Sera-Mag brand and all other relevant IPRs, customer contracts, personnel and the necessary production equipment). Thermo Fisher also committed to supply magnetic beads to the purchaser under a two-year transitional agreement.

Derogation From the Suspension Obligation – Fiat/Teksid (Case COMP/M.4840)

On July 24, 2007, the Commission granted Fiat S.p.a. ("Fiat") a derogation from the suspension obligation

provided for in Article 7(1) of the Merger Regulation,[32] with regard to the acquisition by Fiat of sole control over Teksid Aluminum s.r.l. and Teksid Aluminum Getti Speciali (together, "Teksid").

Fiat manufactures and sells automobiles, commercial vehicles, agricultural machinery, construction equipment, automotive components, and metallurgical products. Teksid produces cast aluminum components for the automotive industry and other residual applications, such as aerospace, rail, and biomedical. The transaction did not involve any horizontal overlaps, but gave rise to a vertical relationship given that Tesksid supplied Fiat with aluminum components for the manufacture of cars and light commercial vehicles.

On July 5, 2007, Fiat entered into a preliminary agreement to acquire sole control of Teksid's aluminum businesses. On July 17, 2007, Fiat applied to the Commission for a derogation under Article 7(3) of the Merger Regulation on the grounds that the Teksid businesses were in serious financial distress. Under Article 7(3) of the Merger Regulation, the Commission may, on the basis of a reasoned request, grant a derogation from the normal obligation to suspend completion of a merger until clearance. In considering such a request, the Commission will take into account the effects of the suspension on one or more undertakings concerned by the concentration or on a third party, and the threat to competition posed by the concentration. In this case, the Commission concluded that the conditions of Article 7(3) of the Merger Regulation were fulfilled because Teksid was in serious financial distress that was already causing production disruption and deterioration of the business and could, in turn, cause disruption in the production activities of Fiat, which depended on Teksid supplies. In the absence of Fiat's acquisition, Teksid would have had to initiate insolvency proceedings.

[32] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/1.

Taking into account the low market shares of: (i) Fiat in the EEA-wide market for the use of automotive components; and (ii) Teksid in all product markets for automotive components (such as the distinct markets for camshaft carriers, engine blocks, cylinder heads, intake manifolds, and suspension arms), as well as the fact that there were many strong competing suppliers of aluminum components, the Commission found that Fiat would have neither the ability nor the incentive to foreclose competing car manufacturers' access to aluminum components. The Commission granted a derogation from the standstill obligation and subsequently, on October 1, 2007, approved the transaction.

Microsoft/Nokia (Case COMP/M.7047)

On December 4, 2013, the Commission cleared without commitments an acquisition by Microsoft Corporation ("Microsoft") of the devices and services business (the "D&S Business") of Nokia Corporation ("Nokia"). Microsoft's primary business activities involve the design, development, and supply of computer software and hardware devices, such as operating systems ("OS") and PC-based productivity software. The D&S Business comprises Nokia's smart mobile devices (smartphones and tablets) business units and includes production facilities, design, and sales operations. Microsoft will also receive a ten-year non-exclusive license to approximately 30,000 patents, including pending and acquired standard-essential patents ("SEPs"), with the option to extend the licenses indefinitely.

In the mobile devices segment, the Commission defined separate product markets for basic/feature phones[33] and smartphones.[34] It left open: (i) whether tablets and smartphones belong to the same product market; and (ii) whether the market should be further segmented between corporate and personal users. The Commission found that the transaction did not give rise to any horizontal

[33] Wireless phones primarily used for calls and text messaging with limited internet browsing and application capabilities.

[34] Wireless phones with advanced internet browsing and application capabilities.

concerns because the parties' combined shares did not exceed 15% at EEA or worldwide level in the manufacture and sale of smart mobile devices, and Microsoft's share in the possible market segment for tablets was limited (below 5%). The Commission's investigation focused on: (i) non-horizontal relationships; and (ii) Nokia's possible post-transaction conduct regarding patent licensing.

Non-horizontal relationships. The Commission investigated Microsoft's ability and incentive post-transaction to foreclose competing providers of smart mobile devices ("OEMs") by restricting access to: (i) Microsoft's mobile OS; (ii) Microsoft's applications ("apps"); and (iii) certain patent licenses allowing for interoperability between Microsoft's mail server software and competing smart mobile devices.

Mobile OS. The Commission concluded that Microsoft would not have sufficient market power to foreclose OEMs' access to its mobile OS because its market share did not exceed 10%. The Commission noted that Android had a 80%-90% market share and there were several new entrants. The Commission also found that Microsoft would not have an incentive to cease offering its OS to OEMs, because, to be able to credibly compete with iOS and Android, it would need to increase the share of its mobile OS with OEMs and app developers.

Microsoft's apps. The Commission found that neither Skype nor Microsoft's Office Mobile apps are a "must-have" product and, even if Microsoft could successfully foreclose access to these, no competition concerns would arise. The Commission noted Skype had many close competitors and that Microsoft would not have an incentive to foreclose other OEMs because, given Windows OS share of less than 10%, Skype's client base depends on interoperability with different OSs. The Commission observed that Microsoft's Office Mobile app appears to have a low market share and there are several competitors offering productivity apps with comparable features. The Commission concluded that, as a result of the transaction, Microsoft would not have a greater incentive to foreclose access to Office Mobile given Nokia's limited presence in the smartphones market and because Office Mobile is not currently available on tablets running non-Windows OS.

Microsoft's mail server software. The Commission also ruled out input foreclosure concerns relating to the licensing of Microsoft's Exchange Server communication protocol ("EAS"). The Commission concluded that EAS had a low share in the market for consumer email software and services (0%-5%). As to the corporate segment, the Commission found that Microsoft's ability to terminate licenses or increase royalty rates is limited by "significant contractual obstacles," such as the restrictions on terminating licenses except in limited circumstances, or on increasing royalties. Moreover, it concluded that Microsoft cannot technically degrade its EAS because it is a patent-only license, not a technology license. While the Commission concluded that it would not be possible in the short-term to switch to competing suppliers of mail server software, certain respondents to the market investigation indicated that they would switch in the medium to long-term if necessary and, in any event, it would not make business sense for Microsoft to stop licensing EAS to rivals.

Licensing of SEPs and non-SEPs by Nokia. The Commission took the view that Nokia's post-transaction conduct in relation to its retained business is outside the scope of the Commission's assessment of the transaction under the Merger Regulation. First, the Commission pointed out that, according to the wording of the Merger Regulation, the assessment of concentrations related to the position of the "undertakings concerned," the definition of which covered only the acquirer and the target (in this case the D&S Business). Second, the Commission noted that, pursuant to the Merger Regulation, only the acquirer and the target can offer commitments to address any perceived competition concerns. Finally, the Commission dismissed arguments raised by third parties that the Commission previously had assessed the conduct of third parties, explaining that those prior assessments focused the post-transaction conduct of third parties *in combination* with the activities of the combined entity.

In any event, the Commission concluded that Nokia's post-transaction conduct would not raise competition concerns even if it did fall within the scope of the Commission's assessment. First, the transaction would not affect Nokia's ability to enforce its SEPs, *i.e.*, the concern over Nokia's SEP licensing is not merger specific. The Commission concluded that Nokia's conduct is constrained by the existence of existing patent license arrangements with OEMs (including Samsung, the largest small mobile device supplier in the EEA) and by Nokia's existing commitments to various standard setting organizations that it would license its SEPs on fair, reasonable and non-discriminatory ("FRAND") terms. Second, the transaction would not increase Nokia's incentives to enforce its SEPs because the retained business would continue to depend on intellectual property rights licenses from third parties. The Commission also concluded that competition enforcement policy regarding FRAND commitments and SEP holders may restrain Nokia's conduct. Finally, because post-transaction Nokia would cease to be a supplier of smart mobile devices, it would not have an incentive to favor one smart mobile manufacturer or OS manufacturer over another.

Regarding Nokia's incentives and ability to enforce non-SEPs post-transaction, the Commission found no competition concerns, in particular because: (i) Nokia's non-SEPs – even if taken together – are not indispensable to device manufacturers' ability to compete; (ii) the transaction would not increase Nokia's enforcement incentives; and (iii) there are some indications that Nokia may license its non-SEPs more broadly post-transaction, which would be procompetitive.

First-phase Decisions With Undertakings

Teva/Cephalon (Case COMP/M.6258)

On October 13, 2011, the Commission cleared, subject to commitments, the acquisition of Cephalon Inc. ("Cephalon") by Teva Pharmaceutical Industries Limited ("Teva"). Teva and Cephalon both produce mainly generic pharmaceutical products.

In evaluating the parties' competing activities, consistent with its prior precedent in the pharmaceutical industry, the Commission divided the parties' products into three groups: (i) product groups in which the parties' combined shares exceeded 35% and the transaction would lead to a share increment of over 1%; (ii) product groups in which the parties' combined shares exceeded 35% and the transaction would lead to a share increment of less than 1%; and (iii) products in which the parties' combined shares were between 15% and 35%. The Commission's assessment focused on group (i) products, which included: (a) A2B anti-ulcerants in Portugal and Estonia; (b) A3A plain antispasmodics and anticholinergics in France; (c) C9A angiotensin converting enzyme inhibitors in Portugal; (d) J1F azithromycin (NFC1 ordinary solid form) in Estonia, Latvia, Lithuania, and Poland; (e) M1A non-steroidal antirheumatics in Latvia, Lithuania, and Poland; (f) M3B central muscle relaxants in the UK; and (g) N4A anti-Parkinson preparations in Germany. The Commission identified no serious competition concerns in any of these markets, due to the presence of credible competition, low barriers to entry, and sufficient capacity of other competitors, enabling them to increase production in response to any hypothetical anti-competitive conduct by the merged company.

The Commission then considered possible vertical effects arising from Teva's production of active pharmaceutical ingredients ("APIs") and Cephalon's processing of APIs into finished pharmaceutical products. The Commission considered whether, post-transaction, the combined entity's future conduct could result in input or customer foreclosure. With respect to input foreclosure, the Commission identified four ATC3-level APIs in which Teva's share of API sales exceeded 30% and where Cephalon's market share of API purchases exceeded 5%. The Commission found no competitive concerns, concluding that a sufficient number of upstream competitors would remain. With respect to customer foreclosure, the Commission identified six ATC3-level APIs in which Cephalon's market share of API purchases exceeded 25% and where Teva's market share of API sales exceeded 5%. The Commission found no

competitive concerns, concluding that a sufficient number of downstream customers would remain post-transaction.

The Commission also analyzed the loss of potential competition between the parties for pipeline products. Cephalon produces and holds various patents on modafinil, a drug used primarily to treat adult narcolepsy. Teva had developed, but had not yet started marketing, the drug's generic version. The Commission's market investigation showed that the elimination of a direct substitute to branded modafinil would raise competitive concerns regardless of whether the market is defined to include only modafinil-based products or also other psychostimulants in the same ATC 3 class, N6B. The Commission noted that other generic manufacturers could not sell generic versions of modafinil before the expiry of Cephalon's patent in October 2015, because generic manufacturers' attempts to enter the market either had been prohibited, or were under threat of prohibition due to litigation by Cephalon in various Member States. Teva, however, had reached a settlement with Cephalon that granted it the right to sell a generic product as early as in October 2012. Because Teva would have been the only generic producer that could definitely compete with Cephalon prior to 2015, the Commission concluded that the transaction raised serious doubts as to its compatibility with the internal market. In reaching this conclusion, the Commission dismissed Teva's arguments that it had abandoned its commercialization plans before entering into merger discussions with Cephalon.

To address the Commission's concerns, Teva proposed to divest Cephalon's generic modafinil pipeline product and related rights, including marketing and safety data, a marketing authorization in France, a non-exclusive license to Cephalon's EEA modafinil patents, and a three-year (non-exclusive) supply agreement for Cephalon's generic modafinil product. Teva also committed not to assert against the divestiture purchaser any patents relating to modafinil and agreed to assist the purchaser with any relevant regulatory approvals and marketing authorizations.

Crown Holdings/Mivisa (Case COMP/M.7104)

On March 14, 2014, the Commission conditionally cleared an acquisition of Mivisa Envases, S.A.U. ("Mivisa"), by Crown Holdings, Inc. ("Crown"), subject to the divestiture of metal can plants in Spain and the Netherlands. Mivisa and Crown are active in the production and supply of metal food cans across the EEA.

The Commission found that the parties compete mainly in the manufacturing and sale of metal food cans, stand-alone can ends, and metal closures. The Commission suggested that the market for metal food cans could be further segmented based on the number of pieces (*i.e.*, 2-piece versus 3-piece cans), the manufacturing process, and design, but left the exact market definition open given that the parties' shares in any potential metal food can market were significant in some EU Member States, regardless of the exact segmentation. The Commission also identified separate markets for stand-alone can ends and metal closures (used for glass containers in the food and beverage industry). Given the high transportation costs, the Commission considered that the market for metal cans was national in scope, while the markets for more easily transportable can ends and metal closures were at least EEA-wide in scope.

The Commission identified competition concerns in the markets for metal food cans in Benelux, France, Spain, and Portugal. The Commission found that Crown and Mivisa were the largest and closest competitors, and accordingly enjoyed a range of specific advantages *vis-à-vis* other cans suppliers, *e.g.*, other suppliers could not supply as large volumes and broad product ranges. The Commission concluded that the transaction would eliminate Mivisa, an important and aggressive competitor of Crown, and leave only one sizeable competing supplier.

The merging parties contended that: (i) the metal food can market was characterized by significant spare capacity (limiting the ability of the merged entity to raise prices); (ii) customers could switch suppliers easily and frequently multi-sourced from several suppliers; (iii) customers exercised countervailing buyer power and could launch

their own manufacturing activities; and (iv) barriers to entry were low.

Based on its market investigation, the Commission found that the parties had overestimated the level of their competitors' spare capacity, that spare capacity varied considerably depending on season, and that the need to keep buffer capacity was significant. Further, the Commission found that switching to a new supplier was not as viable an option as the parties had argued, and that the customers' need to multisource reinforced the parties' position as necessary and inevitable suppliers of food cans, in particular given that customers would generally source from one of the largest suppliers. Finally, contrary to the parties' contention, the Commission found that the possibility of self-manufacturing was only potentially available to particularly large customers, and that entry through the establishment of production facilities in a new country was relatively difficult and risky.

To remedy the Commission's concerns and to avoid a Phase II investigation, Crown committed to divest its entire metal cans business in Spain, to install an additional production line in one of the divested plants to serve Portuguese customers, and to divest Mivisa's metal can plant in the Netherlands. The Commission noted that the commitments will also impose a competitive restraint on the merged entity in France and in Portugal, because the divested plants in Spain could serve customers in southern France and in Portugal, while the divested plant in the Netherlands could serve customers in northern France.

Second-phase Decisions With Undertakings

Südzucker/ ED&F MAN (Case COMP/M.6286)

On May 16, 2012, the Commission conditionally cleared the acquisition of ED&F Man Holding Limited ("EDFM") by Südzucker AG Mannheim/Ochsenfurt ("Südzucker"). Südzucker is the largest sugar and molasses producer in Europe. EDFM, primarily a commodity trading company, is the second-largest sugar trader and the largest molasses[35] trader worldwide. Although Südzucker proposed to purchase only a minority shareholding of 24.99%, the Commission found that Südzucker would acquire *de jure* negative sole control over EDFM by obtaining veto rights over EDFM's annual budget, business plan, and appointment of directors.

When identifying the relevant markets for sugar, the Commission first distinguished, based on the sucrose content by weight (in its dry state), between "raw sugar" and "white sugar." Given the regulated nature of the raw sugar market, the Commission further subsegmented it into markets for beet sugar (produced in the EU) and cane sugar (imports). Sugar cane is not indigenous to the EU, but is imported as a semi-processed "raw sugar" to reduce shipping costs, whereas locally produced beets are directly refined into white sugar. Both parties' Italian refineries were optimized to process raw cane sugar, for which the geographic market comprised at least the main cane sugar supplying countries and was potentially worldwide in scope. Within the downstream market for (refined) white sugar, the Commission distinguished between: (i) white sugar (used in food applications); and (ii) industrial sugar (limited to non-food applications, such as alcohol and yeast production). The Commission found that the parties' activities did not overlap in industrial sugar and that white sugar produced from beet and cane was interchangeable. The Commission left open whether, within white sugar, a further distinction should be made between liquid and granulated sugar, but in the end defined separate markets by distribution channel, namely: (i) supply of white sugar to industrial processors; and (ii) supply of white sugar to retailers. The Commission concluded that these markets were national in scope, due to factors such as regulatory quotas, national alliances with foreign producers, and clear differences in pricing between Member States.

The Commission left product and geographic market definition open as to molasses, because no competition concerns would arise regardless of approach.

The Commission assessed the transaction's impact in three affected markets: (i) the supply of preferential raw

[35] Molasses are a by-product of sugar refining, mainly used in the fermentation industry or incorporated in animal feed products.

cane sugar in the EEA; (ii) the supply of molasses in several Member States (mainly in Central Europe); (iii) the supply of white sugar in Greece; and (iv) the supply of white sugar in Italy.

Supply of raw cane sugar. The Commission concluded that the parties would not have the ability to foreclose access to preferential raw cane sugar, because competitors could readily replace EDFM's supply.

Supply of molasses. At an EU level, depending on the distribution channel, the parties' shares in the sale of molasses could be as high as 40%-50%. The market investigation, however, did not find any substantiated competition concerns because customers usually multi-source and have other alternatives to molasses. At a national level, combined market shares would be as high as 80%-100% in Austria, but the parties' main customers could easily constrain price increases by sourcing from suppliers in neighboring countries. Moreover, EDFM's role in the market was minimal and only in the capacity of a trader, aimed at transporting surplus to Austrian customers. In other Member States in which the parties had high market shares, the market investigation found that customers already multi-sourced molasses, could easily switch to suppliers from other countries, and that EDFM has a relatively weak position.

Supply of white sugar in Greece. Although the Commission concluded that EDFM did not have sales in Greece, it nevertheless examined the likelihood of its entry as a potential competitor. It concluded that EDFM was unlikely to enter: internal documents showed no concrete indication that EDFM would enter the market, and although EDFM was one of the official candidates for the purchase of a Greek supplier, the Commission found no indication that it would ultimately acquire it.

Supply of white sugar in Italy. The Commission identified serious concerns in the Italian market, concluding that Südzucker was the largest and fastest growing producer in that market, due to, among others, a joint venture with Maxi Srl, an Italian sugar trader. The transaction would result in a 10%-20% increment in market shares leading to post-merger shares above 50%-60%. The Commission also found that the parties were one another's closest competitors and the transaction would increase the merged entity's incentives and ability to restrain supply in Italy, largely because competitors faced significant capacity constraints.

To address the Commission's concerns, the parties committed to: (i) divest EDFM's shares in the Brindisi refinery; and (ii) transfer to a purchaser the economic benefit of the three existing contracts for the supply of raw cane sugar to Brindisi. Were the divestment of EDFM's stake in the Brindisi refinery to fail, the parties committed that EDFM would guarantee to continue to supply Brindisi with volumes of preferential raw cane sugar (imported from countries with a lower import tariff).

Syniverse/Mach (Case COMP/M.6690)

On May 29, 2013, the Commission conditionally approved the acquisition of WP Roaming III S.à.r.l. ("Mach") by Syniverse Holdings, Inc. ("Syniverse") following a Phase II investigation. Both parties are global providers of roaming technology services to mobile network operators ("MNOs").

The Commission identified horizontal overlaps in: (i) data clearing ("DC") services that settle the usage records of roaming network subscribers between partnered MNOs; (ii) near real-time roaming data exchange ("NRTRDE") services that help MNOs detect roaming fraud; and (iii) financial clearing ("FC") services that relate to the wholesale invoicing and settlement of accounts payable and receivable by MNOs as a result of the roaming activities of their subscribers. The parties also provide other closely related services, such as roaming hub services, business intelligence solutions, and application-to-person ("A2P") and person-to-person ("P2P") short messaging services. While ultimately the exact geographic market definition was left open, the Commission considered EEA-wide or worldwide markets with respect to all services.

The Commission identified competition concerns only in the DC and NRTRDE markets. In particular, the Commission found that: (i) the merger would combine the first and the second largest supplier of these services, creating a dominant player with virtual monopoly market shares; (ii) there are significant barriers to expansion in these markets; (iii) the entry of new competitors is unlikely; (iv) customers have no significant countervailing buyer power; and (v) the remaining smaller competitors would not be able to act as credible providers to large customers or replace effectively the competitive constraint that Mach exerted on Syniverse pre-transaction. The Commission concluded that, if allowed to proceed as proposed, the merger would lead to a risk of increased prices or reduced quality in the form of inaccurate bills for end-customers of DC and NRTRDE services.

To address the Commission's competition concerns, Syniverse agreed to divest the entirety of Mach's DC and NRTRDE businesses in the EEA. The divestment included infrastructure and proprietary software for DC and NRTRDE operations, former Mach personnel dedicated to these services in the EEA, and contracts with a range of mid-sized and smaller MNO customers.

An interesting backdrop to the present decision is the 2007 acquisition by Syniverse of The BSG Group, which equally related to DC and NRTRDE services and was cleared, among other reasons, because the Commission concluded that Syniverse would continue to face strong competition from Mach post-merger. In the current case, the Commission concluded that competition in the relevant markets has not developed, or was not likely to develop, to such an extent that Syniverse would be constrained if the independent competition from Mach were lost.

STATE AID

ECJ Judgments

Mediaset SpA v Ministero dello Sviluppo economico (Case C-69/13)

On February 13, 2014, the Court of Justice issued a preliminary ruling clarifying the scope of powers of national courts to calculate the amount of aid subject to a recovery order contained in a Commission decision.

In its decision of January 24, 2007,[36] the Commission declared the Italian aid scheme for the digital terrestrial broadcasters incompatible with the internal market, and ordered a recovery of the aid granted without specifying the relevant subjects and amounts. Subsequently, the Commission and Italy engaged in several rounds of exchanges concerning the identification of the individual recipients under the unlawful aid scheme and quantification of the amounts to be recovered. In particular, the Commission took a position as to the amount of aid to be recovered from Mediaset, followed by a recovery order sent from the Italian authorities to Mediaset for the amount in question.

The underlying dispute concerns the action by Mediaset brought before a national court in Italy, essentially seeking an annulment of the recovery order and a reduction of the sum to be recovered. The Italian national court requested an interpretation of EU law with respect to the powers of national courts to quantify the recovery amount in case not specified in the Commission decision.

The Court of Justice found that, because the Commission's letters identifying Mediaset as a recipient of the aid scheme and specifying the exact amount to be recovered do not constitute a decision within the meaning of Article 288(4) TFEU, the letters are not binding on national courts. However, Court of Justice recalled that national courts are bound by the principle of good cooperation with the Commission and European Union Courts, which implies an obligation on national courts to take the Commission's positions into account in assessing the dispute at hand.

The Court of Justice then reiterated that, in its decision, the Commission had neither identified the aid recipients nor specified the amounts to be recovered. Accordingly, the Court of Justice held that it is for the national court to rule on the amount of aid that the Commission ordered to be recovered. The Court of Justice further noted that there was a possibility that "the calculations made by the national court as regards the quantification of the amounts of aid to be repaid [would] result in an amount equal to zero," provided the national court takes into account all the relevant information it has been made aware of, including the exchanges between the Commission and the Italian authorities.

ECJ Advocate General Opinions

Advocate General opinion in SNCM v Corsica Ferries France (C-533/12 P)

On January 15, 2014, Advocate General ("AG") Wathelet handed down an opinion advising the Court of Justice to uphold a decision of the General Court that partially annulled an EU decision that had approved various aid measures to the Société Nationale Maritime Corse-Méditerranée SA ("SNCM").

SNCM is a shipping company that provides regular services to Corsica, North Africa, and Sardinia from mainland France. In 2008, the Commission published a decision approving aid measures granted by France to SNCM, including: (i) compensation for public service obligations; (ii) the partial disposal of SNCM at a negative price; (iii) a cash injection; and (iv) contributions for redundancy payments that went beyond SNCM's legal and contractual obligations.[37]

Corsica Ferries France SA ("Corsica Ferries"), a competitor of SNCM that provides regular ferry services from Corsica to mainland France, appealed the decision to the General

[36] Commission Decision of January 24, 2007 on state aid C 52/2005 (ex NN 88/2005, ex CP 101/2004).

[37] Commission Decision of July 8, 2008 concerning measures C 58/02 (ex N 118/02) which France implemented in favor of SNCM.

Court. The General Court found that the Commission had erred in law and annulled the parts of the decision relating to the aid measures mentioned above. SNCM and France appealed the General Court's decision to the Court of Justice.[38]

A principal concern of AG Wathelet's opinion is the ability of states to justify aid measures as investments aimed at protecting their brand images as global investors in the market economy. France raised this point to argue that it had acted as a private investor in partially disposing of SNCM for a negative price; it argued that additional redundancy payments were rightly included in the minimum cost of liquidation. The AG disagreed, advising that, as a general rule (with some narrow exceptions), "the protection of the brand image of a Member State as a global investor in the market economy cannot constitute . . . sufficient justification . . . of the assumption of additional costs such as additional redundancy payments."

The AG further explained that, under the private investor test, it would be highly improbable that considerations put forward by states relating to the protection of national brands—such as the possibility of sympathy strikes (as in this case), the company in difficulty being in an area of social crisis, or pressures from unions or other political circles—would justify the granting of aid measures. Drawing on previous decisions of the Court of Justice, the AG underlined that injections of capital that have no regard for long-term profitability would constitute state aid in violation of Article 107 TFEU. In particular, he noted that the considerations put forward by states relating to the protection of their national brands fundamentally differ from those of private investors because such considerations lack any concern for profitability.

The AG further underlined that the effectiveness of EU state aid rules would be significantly reduced if states were allowed to justify aid by reference to the need to protect their brand images as global investors in the market economy.

[38] *Corsica Ferries France v. Commission* (Case T-565/08), judgment of September 11, 2012, not yet reported.

FINING POLICY

ECJ Advocate General Opinions

YKK Corp. and others v. Commission (Case C-408/12 P), Opinion of AG Wathelet

On February 27, 2014, AG Wathelet delivered his opinion on the appeal brought by YKK Corp., YKK Holding Europe BV ("YKK Holding"), and YKK Stocko Fasteners GmbH ("YKK Stocko") (together, "YKK") against the General Court's judgment dismissing their previous appeal against the Commission's decision in the fasteners cartel.

On September 19, 2004, the Commission fined seven groups of companies a total of €329 million for participating in four different cartels in the markets for zip fasteners, other fasteners (for example, press studs), and their attaching machines. YKK, fined a total of €150 million, appealed the Commission's decision. After the General Court dismissed the appeal in its entirety, YKK appealed to the General Court.

YKK raised four grounds for setting aside the General Court's judgment:

- First, a failure to state reasons and infringement of the principle of proportionality in setting the starting amount of the fine in excess of the starting amount under the 1998 Fining Guidelines.[39]
- Second, an error in law in applying the 1996 Leniency Notice.[40]
- Third, the incorrect application of the 10% fine limit to YKK Holding.
- Fourth, the incorrect application of the deterrence multiplier.

As to the first ground, the AG concluded that the General Court had not erred in its assessment of the starting amount of the fine for one of the infringements, even though it had set the starting amount of the fine at €50 million without taking into account the impact of the infringement on the market. This is because some infringement, such as price-fixing or customer sharing, are deemed "very serious" under the Commission's 1998 Fining Guidelines without regard to their impact. Moreover, increasing the starting amount to €50 million (from the 1998 Fining Guidelines' €20 million likely starting amount for "very serious" infringements) was not disproportionate, considering the size of the zip fasteners market and the "very serious" nature of the infringement.

As to the second ground, the AG rejected the argument that the General Court had erred in law by not applying the 2002 Leniency Notice[41] (instead of the 1996 Leniency Notice), the lex mitior (the less severe law) according to YKK. The first leniency application was submitted before February 14, 2002, and therefore was governed by the 1996 Leniency Notice, based on the provisions of the 2002 Leniency Notice itself. Further, YKK failed to establish that the 2002 Leniency Notice was more lenient than the 1996 Leniency Notice. The AG noted that YKK was seeking both partial immunity for the infringements it revealed as well as a reduction in the fine for the added value provided, and concluded that YKK was already granted partial immunity and there was no justification for also reducing its fine.

As to the third ground, the AG agreed with YKK that the General Court had misinterpreted the 10% fine upper limit and infringed the principles of personal responsibility, individuality of penalties, proportionality, and equal treatment. Before YKK Stocko was acquired by YKK Holding, YKK Stocko was solely liable for the infringement and therefore the 10% fine upper limit should have been calculated based solely on its turnover, and not on the turnover of the entire YKK group. Therefore, the AG concluded that the amount of the fine imposed solely on YKK Stocko should be reduced.

[39] Guidelines on the method of setting fines pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty, OJ 1998 C 9/3.

[40] Commission notice on the non-imposition or reduction of fines in cartel cases, OJ 1996 C 207/4.

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

With respect to the fourth ground, the AG concluded that the application of a deterrence multiplier of 1.25 to YKK Stocko for the period prior to its acquisition by YKK Holding could not be justified. This multiplier was calculated based on the large resources of the YKK Group and was not appropriate for the fine imposed on YKK Stocko only, for a period during which it was a small undertaking with limited resources.

The AG therefore advised the Court of Justice to set aside the General Court's judgment to the extent that it misapplied the 10% fine upper limit and the deterrence multiplier.

Deltafina (Case C-578/11P), Opinion of AG Sharpston

On March 27, 2014, AG Sharpston advised the Court of Justice to dismiss an appeal by Deltafina SPA ("Deltafina")[42] against the General Court's judgment of September 9, 2011, upholding the Commission's decision of October 20, 2005 in the Italian raw tobacco cartel.[43]

In its decision, the Commission levied fines totaling €56 million on Deltafina and three other Italian raw tobacco processors for fixing prices, allocating customers and rigging bids. As the first leniency applicant, Deltafina initially received conditional full immunity from fines pursuant to the 2002 Leniency Notice.[44] However, the Commission subsequently withdrew that immunity because Deltafina had failed to meet its ongoing duty to cooperate with the Commission. Specifically, the Commission found that Deltafina had disclosed its leniency application to other cartel members before the Commission had occasion to conduct its investigation and without warning the Commission of its intention to do so. Moreover, Deltafina had failed promptly to inform the Commission of the disclosure. The General Court subsequently confirmed the Commission's decision. Deltafina appealed the General Court's judgment on the following four grounds.

First, Deltafina argued that the General Court had erred in finding that it had breached its duty to cooperate by failing to warn or inform the Commission of the disclosure. Deltafina explained that the General Court's failure to address its argument that the Commission had discharged Deltafina from its duty to keep its leniency application secret at a meeting held on March 14, 2002 vitiated its reasoning. The General Court, instead, assumed for the purposes of its analysis that such an agreement existed, but concluded that Deltafina had nevertheless breached its duty of cooperation by failing to warn the Commission of its intention to disclose its leniency application.

The AG recalled that the General Court was not required to respond exhaustively and one-by-one to all arguments raised by the parties. The AG also noted that the General Court had accurately described the scope of a leniency applicant's duty to cooperate under the 2002 Leniency Notice. Such cooperation is voluntary, but must be complete and unreserved for an immunity application to succeed. Accordingly, the General Court did not err in identifying other aspects of the duty of cooperation and in concluding that this duty had been breached.

Second, Deltafina submitted that the General Court made inadequate or incorrect findings of fact and breached its own rules of procedure. The AG recalled that the General Court has broad discretion to determine whether there is any need to supplement the information already at its disposal and may adopt measures allowing an inquiry relating to oral testimony. Where disputed issues of fact relevant to the outcome of a case must be resolved, the proper course is to hear evidence in compliance with the applicable rules of procedure.

Although the AG found procedural irregularities in the General Court's proceedings, she also concluded that they did not adversely affect Deltafina's interests because the General Court did not rely on the testimony at issue to establish Deltafina's breach of the duty to cooperate.

42 *Deltafina v. Commission* (Case T-12/06), judgment of September 9, 2011.

43 *Raw Tobacco Italy* (Case COMP/C38.281/B.2), Commission decision of October 20, 2005.

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

Third, Deltafina maintained that the General Court had failed to adjudicate within a reasonable time: the proceedings before the General Court lasted five years and eight months, and 43 months elapsed between the close of the written procedure and the decision to open the oral procedure. The AG noted that a failure to adjudicate within a reasonable time constitutes a breach of a fundamental right and entitles the affected party to an effective remedy. Where there are no indications that such a failure affected the outcome of the proceedings, setting aside the appealed judgment is not an effective remedy.

In this case, the proceedings were excessively lengthy, but there was no evidence that this affected the outcome of the case. The AG thus concluded that Deltafina's third ground of appeal could not lead to the setting aside of the appealed judgment. However, the AG noted that the excessive duration of the proceedings constituted a serious breach of the rule of law aimed at conferring rights upon individuals and that it was therefore open to Deltafina to bring a separate action for damages before the General Court.

Having also advised the Court of Justice to reject Deltafina's fourth plea as inadmissible, the AG recommended that the appeal be dismissed in its entirety.

General Court Judgments

SKW Stahl-Metallurgie Holding AG and SKW Stahl-Metallurgie GmbH v. Commission (Case T-384/09), Evonik Degussa and AlzChem Hart v. Commission (Case T-391/09), Gigaset v. Commission (Case T-395/09)

On January 23, 2014, the General Court handed down three judgments in the appeals brought by: (i) SKW Stahl-Metallurgie Holding AG ("SKW Holding") and SKW Stahl-Metallurgie GmbH ("SKW"); (ii) Evonik Degussa ("Degussa") and AlzChem Hart ("AlzChem"); and (iii) Arques Industries, now Gigaset ("Arques") against the Commission's decision in the calcium carbide and magnesium reagents cartel.[45] Following a leniency application by Akzo Nobel, the Commission investigated and found that the main suppliers of calcium carbide and magnesium had participated in a cartel from April 2004 to January 2007.

A number of the appellants' arguments related to the Commission's setting of the fines in the context of the evolving ownership of SKW. On August 30, 2004 (*i.e.*, during the infringement period), Degussa sold SKW—a calcium carbide sales business—to Arques, which held SKW through an intermediary entity, SKW Holding. Degussa also continued the production of calcium carbide through its subsidiary AlzChem (through which it had previously owned SKW). Three selected arguments are discussed below, relating to: (1) the application of a fine increase for recidivism; (2) the extent to which companies are held jointly and severally liable; and (3) the calculation of duration multiplier.

As to (1), in Case T-391/09, the Commission's decision increased Degussa and AlzChem's fine for recidivism because Degussa and AlzChem had previously participated in the animal feed cartel.

Degussa and AlzChem objected, noting that the finding of recidivism was based on the fact they formed a single economic unit with SKW as they otherwise had not participated in the calcium carbide and magnesium cartel. They also argued that, in any event, this aggravating circumstance should not have been applied to the fine with respect to AlzChem, because it was not part of the Degussa group at the time of the first infringement. While the General Court rejected the former argument, it agreed with the latter. Referring to earlier case-law,[46] the General Court concluded that the fact that Degussa and AlzChem constituted a single economic unit at the time of the second cartel was insufficient to impose the consequences of Degussa's first cartel infringement on AlzChem's fine for participating in the second cartel. The General Court distinguished this case from *Lafarge v. Commission*,[47] in which the parent company had previously been fined and the finding of recidivism was based on a new infringement by a subsidiary, for which the parent company was held liable.

As to (2), Degussa and AlzChem argued that the Commission had breached the principle of equal treatment by holding SKW jointly and severally liable only for a part of the fine imposed on them, whereas SKW was held joint and severally liable for the entirety of the fine imposed on SKW Holding and Arques. The part of Degussa and AlzChem's fine for which SKW was not held jointly and severally liable represented: (i) the fine increase for recidivism; and (ii) the additional amount for deterrence (an increase to the basic amount of the fine intended to deter companies from engaging in illegal practices in the first place). The General Court concluded that, for the reasons explained above with regard to AlzChem, SKW Holding could not be held liable for the increase for recidivism (specific to Degussa). However, it agreed with Degussa and AlzChem that SKW should be held jointly and severally liable for the additional amount for deterrence. Although the Commission correctly noted that SKW should not bear

[45] *Calcium carbide and magnesium reagents* (Case COMP/39.396), Commission decision of July 22, 2009.

[46] *Aristrain v.* Commission (Case C-196/99) 2003 ECR I-11005; *ThyssenKrupp Liften Ascenseurs v. Commission* (Case T-144/07) 2011 ECR II-5129.

[47] *Lafarge v. Commission* (Case T-54/03) 2008 ECR II-0120.

the cost of the additional amount for deterrence twice(as it was already liable for that amount under the fine it was jointly and severally liable for with SKW Holding and Arques), the General Court concluded that SKW's joint and several liability would not lead to this result, but rather would free Degussa and AlzChem from liability to the extent of the amount paid by SKW.

As to (3), in Case T-395/09, Arques criticized the Commission's use of the same duration multipliers for Arques and for SKW GmbH. In calculating fines, the Commission adapts the basic amount of the fine by applying a multiplier that reflect the duration of a cartelist's individual participation. The Fining Guidelines[48] state that periods of less than six months are counted as half a year, and the Commission had decided that it would apply a multiplier of 0.5 (for half a year) only to periods of over three months (which the decision did not state). The Commission applied the same multiplier to Arques and SKW GmbH—2.5 for the calcium carbide part of the cartel infringement—even though Arques participated in the calcium carbide part of the cartel for two years, four months, and 17 days, whereas SKW GmbH participated for two years, eight months, and 25 days (*i.e.*, the entire cartel duration). Therefore, the General Court found that the Commission had breached the principle of equal treatment, as the identical treatment of the two situation was not based on an objective and reasonable criteria (a multiplier of three should have been applied to SKW GmbH).

The General Court similarly found that the Commission's use of a multiplier of 0.5 for Degussa and AlzChem's four month participation in the cartel (in Case T-391/09) breached the principle of proportionality. Even though the Fining Guidelines allowed counting periods of less than six months as half a year, the principle of proportionality required that a multiplier of one third be applied for a participation that lasted only four months.

[48] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/4.

CEEES and Asociación de Gestores de Estaciones de Servicio (Case T-342/11)

On February 6, 2014, the General Court rejected an appeal by two associations of Spanish service station operators, Confederación Española de Empreasas de Gestores de Estaciones de Servicio and Asociación de Gestores de Estaciones de Servicio (the "station operators" associations"),[49] against the Commission's decision of April 28, 2011, refusing to re-open proceedings against Spanish oil company Repsol for allegedly breaching binding commitments secured under Article 9 of Regulation 1/2003.[50]

On April 12, 2006, the Commission decided to close its investigation into Repsol's vehicle fuel distribution contracts with Spanish service stations.[51] The Commission was concerned that these contracts contained anticompetitive provisions relating to the resale price of fuel. To address the Commission's concerns, Repsol committed, *inter alia*, to ensure that service stations in its network have complete freedom to offer discounts on recommended resale prices. On May 30, 2007, the station operators' associations lodged a complaint with the Commission, arguing that Repsol had breached that commitment by fixing the resale price of fuel for service stations within its network. On July 30, 2009, the Spanish Competition Authority ("CNC") imposed a €5 million fine on Repsol for the same behavior. On April 28, 2011, the Commission rejected the applicants' complaint, holding, in particular, that the CNC's decision made it unnecessary to investigate their allegations.

The applicants appealed the Commission's decision, arguing that the Commission exceeded the bounds of its discretion by refusing to re-open proceedings against and impose periodic penalty payments on Repsol. The General Court first explained that the Commission enjoys broad

[49] *CEES and Asociación de Gestores de Estaciones de Servicio* (Case T-342/11), judgment of February 6, 2014.

[50] *CEEES AOP-REPSOL* (Case COMP/39.461), Commission decision of April 28, 2011.

[51] *Repsol CPP* (Case COMP/B-1/38.348), Commission decision of April 12, 2006.

discretion in deciding whether to re-open proceedings against and impose periodic penalty payments on an undertaking for allegedly failing to comply with binding commitments. These powers follow from the Commission's task to ensure compliance with EU competition law and aim to ensure compliance with commitments accepted pursuant to Regulation 1/2003. They do not, however, aim to impose a double penalty on undertakings for particularly serious violations of EU competition law.

The General Court further observed that the Commission has limited resources and must prioritize certain cases over others and decide whether the EU's interest requires that they be considered further. In doing so, the Commission must take into account all relevant elements of fact and law, including actions by national competition authorities and may attach greater weight to one factor than another. These principles apply equally to complaints alleging a breach of Articles 101 and 102 TFEU and complaints alleging non-compliance with binding commitments.

The General Court also recalled that national competition authorities are free to adopt their own decisions on a given infringement of Articles 101 and 102 TFEU once the Commission has closed its investigation into the same.

The General Court thus held that the Commission was entitled to rely on the CNC's infringement decision to conclude that re-opening proceedings against and imposing periodic penalty payments on Repsol was not in the EU's interest. According to the General Court, the CNC's decision pursued and was sufficient to reach objectives convergent with those the Commission would have pursued by imposing periodic penalty payments on Repsol, namely to end Repsol's resale pricing practices.

The General Court explained that none of the arguments raised by the applicants called this conclusion into question. The applicants argued that the Commission was required to impose periodic penalty payments on Repsol to preserve the effectiveness of the commitments procedure of Article 9 of Regulation 1/2003. The General Court disagreed, holding that the Commission was entitled to conclude that re-opening proceedings against and imposing periodic penalty payments on Repsol was not in the EU's interest because doing so would have required the Commission to expend resources. Further, there was limited value to punishing Repsol for behavior already sanctioned by a national competition authority.

Having also rejected the applicants' other pleas, the General Court dismissed the action in its entirety.

InnoLux v. Commission, LG Display Co. Ltd v. Commission (Cases T-91/11 and T-128/11)

On February 27, 2014, the General Court issued its judgments in the appeals brought by InnoLux Corporation ("InnoLux") and LG Display Co. Ltd. and LG Display Taiwan Co. Ltd. (together, "LG Display") against the Commission's decision in the liquid crystal display ("LCD") cartel. The General Court reduced InnoLux's fine from €300 million to €288 million (a reduction of 4%) and LG Display's fines – from €215 million to €210 million (a reduction of 2.3%).

In 2011, the Commission sanctioned six companies – AU Optronics Corporation, Chunghwa Picture Tubes, HannStar Display Corporation, Chimei InnoLux, and LG Display – for fixing the prices of LCD panels between October 2001 and February 2006.[52] LCD panels are the main part of flat screens used in computers, notebooks, and television sets.

LG Display and Innolux sought annulment of the Commission's decision or, failing that, reduction of the fines. While it dismissed most the applicants' pleas, the General Court: (1) agreed with InnoLux regarding the consequences of mistakes in the numbers provided for the value of relevant sales (which serve as a basis for determining the fine); and (2) agreed with LG Display regarding the effect on its fine of the partial immunity granted by the Commission.

As to (1), InnoLux provided incorrect data for the value of relevant sales necessary to determine the fine. Because InnoLux did not make clear to the external company

[52] *LCD* (Case COMP/39.309), Commission decision of December 8, 2010.

responsible for compiling the sales numbers which LCD panels should be taken into account, the data included sales relating to categories of LCD panels not covered by the Commission's decision.[53] The General Court found that the circumstances behind did not justify increasing InnoLux's fine for the provision of incorrect data. It noted: "The applicant did not seek to mislead the Commission […] the applicant clearly had no interest in the Commission receiving incorrect data that included sales of products other than cartelised LCD panels, since those inaccuracies could only be detrimental to it in that the amount of the fine which the Commission would impose on it would be increased."[54]

InnoLux challenged how the amount of fine, excluding the irrelevant sales, should be calculated. The Commission and InnoLux agreed that the basic amount of the fine was €301,684,468, of which a portion of €13,246,618 arose from the mistakes, but disagreed on the way those amounts should be rounded. For all the other cartel participants, the Commission rounded down the basic amount to the first two digits (except if doing so would lead to a reduction of more than 2% compared to the amount before rounding, the Commission then rounded down to the first three digits). Rejecting InnoLux's suggested calculation, the General Court applied the Commission's methodology to exclude the portion of the fine based on the incorrect data. It accordingly reduced the fine from €301,684,468 to €288,000,000.[55]

As to (2), LG Display argued that it should have received immunity for the year 2005 and that the Commission had miscalculated the fine by taking into account the month of January 2006 (for which LG Display had received partial immunity) at various stages of the fine calculation. The General Court sided with the Commission regarding LG Display's immunity for 2005. It found that the information provided by LG Display did not meet the requirements to obtain immunity, but represented "significant added value" justifying a 50% reduction of the fine.

The General Court agreed with LG Display regarding the exclusion of the month of January 2006 from every stage of the fine calculation and reduced the fine. While the Commission excluded that month from the calculation of the multiplier representing duration, it did not do so when defining the value of the sales related to the infringement (from which the fine basic amount is calculated), taking into account the sales for January 2006.

Faci SpA v. Commission (Case T-46/10)

On March 20, 2014,[56] the General Court dismissed Faci S.p.A.'s ("Faci") appeal of the Commission decision of November 11, 2009,[57] fining Faci €5.94 million for participation in the heat stabilizers cartel.

The General Court upheld the Commission's findings that Faci had attended meetings during which Faci and its competitors exchanged commercially sensitive information and agreed on certain "minimum" or "target" prices, as well as on customer allocation "quotas." The General Court found that, because Faci was present at the meetings and did not expressly distance itself from these discussions, it entered into an anticompetitive agreement in breach of Article 101 TFEU. It did not matter that Faci or its competitors disagreed on the implementation of the agreement and pursued, to a certain extent, independent pricing policies.

The General Court further rejected the plea that the Commission had breached the principle of equal treatment in its calculation of the fines. Faci maintained that, by imposing on it an "entry fee"[58] of 18% of the fine's basic

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[53] The Commission is allowed to impose a specific fine, of up to 1% of an undertaking's total turnover, if a company submits, intentionally or negligently, incorrect or misleading information.

[54] *InnoLux v. Commission* (Case T-91/11), judgment of February 27, 2014, not yet published, para. 72.

[55] €301,684,468 - €13,246,618, or €288,437,850, rounded down to the first three digits, because rounding down to the first two digits would have led to a reduction greater than 2%.

[56] *Faci SpA v. Commission* (T-46/10), judgment of March 20, 2014.

[57] *Heat Stabilisers* (Case COMP/38589), Commission decision of November 11, 2009.

[58] Para. 25 of the 2006 Commission Guidelines on the method of setting fines provides for a "deterrence" fee (also called "entry" fee) amounting to between 15% and 25% of the value of sales. In deciding on the level

amount (compared to the "entry fee" of 19% imposed on the other cartel participants), the Commission had failed fully to differentiate Faci's conduct from that of the others, given that Faci joined the alleged cartel later than others, was involved only for a short period, and did not implement the anticompetitive agreements. The General Court held that the Commission had properly taken account of the limited duration of Faci's participation and Faci's "less rigorous" implementation.

Faci also challenged the length of the Commission proceedings.[59] Following established precedent, the General Court held that an excessive duration of proceedings may provide a basis for annulment of the resulting decision only if the company's rights of defense were violated, which Faci did not claim. Furthermore, a reduction of Faci's base fine by one point was entirely appropriate to take account of the delay.

Finally, the General Court confirmed that the Commission had acted in a proportionate manner when it refused to grant Faci the benefit of mitigating circumstances even if Faci acted "more or less" independently *vis-à-vis* the cartel. To benefit from mitigating circumstances, and thus a reduction of the fine, it is not sufficient for the participant to act in contradiction with the cartel's policy. Where the company "g[a]ve the appearance of adhering to the agreement," inciting "other undertakings to implement the cartel," it would be inappropriate to allow it to benefit from the fine reduction.[60] The company must be able to adduce concrete evidence that it "clearly and substantially opposed the implementation of the cartel to the point of disrupting the very functioning of it." Noting that Faci was not able to adduce such evidence, the General Court rejected the plea.

Joined Cases T-56/09, T-73/09 Saint Gobain Glass France & Others v. Commission

On March 27, 2014, the General Court handed down its judgment on the appeals brought by Saint Gobain Glass France SA and Compagnie de Saint-Gobain SA (together, "Saint-Gobain") against the Commission's November 12, 2008 decision fining them for participation in the car glass cartel.[61] The General Court reduced the fine imposed on Saint Gobain from €880 million to €715 million (a reduction of 18.75%), concluding that the Commission had erred in taking into account two previous infringements.

The Commission's decision included a 60% uplift of the fine on Saint-Gobain for "recidivism." This was based on the Commission's finding that Saint-Gobain previously had participated in similar infringements: specifically, cartel infringements in 1984 and 1988 in the flat glass sector in Benelux and Italy.[62]

On appeal, Saint-Gobain argued, *inter alia*, that the 60% uplift of the fine for two instances of recidivism was excessive, disproportionate, and could not be justified by the objective of deterrence. The General Court examined whether the infringements found by the 1984 Benelux and 1988 Italy decisions were committed by the same undertaking.

The General Court found that the 1988 Italy decision concerned a different subsidiary of the Saint-Gobain group (Fabbrica Pisan) to those concerned in the present case. Because the decision was not addressed to Compagnie de Saint-Gobain SA or Saint-Gobain, Saint-Gobain could not

of the fee, the Commissions may consider a number of factors, including the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented (para. 22).

59 The Commission had to suspend its investigation for five years due to parallel proceedings led by Akzo on the legal privilege status of certain documents seized by Commission officials during inspections (Akzo's offices had been inspected on the course of the investigation). The proceedings ended when the General Court dismissed Akzo's claims in its judgment of September 17, 2007 in *Akzo Nobel Chemicals and Akcros Chemicals v. Commission* (Joined Cases T-125/03 and T-253/03).

60 Para. 201 of the judgment.

61 *Car Glass* (Case COMP/39.125), Commission decision of November 12, 2008. The four cartelists (Asahi, Pilkington, Saint-Gobain, and Soliver) were fined a total of €1.384 billion (which was also a record fine at the time).

62 Commission Decision 84/388/EEC of July 23, 1984, OJ 1984 L 212/13; and Commission Decision 89/93/EEC of December 7, 1988, OJ 1989 L 33/44.

be considered a repeat infringer based on the 1988 Italy decision.

On the other hand, the 1984 Benelux decision was addressed to Compagnie de Saint-Gobain SA and a Saint-Gobain subsidiary. In respect of this decision, there was, therefore, a case of repeated infringements.

Accordingly, the General Court halved the 60% uplift to 30% and reduced the fine imposed on Saint-Gobain to €715 million.

POLICY AND PROCEDURE

ECJ Judgments

Commission v. EnBW Energie Baden-Württemberg AG (Case C‑365/12 P)

On February 27, 2014, the Court of Justice confirmed that private claimants cannot use the Transparency Regulation[63] to obtain general access to Commission antitrust case file.[64]

After the Commission fined a number of companies for their participation in the gas insulated switchgear cartel,[65] EnBW sought full access to the documents relating to the proceedings under the Transparency Regulation to support its damages claim. The Transparency Regulation gives a right of access to all documents held by an institution of the EU, subject to certain 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 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 those relating to the facts and procedural documents. The Commission refused to grant access to any of these categories of documents on the ground that they all fell within the exceptions provided for by the Transparency Regulation, and that there was no overriding interest in granting access.[66] On appeal, the General Court annulled the decision, concluding that the Commission had wrongly relied on a general presumption that access should be refused. The General Court held that the Commission should have undertaken an individual examination of each of the documents concerned.[67] The Commission appealed the General Court's judgment before the Court of Justice.

The Court of Justice found that the Commission was entitled to apply a general presumption that the disclosure of the requested documents would undermine the protection of the commercial interests of the undertakings involved and the purpose of the investigation. This general presumption arises from the provisions of Regulations 1/2003[68] and 773/2004,[69] which limit the right of access to the Commission's file in cartel cases. Allowing for general access to the requested documents would undermine the balance struck by these regulations between the undertakings' obligation to submit commercial information to the Commission and the Commission's obligation to protect the undertakings' business and professional secrets.

The Court of Justice also stated that the exception relating to the protection of the purpose of the investigation applies as long as the Commission's decision can be annulled, because the annulment of the decision may lead the Commission to resume its investigation with a view to adopting a new decision.

This judgment contributes to the increasing case-law relating to requests for access to the Commission's file in competition cases. It clarifies that the Transparency Regulation cannot be used to circumvent the specific rules governing access to documents in antitrust cases.

[63] 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.

[64] *Commission v. EnBW Energie Baden-Württemberg AG* (Case C‑365/12 P), judgment of February 27, 2014.

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

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

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

[68] Regulation (EC) 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 L 1/1.

[69] Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123/18.

Interestingly, contrary to AG Villalon's recommendations, the Court of Justice, applied the same reasoning to all five categories of documents and did not conduct a separate analysis of leniency documents, stating that the mere obligation of an undertaking to supply information to the Commission justifies their protection from third party access. The fact that the information is provided on a voluntary basis may therefore be irrelevant when applying the Transparency Regulation.

General Court Judgments

Cemex and Others v. Commission (Case T-292/11), Holcim (Deutschland) and Holcim v. Commission (Case T-293/11), Cementos Portland Valderrivas v. Commission (Case T-296/11), Buzzi Unicem v. Commission (Case T-297/11), Heidelberg Cement v. Commission (Case T-302/11), Italmobiliare v. Commission (Case T-305/11), and Schwenk Zement v. Commission (Case T-306/11)

On March 14, 2014, the General Court confirmed the broad margin of discretion of the Commission when requesting information to establish an infringement to Article 101 TFEU.[70]

In December 2010, the Commission announced that it had opened proceedings against cement manufacturers in relation to a suspected cartel.[71] On March 30, 2011, the Commission adopted a decision under Article 18(3) of Regulation 1/2003, requesting information from the cement companies under investigation.[72] The decision requested very detailed data, over a long period of time, in a specific formatting, that were to be provided within 12 weeks. Seven of the addressees challenged this decision with the General Court.

The applicants argued that the Commission had failed to substantiate the reasons underlying its requests. The decision, however, mentioned all the elements required by Article 18(3): *i.e.* the legal basis of the request, its purpose, the time-limit to reply, the indicative penalties, the right to have the decision reviewed by the Court and the fact that the Commission intended to investigate. In particular, the General Court concluded that a reference to restrictions on imports in the EEA, market sharing and price coordination on the cement market and associated markets was a clear enough description of those facts.

The applicants further claimed that the Commission breached Article 18 of Regulation 1/2003 in requesting information that was not necessary for the investigation, in particular because the Commission already had most of the information requested. The General Court reminded the applicants that it is for the Commission to decide whether a particular piece of information is necessary to its investigation. It is sufficient that the Commission may reasonably suppose that the information would help it to determine whether the alleged infringement had taken place. Here, the Commission was entitled to request information already in its possession because the request was made to obtain an exhaustive, coherent, and consolidated response, and to obtain supplementary information.

The General Court also concluded that the decision did not breach the principle of proportionality. Most applicants argued that the information requested and the short deadline had imposed an excessive and disproportionate burden on them. However, in the General Court's view, none of the length of the questionnaire (100 pages), its very detailed nature, the specific format required (three-monthly), the time period for the data requested (10 years), or the 12-week time limit could be considered disproportionately burdensome, given the serious nature and complexity of the alleged facts, the alleged duration of the infringement, and the number of undertakings involved. The General Court concluded that the scope of the

[70] *Cemex and Others v. Commission* (Case T-292/11), *Holcim (Deutschland) and Holcim v. Commission* (Case T-293/11), *Cementos Portland Valderrivas v. Commission* (Case T-296/11), *Buzzi Unicem v. Commission* (Case T-297/11), *HeidelbergCement v. Commission* (Case T-302/11), *Italmobiliare v. Commission* (Case T-305/11), and *Schwenk Zement v. Commission* (Case T-306/11), judgments of March 14, 2014.

[71] Commission Press Release IP/10/1696 of December 10, 2010.

[72] Commission Decision C (2011) 2360 final of March 30, 2011.

resources required to answer the Commission's questionnaire did not alter this assessment.

The General Court, however, concluded that the specific, two-week time limit imposed on Schwenk Zement to submit its reply was excessively short (the request covered the provision of documents relating to the role and responsibilities of certain employees and to the meetings and contacts they had with other persons in the cement business).

The General Court also found that the Commission did not exceed its powers under Regulation 1/2003 to request information. The General Court concluded that requiring companies to process and re-format millions of data points – even if this required a change in the respondent's IT system – was neither disproportionately burdensome, nor resulted in the respondent's self-incrimination.

This judgment confirms the wide margin of discretion of the Commission in deciding what information is necessary in the framework of an antitrust investigation.

Case T-181/10, Reagens SpA v. Commission

On March 20, 2014, the General Court partially annulled a Commission decision that denied Reagens SpA ("Reagens") access to the non-confidential version of documents relating to the application made by other participants in the heat stabilizers cartel for a reduction of fine for inability to pay.[73]

On November 11, 2009, the Commission fined several companies, including Reagens, for their participation in the heat stabilizers cartel.[74] During the procedure, Reagens and two other companies (X and Y), had requested the application of paragraph 35 of the 2006 Fining Guidelines,[75] which provides that, "in exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context," when setting the fine. The Commission granted Y a reduction of fine, but rejected Reagens' and X's requests. To prepare its appeal against the decision, Reagens sought access to certain non-confidential documents relating to X's and Y's requests under the Transparency Regulation.[76] 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 inspections, investigations and audits. In particular, Reagens requested access to:

- X's and Y's initial requests for application of paragraph 35 of the 2006 Fining Guidelines;
- the Commission's first questionnaire sent to the companies (the "standard" questionnaire);
- the companies' replies to the standard questionnaire;
- the Commission's second questionnaire (the "targeted" questionnaire); and
- the companies' replies to the targeted questionnaire.

The Commission denied access to these documents on the ground that they were covered by the exceptions relating to the protection of commercial interests and, as regards the Commission's questionnaires, the protection of the purpose of investigation. The Commission also found that the principle of sound administration and proportionality excluded the possibility of partial access, and that no overriding public interest would justify granting access to the requested documents.

The General Court, however, found that the companies' initial requests were not covered by the exception relating to the protection of commercial interest, because their content was necessarily abstract, and the Commission could in any event redact any sensitive information before

73 *Reagens SpA v. Commission* (Case T-181/10), judgment of March 20, 2014.

74 Commission Decision C(2009) 8682 final of November 11, 2009.

75 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 2010/2.

76 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.

disclosure. The General Court also found that the Commission's first questionnaire was not covered by the commercial interest exception because it did not contain any confidential information. Further, it was not covered by the exception relating to the protection of the purpose of the investigation, in view of its standard content.

The General Court, however, agreed with the Commission that the replies to the standard questionnaire, the targeted questionnaire, and the replies to the targeted questionnaire were covered by the exception relating to the protection of commercial interest because they contained specific information relating to the financial situation of X and Y. Furthermore, the General Court held that the purpose of better preparing an action against a decision does not constitute an overriding public interest in disclosure of these documents because it is indistinguishable from Reagens' individual interest.

This judgment contributes to the increasing volume of case-law relating to requests for access to the Commission's file in cartel investigations. Even though it partially annulled the Commission decision, in practice it only allowed limited access to documents that were of little use for Reagens and did not contain meaningful information. The judgment further clarifies that the Transparency Regulation is only of limited use for applicants seeking such access. This is because the purpose of this regulation is mainly to ensure greater participation by citizens in the decision-making process and to guarantee a greater legitimacy to the institutions. It is therefore less relevant for documents issued during an administrative procedure, such as a competition law investigation, than for documents issued in the legislative process.

ABUSE/STATE ENTERPRISES

ECJ Judgments

OSA v. Léčebné a.s. (Case C-351/12)

On February 27, 2014, the Court of Justice ruled on a reference for a preliminary ruling by a Czech court on the application of the Copyright Directive[77] and of Article 102 TFEU to the grant of territorial monopolies to copyright societies.[78]

In the main proceeding, OSA,[79] a copyright collecting society, sued Léčebné lázně Mariánské Lázně a.s. ("Lecebne"), a non-state healthcare provider, for failure to pay royalties for various copyrighted works played at its healthcare spas. Lecebne argued that OSA was abusing its dominant position by charging royalties that were excessively high compared to those charged by collecting societies in the neighboring Member States. The Czech court requested a preliminary ruling on whether Article 56 TFEU, which provides for the freedom of services within the EU, and Article 102 TFEU, which prohibits abuse of dominance, preclude the Czech legislation that granted OSA a territorial monopoly on the collection of royalties.

The Court of Justice[80] held that Article 56 TFEU did not preclude legislation granting OSA monopoly rights, because such an arrangement constitutes a "suitable"[81] and appropriate method of protecting territorial copyright.[82]

[77] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the "Copyright Directive") OJ 2001 L 167/10.

[78] *OSA v. Léčebné lázně Mariánské Lázně a.s.* (Case C-351/12), judgment of February 27, 2014, not yet published.

[79] Ochranný svaz autorský pro práva k dílům hudebním o.s.

[80] The Court of Justice also held that: (i) the EU Copyright Directive's provisions did not allow an exemption for healthcare providers, and therefore precluded this Czech law's exemption; and (ii) the Copyright Directive could not be given direct effect between OSA and Lecebne, though the Czech court should interpret the implementing law as closely in line with the Copyright Directive as possible.

[81] *Supra* note 78, para. 72.

[82] *Ibid* , para. 78.

The Court of Justice then ruled that the Czech legislation granting exclusive collecting rights to OSA fell within Article 106(1) TFEU.[83] The Court of Justice also concluded that, because the collecting society managed private interests (*i.e.*, the intellectual property of musicians), the exclusive rights fell outside the scope of the Article 106(2) TFEU exemption for services of a general economic interest or those related to state revenue producing monopolies.[84]

The Court of Justice found that OSA, as a monopolist, held a dominant position within the meaning of Article 102 TFEU. However, as the grant of a monopoly (and a corresponding dominant position) did not in itself constitute an abuse, Article 102 TFEU did not prohibit the Czech legislation. Instead, it was for the referring Czech court to determine whether OSA had abused its dominant position. The Court of Justice indicated that abuse might be found if: (i) OSA had charged royalty rates that were "appreciably higher than those charged in other Member States"[85] (assuming that a comparison of royalty rates could be carried out on a consistent basis); or (ii) OSA's royalty rates were "excessive in relation to the economic value of the service provided."[86] It further explained that, absent objective grounds for differences between OSA's royalty rates and those applied by collecting societies in other Member States, OSA's royalty rates would infringe Article 102 TFEU.[87] The Court of Justice also concluded that the Czech implementing legislation would also breach both Article 102 and Article 106(1) TFEU, if the abuse arose as a direct result of OSA exercising the rights conferred on it by the Czech legislation.[88]

[83] Article 106(1) TFEU provides that Member States shall not grant special or exclusive rights to undertakings where those rights are contrary to the rules set out in the EU Treaties, including Articles 101 and 102 TFEU.

[84] *Ibid* , para. 81.

[85] *Ibid*, para. 87.

[86] *Ibid*, para. 88.

[87] *Ibid*, para. 87.

[88] *Ibid*, para. 83.

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