HORIZONTAL AGREEMENTS

ECJ Judgments

Kone AG & Others (Case C-557/12)

On June 5, 2013, the Court of Justice ruled on whether a national legal system can exclude damages resulting from "umbrella pricing." Umbrella pricing occurs when companies that are not party to a cartel benefit from the higher prices caused by the cartel (operating "under the cartel's umbrella")[1] to set their own prices higher than they would otherwise have been able to under competitive conditions. Following Advocate General Kokott's recommendation, the Court of Justice held that Article 101 TFEU precludes the categorical exclusion of umbrella pricing claims – *i.e.*, purchasers from companies not part of a cartel cannot be barred from seeking relief from cartel members under national legislation.[2]

The case was a preliminary reference 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, and the Austrian Supreme Court wanted to know whether EU law precluded such a categorical exclusion of liability.

The Court of Justice's reasoning was brief: Article 101 TFEU creates direct obligations between individuals. Individuals must be able to claim compensation for harm caused by a restriction of competition. Domestic legal systems set out the procedural rules governing such compensation claims, but these rules are subject to the principles of "equivalence" (*i.e.*, rights deriving from EU law must not be less favorable than those governing domestic actions) and "effectiveness" (*i.e.*, domestic rules must not make it practically impossible or excessively difficult to exercise rights conferred by EU law). Umbrella pricing is one of the possible effects of a cartel that cartelists "cannot disregard"[3]. Therefore, the categorical exclusion of umbrella pricing claims would put the full effectiveness of Article 101 TFEU at risk.

Advocate General Kokott had previously noted that "[t]he Court's Judgment in this case will without doubts be ground-breaking in the context of the further development of European competition law and, in particular, its private enforcement."[4] This is arguably an overstatement. The Court of Justice's judgment only holds that national legislation cannot categorically exclude umbrella pricing claims. Claimants will still need to prove the causal link between the cartel, the umbrella pricing, and the loss they have suffered, and national courts are under no obligation to accept the umbrella pricing theory when examining the causal link in any individual case.

General Court Judgments

Toshiba Corp. v. Commission (Case T-519/09)

On May 21, 2014, the General Court dismissed an appeal by Toshiba Corp. ("Toshiba") against the Commission's decision in the power transformer cartel. In its decision of October 7, 2009, the Commission fined six European and Japanese power transformers producers a total of €67.6 million for their involvement in an oral market sharing agreement.[5] A seventh producer, Siemens, received full immunity under the Commission's Leniency Notice.

On appeal, Toshiba argued that the Commission had failed to prove the existence of the cartel to the requisite legal standard and had not shown the alleged cartel's immediate

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1 Opinion of Advocate General Kokott in *Kone AG & Others* (Case C-557/12) EU:C:2014:45, para. 2.

2 Interestingly, in the US, district courts have tended to view this theory as too speculative or conjectural to found a damages claim. *See*, *e.g.*, *Antoine Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1167-68 (C.D. Cal. 2000) .

3 *Kone AG & Others* (Case C-557/12) EU:C:2014:1317, para. 30.

4 Opinion of Advocate General Kokott in *Kone AG & Others*, *supra* n 1, para. 4.

5 *Power transformers* (Case COMP/39.129), Commission decision of October 7, 2009..

and substantial effect on competition in the EU, nor an appreciable influence on the pattern of trade between Member States.

The General Court rejected Toshiba's argument that the Commission had relied on evidence with low probative value. It noted that no provision or general principle of EU law prohibits the Commission from using statements against a company made by other companies accused of participating in a cartel and held that statements "made within the context of the Commission's leniency programme does not call their probative value into question."[6]

The General Court also rejected Toshiba's argument that the Commission had infringed the *in dubio pro reo* principle[7]. The General Court recalled that, in line with established precedent, the presumption of innocence and the *in dubio pro reo* principle do not require that every item of evidence on its own prove beyond a reasonable doubt that an infringement was committed , and stated that "[i]t is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement [of proof beyond a reasonable doubt]."[8] The General Court found that the evidence produced by the Commission permitted it to conclude beyond a reasonable doubt, based on the body of evidence as a whole, that the infringement took place.

The General Court also rejected Toshiba's argument that the Commission had not adequately explained certain details of the alleged cartel agreement. The General Court simply recalled that it is not necessary for the Commission to prove all details of an unlawful agreement.[9]

Toshiba also argued that the Commission had failed to show both the alleged cartel's immediate and substantial effect on competition in the EU and its appreciable influence on the pattern of trade between Member States. Toshiba rejected the Commission's finding that the cartel agreement had restricted competition and affected trade between the Member States because "insurmountable barriers" already precluded the entry of Japanese producers onto the European market.[10]

The General Court restated its settled case law according to which the Commission does not have to show a cartel's effects on actual or potential competition where the cartel's object is to restrict competition, as was the case with the agreement at issue. The Commission has to show only that the barriers to entry to the European market were not insurmountable. The General Court first held that the "very existence of the [cartel a]greement provides a strong indication that a competitive relationship existed between the Japanese and European producers."[11] In addition, there was evidence that a Japanese producer had accepted European projects. The General Court thus found that the barriers were not insurmountable.

The General Court rejected Toshiba's argument that the Commission had not applied the correct legal standard in finding that trade between the Member States had been affected. In particular, the General Court held that Article 101 TFEU is not limited to cases in which there is a physical transfer of goods from a third country to the EU. Toshiba's argument that transportation of power transformers from Japan to Europe did not take place and would not have been economically viable was therefore irrelevant.

Having also rejected Toshiba's pleas concerning alleged errors in the determination of the duration of the cartel and calculation of the fine, the General Court dismissed the action in its entirety.

6 *Toshiba Corp. v. Commission* (Case T-519/09) EU:T:2014:263, para. 51.

7 When in doubt, for the defendant, *i.e.*, a defendant may not be convicted where a doubt about the guilt exists.

8 *Toshiba Corp. v. Commission*, *supra* n 6, para. 158.

9 *JFE Engineering and Others v. Commission* (Joined Cases T-67/00, T-68/00, T-71/00, and T-78/00) EU:T:2004:221, para. 203.

10 *Toshiba Corp. v. Commission*, supra n 6, para. 224.

11 *Toshiba Corp. v. Commission*, *ibid*, para. 231.

FINING POLICY

ECJ Judgments

Areva & Alstom v. Commission **(Case C-241/11 P and C-253/11 P)**

On April 10, 2014, the Court of Justice held that the General Court and the Commission had erred in the approach taken to joint and several liability for fines in one of its judgments in the gas insulated switchgear cartel. On January 24, 2007, the Commission imposed fines totaling over €750 million on a group of 11 Japanese and European companies, including Areva and Alstom, for infringing Article 101 (1) TFEU.[12] The Commission found that the companies had entered into illegal agreements and engaged in a range of unlawful practices, including market sharing, quota allocation, bid rigging, price fixing, and the exchange of competitively sensitive information.

The General Court's March 3, 2011 judgment mostly upheld the Commission's analysis. However, the General Court concluded that the Commission infringed the principles of proportionality and equal treatment by increasing the basic amount of the fine imposed on Alstom and the Areva group companies by 50% (based on its finding that the companies were cartel ring leaders) and accordingly reduced the fines.

Alstom and Areva lodged appeals against the judgment. The Court of Justice dismissed most arguments, but upheld the applicants' claim alleging errors of law with respect to the rules governing joint and several liability for payment of fines.[13]

Alstom and Areva were the successive parents of a subsidiary of which business units had participated in the gas insulated switchgear cartel. The General Court had endorsed the Commission's methodology, under which it included the fine for which Areva and the subsidiary were jointly and severally held liable in the fine for which Alstom and the subsidiary were jointly and severally liable. Alstom and Areva argued that this imposed a *de facto* joint and several liability between Alstom and Areva.

The Court of Justice found that, while the General Court had not established a formal link of joint and several liability between Alstom and Areva and the parent companies had never constituted an economic unit with each other, the methodology was likely to produce the same effects as with such a link. The Court of Justice held that the methodology used by the Commission was at odds with the principle that the penalty must be specific to the offender and the offence, which requires that the Commission separately determine for each of the undertakings involved the amount of the fine for which the companies forming part of the undertaking are jointly and severally liable. With regard to the external determination of joint and several liability, each successive parent company must be in a position to infer from the decision its share of liability for payment of the fine, corresponding to the part of the fine imposed on the subsidiary which may be imputed to it. Areva and Alstom could not do so in the present case. Keeping the total amounts of the fines, the Court of Justice allocated the amounts for which each parent company was respectively held jointly and severally liable with the subsidiary.

The applicants also raised arguments with respect to the internal allocation of liability between those held jointly and severally liable. The General Court had held that in the absence of any finding in the Commission's decision that some of the companies in the undertaking have a greater share of responsibility than others, it must be presumed that they are equally liable.

The Court of Justice held that the Commission's power to impose joint and several liability does not extend to the internal allocation between those who are jointly and severally liable. Where there is no contractual agreement, it is for the national courts to determine the internal shares to be paid, by applying national law, in a manner consistent with EU law. The Court of Justice thereby rejected the premise on which both the applicants and the General

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

13 *Areva and Alstom v. Commission* (Case T-117/07) 2011 ECR II-633.

Court relied: that the Commission's power to impose joint and several liability to companies forming part of a single undertaking includes the exclusive power to determine the shares of the fine to be borne by those companies in the context of their internal relationship. Therefore, the Court of Justice concluded that the General Court had erred in law in holding that, in the absence of any finding by the Commission that some of the companies in the undertaking have a greater share of responsibility, it must be presumed that they are equally liable.

The Court of Justice did not however annul the judgment on that point. In line with established precedent, it noted that, where the grounds of a General Court judgment infringe EU law but its operative part is shown to be well founded on other legal grounds, the infringement does not lead to the annulment of that judgment, but a substitution of grounds.[14] The General Court had correctly rejected Areva and Alstom's arguments alleging: (i) infringement of the principle of legal certainty; and (ii) unlawful delegation of the Commission's powers, albeit on incorrect grounds.

The Court of Justice substituted its own grounds: (i) because the Commission does not have the power to determine how the fine imposed jointly and severally is to be allocated internally, the fact that it had not determined so in its decision could not constitute an infringement of the principle of legal certainty; (ii) because the internal allocation of a joint and several fine rests with a national court or arbitration panel, not with the Commission, the Commission could not be criticized for unlawfully delegating such a power due to its failure to determine the shares to be paid. Therefore, the Court of Justice dismissed the appeal on that point.

***FLSmidth & Co. A/S v. Commission* (Case C‑238/12 P)**
On April 30, 2014, the Court of Justice dismissed an appeal by FLSmidth & CO A/S ("FLSmidth") against the General Court's judgment of March 6, 2012,[15] partly upholding the Commission's decision of November 30, 2005, in the industrial bags cartel.[16]

In 2005, the Commission levied fines totaling €290.71 million on 16 industrial plastic bags producers, including a €17.85 million fine on Trioplast Wittenheim SA ("Trioplast Wittenheim"). FLSmidth was held jointly and severally liable for €15.3 million in its capacity as former parent company of Trioplast Wittenheim. On appeal, the General Court reduced the fine for which FLSmidth had been held jointly and severally liable to €14.45 million on the grounds that the Commission had failed to establish that FLSmidth had decisive influence over Trioplast Wittenheim in 1991. FLSmidth appealed the General Court's judgment to the Court of Justice.

FLSmidth argued that the presumption that a company holding directly or indirectly all or almost all of the capital of another company does in fact exercise decisive influence over the latter, violates the presumption of innocence. According to FLSmidth, such a presumption is essentially irrebuttable. The Court of Justice recalled that this presumption results from settled case law and in no way infringes the presumption of innocence. The fact that it is difficult to prove the opposite does not in itself render the presumption irrebuttable.

FLSmidth further maintained that the General Court had failed to carry out an independent review of the Commission's calculation of the fine. The Court of Justice noted that the General Court has unlimited jurisdiction with regard to the fines imposed by the Commission. Accordingly, the General Court has the power not only to review the lawfulness of those fines, but also to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce, or increase the fine imposed. The Court of Justice concluded that the General Court had conducted an independent and complete analysis of the fine imposed on FLSmidth, even though it

14 *FIAMM and Others v. Council and Commission* (Joined Cases C‑120/06 P and C‑121/06 P) EU:C:2008:476.

15 *FLSmidth v. Commission* (Case T-65/06) EU:T:2012:103.

16 *Industrial bags* (Case COMP/38354), Commission decision of November 20, 2005.

ratified, in certain respects, the appraisal carried out by the Commission and the result thus reached.

FLSmidth also contended that the fine was disproportionate, because FLSmidth was held jointly and severally liable for 80% of the fine imposed on Trioplast Wittenheim, even though FLSmidth had formed an economic entity with Trioplast Wittenheim for only 35% of the infringement period. The Court of Justice noted that the fine need not be strictly proportional, or, in principle, reasonably proportional, to the duration of the participation of the undertaking concerned in the infringement at issue, provided the amount appropriately reflects the gravity of the infringement committed. The Court of Justice concluded that the fine was not disproportionate given the serious nature of the infringement and the minimum amount of €20 million generally contemplated by the Commission's fining guidelines for such infringements.

FLSmidth claimed that the General Court had infringed the principle of equal treatment by confirming the Commission's finding that FLSmidth could not benefit from a 30% reduction of the basic amount of the fine pursuant to the Leniency Notice,[17] whereas Trioplast Industrier AB and its subsidiary, which acquired control over Trioplast Wittenheim in 1999, could. The Court of Justice noted that the objective of the Leniency Notice is to promote the detection of anticompetitive conduct. This objective was not served by extending a fine reduction granted to an undertaking for cooperation with the Commission to an undertaking that had controlled the infringing undertaking at the time of the infringement but no longer did when that undertaking cooperated with the Commission. Considering that Trioplast Wittenheim and FLSmidth no longer formed an economic unit when Trioplast Wittenheim cooperated with the Commission, the 30% reduction could not be extended to FLSmidth.

Having also rejected FLSmidth's pleas concerning the misapplication of the Leniency Notice, infringement of the principle of equal treatment, and the General Court's failures to adjudicate within a reasonable time and to review the Commission's duty to state reasons, the Court of Justice dismissed the appeal in its entirety.

Deltafina SpA v. Commission **(Case C-578/11 P)**

On June 12, 2014, the Court of Justice dismissed an appeal by Deltafina SPA ("Deltafina") against the General Court's judgment of September 9, 2011,[18] upholding the Commission's decision of October 20, 2005 in the Italian raw tobacco cartel.[19]

In 2005, the Commission fined Deltafina and three other Italian raw tobacco processors a total of €56 million for fixing prices, allocating customers, and rigging bids. As the first leniency applicant, Deltafina had initially received conditional full immunity from fines pursuant to the 2002 Leniency Notice.[20] However, the Commission subsequently withdrew that immunity, because Deltafina had failed to meet its continuing duty to cooperate with the Commission. Specifically, the Commission found that Deltafina had informed other cartel members of its leniency application before the Commission could conduct its investigation, without warning the Commission of its intention to do so or informing it of the disclosure after the fact.

On appeal, the General Court confirmed the Commission's decision, and Deltafina appealed the General Court's judgment to the Court of Justice.

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 maintained that the General Court's failure to address its plea that the Commission had released Deltafina from the duty to keep the leniency application secret, vitiated its reasoning. The Court of Justice noted that Deltafina's

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

18 *Deltafina v. Commission* (Case T-12/06) EU:T:2011:441.

19 *Raw Tobacco Italy* (Case COMP/C.38.281/B.2), Commission decision of October 20, 2005.

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

disclosure of its cooperation had been unsolicited and therefore not inevitable. Deltafina did not dispute that the Commission had not expressly authorized the unsolicited disclosure. Even assuming that the Commission had authorized a non-voluntary disclosure by Deltafina, that would not justify an unsolicited disclosure such as Deltafina's.

Deltafina also maintained that the General Court had infringed Deltafina's right to a fair hearing by breaching its rules of procedure on the hearing of witnesses. The Court of Justice recalled that the General Court is the sole judge of whether the information available to it is sufficient or needs to be supplemented. This matter is not subject to review by the Court of Justice, unless the evidence has been distorted or the substantive inaccuracy of the General Court's findings is apparent from the documents in the case.

The Court of Justice recognized that the General Court had committed a procedural irregularity in hearing the testimony of the parties' representatives. However, this irregularity did not violate the parties' right to a fair hearing because the General Court did not rely on the testimony in question, but based its findings on written evidence alone.

Deltafina also argued that the General Court had infringed its fundamental right to obtain a judgment within a reasonable time because the proceedings before the General Court lasted five years and eight months, and 43 months elapsed between the end of the written procedure and the decision to open the oral procedure. The Court of Justice agreed that the General Court had seriously breached its duty to adjudicate within a reasonable time, and that such breach could not be justified by the difficulty of the case or the number of parties. The Court of Justice further stated that this was a breach of a fundamental right entitling the affected party to an effective remedy. The right to an effective remedy cannot, however, lead to the setting aside of the judgment under appeal where there is no indication that the excessive duration of the proceedings affected their outcome. In this case, Deltafina did not adduce any evidence showing that the General Court's alleged failure to adjudicate within a reasonable time could have affected the outcome of the case.

The Court of Justice further recalled that the need to ensure compliance with EU competition law precludes it from reconsidering the validity or amount of a fine on the sole ground that the General Court failed to adjudicate within a reasonable time, where all pleas concerning the amount of the fine and the conduct it penalizes have been rejected. The Court of Justice thus rejected Deltafina's third plea, but noted that Deltafina could bring a separate action for damages before the General Court sitting in a different composition from that which heard the appeal against the Commission's decision.

Having also rejected as inadmissible Deltafina's plea concerning an alleged breach of the principle of equal treatment in calculating the reduction to Deltafina's fine, the Court of Justice dismissed the appeal in its entirety.

ECJ Advocate General Opinions

***Guardian Industries and Guardian Europe v. Commission* (Case C-580/12 P)**

On April 29, 2014, Advocate General ("AG") Wathelet advised the Court of Justice to set aside the General Court's judgment dismissing Guardian Industries Corp.'s and Guardian Europe Sàrl's (collectively, "Guardian") action against the Commission's decision of November 28, 2007, imposing a fine of €148 million on Guardian for its involvement in the flat glass cartel between April 2004 and February 2005.

Guardian appealed the Commission's decision, seeking partial annulment and a reduction of the fine imposed. The General Court dismissed Guardian's appeal in its entirety. In particular, the General Court held that the Commission had not breached the principle of non-discrimination in setting the fines by excluding the value of captive sales (internal sales between members of vertically integrated companies) from the calculation of the fines of the other cartel members, without reducing Guardian's fine by an equivalent proportion. Guardian appealed the General Court's judgment to the Court of Justice.

AG Wathelet explained that, while an infringement to Article 101(1) TFEU cannot extend to relationships within a single economic unit consisting of a group of companies, the case law of the Court of Justice requires that captive or internal sales be treated in the same way as external sales, to avoid any discrimination between vertically integrated undertakings and those which are not. This was also required under the 1998 and 2006 Fining Guidelines.[21]

Under the 2006 Fining Guidelines, the basis for setting the fine was the value of sales of goods or services to which the infringement directly or indirectly relates. Prior to its flat glass cartel decision, the Commission had always included internal sales in the turnover figure used for calculating the fine. It did not do so in its November 2007 decision.

The Commission is required to apply a single interpretation of the Guidelines, except where it sets out all the reasons for departing from such interpretation in individual cases. The Commission did not prove the existence of any exception or special circumstances for excluding internal sales, but simply excluded them on the ground that it had not been established that such internal sales had contributed to the competitive advantage generated by the cartel. Because the Commission excluded internal sales without providing a statement of reasons for doing so, AG Wathelet concluded that the General Court had erred in law in upholding the Commission's approach.

AG Wathelet also considered the question of discrimination. Guardian was the smallest (in terms of market share) and the only non-vertically integrated cartel member. By excluding captive sales from the turnover used for calculating the cartel participants' fines, the Commission gave the other cartel members an unjustified advantage, as they received a fine which, in relative terms, did not reflect their ability to distort competition and benefit from their infringement. The exclusion of internal sales reduced the size of the relevant turnover from €2.7 billion to €1.7 billion, which significantly altered, in terms of value of sales, the relative weight of each undertaking involved in the cartel.

AG Wathelet noted that vertically integrated groups are not in an objectively different situation from companies that are not integrated. Even though the cartel related solely to the prices charged to independent customers, the differences in the structure of the companies have no relevance in the calculation of the fine. The only relevant factors are those relating to the gravity and duration of the infringement and the relative weight of the participants on the relevant market. At the hearing, the Commission had complained that any obligation to take into account captive sales would entail a sharp increase in the amounts of the fines on integrated groups. AG Wathelet remarked that this was a consequence of the EU legislature's choice to refer to turnover in the calculation of the fines, rather than operating profit or net profit.

Therefore, AG Wathelet concluded that the General Court had erred in law by failing to recognize the unequal treatment and that its judgment should be set aside. With regard to Guardian's remedy, AG Wathelet noted that the fact that it is no longer possible to increase the fines imposed on the other cartel members does not mean that the rights of the victim cannot be protected.[22] Therefore, AG Wathelet concluded that Guardian's fine should be reduced in the proportion of captive sales on the market (€1 billion out of a market of €2.7 billion), *i.e.*, a 37% reduction, from €148 million to €93 million.

General Court Judgments

***Donau Chemie AG v. Commission* (Case T-406/09)**[23]

On May 14, 2014, the General Court partially upheld Donau Chemie AG's ("Donau Chemie") appeal of the

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

[22] Appeals before the Court of Justice only concern questions of law and the Court of Justice has no power of full judicial review.

[23] *Donau Chemie AG v. Commission* (Case T-406/09) EU:T:2014:254.

Commission's 2009 decision finding that, between 2004 and 2007, Donau Chemie and several other calcium carbide and magnesium reagent companies regularly shared market data, fixed prices and quotas, and exchanged sensitive information.[24] The General Court reduced Donau Chemie's fine from €5 million to €4.35 million, concluding that the Commission had incorrectly applied the fine reduction that Donau Chemie was entitled to under the Leniency Notice.[25]

The Commission's 2009 decision had imposed fines totalling €61 million on nine companies, including Donau Chemie. Donau Chemie's €5 million fine included a 35% reduction on account of its leniency application. Donau Chemie appealed the decision.

First, Donau Chemie argued that the Commission had incorrectly determined the basic amount of the fine. Donau Chemie claimed that the Commission should have taken into account a broader market definition that included lime and/or petrochemical acetylene as substitute products, rather than just calcium carbide powder, calcium carbide granulates, and magnesium granulates. (Based on a broader approach to market definition, Donau Chemie's market shares would have been lower, thus impacting the percentage of the value of sales affected by the infringement and, ultimately, the basic amount of the fine). It also argued that the Commission failed to consider the lack of impact of the infringement on the market or the relative gravity of its involvement in the infringement.

The General Court rejected these claims, finding that Donau Chemie did not provide sufficient evidence to mandate a different market definition. The General Court noted, *inter alia*, that lime is not a common substitute for calcium carbide and magnesium reagents in Europe. The General Court further concluded that Donau Chemie had failed to show that it had only a minor role in the cartel, finding that Donau Chemie actively organized and contributed to cartel meetings.

Second, Donau Chemie contended that the Commission should have taken into consideration as mitigating circumstances: (i) the lack of implementation of the agreements; (ii) Donau Chemie's admission of involvement and regret; (iii) the compliance measures adopted; and (iv) the crisis that was taking place in the industry at that time due to falling demand and increasing competition from companies in Eastern Europe. The General Court rejected all these arguments, concluding that: (i) the agreements had been implemented; (ii) the mere act of not challenging a finding of involvement did not justify further reductions; (iii) putting in place a compliance program is not enough to secure a fine reduction; and (iv) a difficult economic situation in the industry was not a mitigating circumstance for participating in the cartel.

The General Court, however, partially upheld Donau Chemie's third ground of appeal. It found that the Commission had erred in applying the Leniency Notice [26] by granting an inadequate reduction relative to the evidence provided by Donau Chemie. The Commission's 35% reduction was based on the evidence provided by the company, which mainly related to one of the three products involved in the infringement: *i.e.* calcium carbide granulates. The Commission granted a reduction only with regard to the part of the fine relating to the aspect for which Donau Chemie provided significant information to the Commission, namely corroboration and details of the cartel events related to calcium carbide granulates, strengthening the Commission's case. Donau Chemie was also the first undertaking to report that collusion with regard to calcium carbide granulates was part of a wider anticompetitive scheme, which also encompassed magnesium granulates. The General Court held that the Leniency Notice did not allow the Commission to apply the fine reduction solely to the part of the fine relating to the facts for which the leniency applicant provided *significant* information.

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

[25] Commission notice on immunity from fines and reduction of fines in cartel cases, February 19, 2002, OJ 2002 C 45/3.

[26] Commission notice on immunity from fines and reduction of fines in cartel cases, February 19, 2002, OJ 2002 C 45/3.

Therefore, the fine reduction should have been calculated based on Donau Chemie's turnover in relation to each of the three products as to which it provided evidence.

The General Court therefore increased the reduction of the basic amount of the fine from 35% to 43.5%, reducing the total fine from €5 million to €4.35 million.

ABUSE/STATE ENTERPRISES

General Court Judgments

Intel v. Commission **(Case T-286/09)**

In a judgment of June 12, 2014, the General Court upheld in its entirety the Commission's May 13, 2009 decision imposing a record fine of €1.06 billion on Intel for abuse of dominance in the market for x86 central processing units (CPUs). The General Court confirmed the Commission's finding that Intel committed an abuse through rebates and other payments it made to computer manufacturers Dell, HP, NEC, Lenovo, and Europe's largest electronics retailer, Media Saturn, that were conditioned on exclusivity or quasi-exclusivity. The General Court's judgment is significant, mainly because the Court confirmed that, unless they are "objectively justified", exclusivity rebates granted by dominant undertakings are generally considered abusive, regardless of whether they actually produce any anticompetitive effects.

In the decision under appeal, the Commission held that Intel's rebates breached Article 102 TFEU, based on the long-standing precedent set by the Court of Justice in *Hoffman-La Roche*, under which rebates conditioned on exclusivity are generally considered abusive (save for extraordinary circumstances in which they may be objectively justified). Notwithstanding its reliance on this case law, the Commission, "for completeness", also examined in its decision at considerable length the actual foreclosure effects of the rebates based on the so-called "as-efficient competitor test" as set out in its 2009 Guidance Paper on enforcement priorities under Article 102 TFEU. Based on this "effects-based" analysis, the Commission concluded that Intel's rebates were such that an equally efficient competitor would have been unable effectively to compete for sales that it could otherwise realistically have contested (the "contestable" share) because the rival would have been forced to price below costs to match Intel's discount.

This reasoning represented the first time that the Commission used an "effects-based" analysis for alleged "exclusivity" or "loyalty" rebates under Article 102 TFEU, even though only "for completeness". In its appeal, Intel took up this lead and argued that, as a matter of law, the Commission must prove actual anticompetitive effects in order to conclude that exclusivity rebates are abusive. Intel further argued, as a matter of fact, that the Commission failed to provide such proof. Many observers therefore viewed the proceedings as a "test case" that would determine whether the General Court would endorse an "effects-based" approach to exclusivity rebates under Article 102 TFEU.

The General Court confirmed, based on existing case law and, in particular, Hoffmann La Roche that an effects-based analysis is not required in order to establish that exclusivity rebates infringe Article 102 TFEU, as such rebates, "by their very nature", are capable of restricting competition. The General Court's judgment therefore essentially confirms the status quo since the 1970s.

On August 28, 2014, Intel appealed the judgement to the Court of Justice. It remains to be seen whether the Court of Justice will uphold the General Court's position. In the meantime, while the judgment is clear that no effects-based economic analysis is required to establish that exclusivity rebates infringe Article 102 TFEU as a matter of substantive law, it should not as such have direct consequences for the Commission's enforcement policy more generally. The Commission's stated position in this regard is still that as set out in its 2009 Guidance Paper, according to which the Commission will direct its enforcement efforts to situations in which there are actual anticompetitive effects, as determined by the as-efficient competitor test. This test will thus remain of importance with respect to the Commission's investigations, but, it is important to note, it will not shield companies from private litigation, or from pursuit by national authorities. Moreover, the General Court explicitly reaffirmed the Court of Justice's holding in *Post Danmark* that this test is key to the analysis of what it terms pure "pricing practices" (*i.e.*, unconditional pricing or discounting practices that are not subject to exclusivity or other potentially exclusionary criteria that customers must fulfil). As such, the as-efficient competitor test retains its relevance as a benchmark for Article 102 TFEU enforcement more generally, and even for rebate practices, provided they do not amount to exclusivity or quasi-exclusivity rebates.

To frame its legal analysis, the General Court analyzed and invoked long-standing case law to draw a "distinction … between three categories of rebates":

- **Quantity rebates**. These are rebates "linked solely to the volume of purchases", *i.e.*, they are granted as a customer's purchase volumes increase. The Court noted that such rebates are "generally considered" not to breach Article 102 TFEU on the grounds that if "increasing the quantity supplied results in lower costs for the supplier" the supplier "is entitled to pass on that reduction to the customer in the form of a more favorable tariff."[27] The judgment does elaborate on this type of rebate or identify specific examples of such rebates. The Court seemed to have had in mind uniformly applicable volume-based rebate scale (but, depending on the specifics—notably retroactivity and duration of reference periods—these rebates can also produce fidelity-building effects, as discussed under the third category below), rebates offered in return for firm commitments to purchase certain volumes (which may reduce costs by facilitating, *e.g.*, production planning), or rebates offered on bulk orders (which might reduce delivery or logistics costs). It bears note that the Court's reference to quantity rebates being a legitimate means for a dominant supplier to pass on cost savings to consumers leaves unclear whether quantity rebates are also permissible as such in the absence of such cost savings.

- **Exclusivity rebates**. These are rebates conditional on the customer obtaining "all or most" of its demand from a dominant undertaking, *i.e.* requiring exclusivity or quasi-exclusivity. As noted, the Court recalled existing case law and set out a blanket rule that, absent "objective justification", such rebates are abusive because they are "not based—save in exceptional circumstances—on an economic transaction which justifies this burden or benefit", but are rather "designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market." These are the types of rebates the Commission found Intel to engage in, as discussed in greater detail below.

- **Other conditional, fidelity inducing rebate systems**. Finally, the Court sets out a third category of rebates, where the grant of a financial incentive is "not directly linked to a condition of exclusive or quasi-exclusive supply," but "the mechanism for granting the rebate may also have a fidelity-building effect." Such rebates might include retroactive volume rebate systems that depend on the attainment of individual sales objectives, such as the rebates discussed in *Tomra*.[28] Rebates falling within this category therefore have the potential to be abusive, but whether this is in fact the case depends on an assessment of the effects of the rebate in the individual case. It is thus necessary to show that the specific rebate mechanism has in fact a fidelity inducing effect similar to an exclusivity discount. Once this is established, the Court (citing *Michelin I*)[29] considers that it "is not essential" to show that the rebate scheme in question would fail the as-efficient competitor test, noting further that this test[30] "only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult."[31] That said, it seems clear that, conversely, if a rebate scheme does fail the as-efficient competitor test, it would be considered

27 Intel Judgment, para. 75.

28 *Tomra v. Commission* (Case C-549/10 P) EU:C:2012:221.

29 In *Michelin I*, the Court of Justice "relied on the loyalty mechanism of the rebates at issue, without requiring proof, by means of a quantitative test, that competitors had been forced to sell at a loss". (Intel Judgment, para. 144).

30 Intel Judgment, para. 144.

31 Intel Judgment, para. 150.

abusive. In addition, it is unclear to what extent the arguments that the Court rejected in *Intel* concerning the level, duration, coverage, and potential foreclosure effects of a given rebate system (discussed below) would be accepted by the General Court for rebates of this type, although, since they bear on the fidelity inducing effects, they should.

Importantly, the Court further distinguishes the three types of conditional rebates above from what it calls pure "pricing practices". Intel cited *TeliaSonera*[32] and *Post Danmark*[33] in support of its arguments that the Commission should be required to apply the as-efficient competitor test to alleged exclusivity rebates. The Court rejected this argument, holding that "the scope of that case-law is limited to pricing practices and does not affect the legal characterisation of exclusivity rebates".[34] However, in so doing, the Court expressly affirmed the continued relevance of the as-efficient competitor test to other categories of abuse. As the Court noted, the competition concerns at issue in *Intel* were "not based on the exact amount of the rebates", but on the fact that the rebates were "conditional on exclusive or quasi-exclusive supply." By contrast, because "the level of a price cannot be regarded as unlawful in itself," the as-efficient competitor test has a key role in distinguishing legitimate and non-legitimate prices.[35] For example, the Court accepts that allegations of selective price cuts or discriminatory pricing (as in *Post Danmark*) ought to be analyzed using the as-efficient competitor test, because in such cases the question is the level of the price itself as opposed to pricing that is conditioned on customers' purchasing behavior.

In assessing the compatibility with Article 102 TFEU of Intel's rebate schemes, the General Court, as a starting point for its analysis, agreed with the Commission that Intel's rebates were indeed "rebates falling within the second category, namely exclusivity rebates."[36] The judgment states, in no uncertain terms, that once a rebate is characterised as such an exclusivity rebate, the existence of an abuse "does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect."[37] The only possible defence open to a dominant company is "objective justification", although the Court gives no examples of what such an objective justification might consist of and any such circumstance is probably going to be rare in practice. (One example may be the need for a period of exclusivity to fund investment in new capacity dependent on demand from a certain customer.) For all intents and purposes, therefore, the General Court thus confirms that Article 102 TFEU generally prohibits exclusivity rebates by dominant companies, *i.e.*, regardless of their actual effects, unless they are objectively justified.

This approach, which distinguishes between different types of rebates, and requires an effects-based analysis for some, but not for others, somewhat resembles the distinction made between restrictions of competition by object and effect in the context of Article 101 TFEU. The Court justifies its position regarding exclusivity rebates on the basis that such rebates granted by a dominant company are "by their very nature capable of restricting competition", as the "undertaking in a dominant position grants a financial advantage designed to prevent customers from obtaining their supplies form competing producers."[38] Interestingly, the Court acknowledges that in the Article 101 TFEU context (*i.e.*, in the absence of dominance), "exclusivity conditions may, in principle, have beneficial effects for competition" making it necessary "to assess their effects on the market in their specific context"[39]. The justification offered by the Court for this apparent inconsistency under Articles 101 and 102 TFEU is

32 *TeliaSonera Sverige* (Case C-52/09) EU:C:2011:83.

33 *Post Danmark* (Case C-209/10) EU:C:2012:172.

34 Intel Judgment, para. 99.

35 *Ibid.*

36 *Ibid*, para. 79.

37 Intel Judgment, para. 80.

38 Intel Judgment, paras. 85, 86.

39 *See Delimitis* (Case C-234/89) EU:C:1991:91.

the "special responsibility" of a dominant firm, and the necessity to protect already weakened competition in the market concerned from "additional interference."[40] The Court's reasoning is premised on the assumption that where an undertaking has a "strong dominant position", it is an "unavoidable trading partner", and there are no proper substitutes for its products for a substantial part of customer demand.[41] In the Court's view, this reasoning is sufficient to absolve the Commission of any need to assess the existence of any (even potential) foreclosure effects of exclusivity rebates to find an abuse. Based on the Court's wording, this reasoning applies even if an assessment of the circumstances of the case would in fact reveal no foreclosure, or even potential foreclosure, of as-efficient competitors.

The consequences of having a rebate scheme classified an exclusivity rebate therefore can be harsh for dominant companies. They are well illustrated by the arguments raised by Intel in its appeal, all of which the Court explicitly rejected, as a matter of principle:

- **Lack of causality irrelevant**. Even if a dominant company can prove that customers would buy from it in the absence of the rebates, the rebate can still be abusive. As the Court puts it, there is no need to prove "either direct damage to consumers or a causal link between such damage and the practices at issue".[42]
- **Level of rebates irrelevant**. The Court holds that exclusive rebates by a dominant company are abusive, even when set at very low levels, because "it is not the level of the rebates which is at issue in the contested decision but the exclusivity for which they were given"[43].
- **Rivals' ability to offset rebates irrelevant**. The reasoning above applies "irrespective" of "whether the competing supplier could have compensated the customer for the loss of the rebate if that customer switched supplier." [44]
- **Motivation for rebates irrelevant**. Intel cited a number of other rationales for the rebates (which were not expressly granted for exclusivity, see below), but the Court was satisfied that Intel granted the rebates at issue "at least in part" in consideration of exclusivity, and that therefore they were abusive.[45] As such, if the Commission finds evidence that a given rebate scheme is motivated, even "in part", by a dominant firm seeking to extract exclusive purchasing from a customer, the Commission could make a finding of abuse.
- **Duration of rebate agreement irrelevant**. Some of the Intel contracts at issue were of very short duration, and terminable on 30 days' notice. The Court held that this is irrelevant, noting that "any financial incentive to purchase exclusively constitutes interference with the structure of competition on a market."[46]
- **Market coverage irrelevant**. Intel claimed that the rebates at issue "concerned only a small part of the x86 CPU market, namely between 0.3% and 2% per year." The Court concluded that this is "not a relevant argument," holding that there is no *de minimis* rule under Article 102, and that dominant companies must "compete on the merits for the entire market and not just for a part of it".[47]
- **Proportion of customers' demand covered irrelevant**. Some of the Intel rebates at issue only covered certain segments of its customers' demand for x86 CPUs (for example, HP's x86 CPU corporate desktop requirements amounted to only 30% of HP's total x86 CPU requirements). The Court held that this was irrelevant, holding that it is sufficient that the rebates would cover a certain "segment" of the market

[40] Intel Judgment, para 90.

[41] *Ibid*, paras. 91-92 and 103.

[42] *Ibid*, para. 105.

[43] *Ibid*, para. 108.

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid*, para. 110-113.

[47] *Ibid*, para. 117.

(regardless of the market definition adopted by the Commission, which encompassed all x86 CPUs).[48]

- **Customers' buyer power irrelevant**. Intel argued that its customers exercised their buyer power to extract higher levels of rebates. The court held that this was irrelevant, merely noting, in the same general terms as above, that an exclusivity requirement creates an "additional interference" with the "structure of competition" in a market "already weakened" by the presence of a dominant company, regardless of whether customers request the discounts themselves.[49]

Taken to its logical conclusion, the Court's judgment implies that dominant companies run the risk of infringing Article 102 TFEU even by offering quasi-exclusivity rebates, over a mere portion of a single customer's demand, set at a very low rate, for a brief period of time, in response to a powerful customer's request, in circumstances where there is no risk of foreclosing competitors, and that customer would have bought from the dominant firm anyway.

This may be a case of a "hard case" (Intel had particularly high market shares for the entirety of the period under review and the rebates seemed to affect severely its only significant competitor AMD) making what some may criticise, at least in the abstract, as "bad law." Conceivably, Commission and General Court might have adopted a more nuanced approach in different circumstances. On the other hand, the Court's rule has the merit of clarity and simplicity, and critics will have to answer the question why a dominant undertaking would want to resort to exclusivity rebates in the first place if they had no foreclosure effect (and produced no efficiencies providing objective justification).

In these circumstances, the question of when, as a factual matter, a given rebate scheme can be deemed to be conditioned on exclusivity (or quasi-exclusivity), is of paramount importance. It goes without saying that all potentially dominant firms are well advised to review the functioning of their rebate schemes to ensure that they do not implement any rebates that could be deemed, even in part, to compensate the customer for exclusivity. Clearly, dominant companies, even if they do not expressly impose exclusive terms, ought to be particularly circumspect in how they communicate with customers in discussions surrounding rebates, lest they be characterised as "*de facto* exclusive".

In this connection, it bears note that, aside from the legal questions discussed above, Intel also appealed the Commission's factual characterisation of its rebate schemes as "exclusive" or "quasi-exclusive" in nature. Indeed, the General Court's review of the Commission's evidentiary assessment of this question takes up the bulk of its 1,600 paragraph-long judgment. In reviewing this question, the Court applied the general standard of proof applicable to the review of antitrust cases, namely whether there is "sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place."[50] In reviewing the Commission's factual assessment in this regard, the Court noted that it is "not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement," but that it is sufficient if the body of evidence relied on "viewed as a whole, meets that requirement".[51]

As the Court notes, the Commission did not conclude that the rebate agreements at issue contained "a formal exclusive supply obligation",[52] *i.e.*, it was not stated in the relevant contracts that OEMs were required to source all of their x86 chipset needs from Intel or lose the benefits of the

48 *Ibid*, para. 129.

49 *Ibid*, para. 139.

50 *Limburgse Vinyl Maatschappij and Others v. Commission* (Joined Cases C-238/99 P,C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P) EU:C:2002:582, paras. 513-523; *AstraZeneca v. Commission* (Case T-321/05) EU:T:2010:266, para. 477.

51 Intel Judgment, para. 64.

52 *Ibid*, para. 440.

rebates (and indeed many of the OEMs expressly corroborated the lack of any such exclusivity in their responses to the Commission's information requests). The Commission nevertheless concluded, based on a combination of evidence from OEMs' responses to information requests, Intel's internal documents, and bilateral communications between Intel and its partners, that the rebates at issue were *de facto* paid for exclusivity.[53] Among other things, the Commission relied on inferences from evidence of the impressions of individuals working for Intel's trading partners as to what Intel's reaction would be if they decided to purchase from AMD to prove that Intel's rebates were conditioned on *de facto* exclusivity.

The General Court reviewed and upheld the Commission's assessment of the alleged *de facto* exclusivity. As noted above, the Court ultimately took a global view of the evidence and considered it to support the Commission's conclusion that the rebates were granted to compensate for exclusivity. The Court nevertheless carried out a lengthy and highly detailed review of many individual pieces of evidence. The Court's assessment of some of this specific evidence, and notably of contradictory evidence, is not entirely immune from criticism. For example, the Court seemed to second guess statements made in response to information requests to the effect that Intel's rebates were not based on exclusivity,[54] while it relied in other contexts on responses as dispositive evidence, in and of themselves.

Other recent rulings of the Court of Justice (notably *Post Danmark*) have been more amenable to an effects-based analysis under Article 102 TFEU (but, as the General Court pointed out, they concerned different pricing practices). It therefore remains to be seen whether the Court of Justice would go so far as to overrule the General Court and its own long-standing precedent on the general illegality of express or *de facto* exclusivity rebates by dominant companies.

In the meantime, and in the absence of any statement by the Commission to the contrary, the Commission's Guidance Paper remains its stated set of enforcement priorities. Though the General Court refused in *Intel* to hold that the as-efficient competitor test is a necessary legal condition for exclusivity rebates to be abusive, it indeed entertained in its judgment a discussion of the applicability of the Guidance Paper, but rejected this, noting that the *Intel* proceeding had already been initiated before the Guidance Paper was published.[55] Moreover, the Court rejected the argument that the Commission infringed the principle of "legitimate expectations", on the basis that Intel was not given any sufficiently "precise assurances" that Commission would apply the as-efficient competitor test.[56] Nonetheless, this does not exclude that the Commission might be bound by this principle if it ever were found to grant such assurances in a future case. Again, however, this would not prevent civil courts or national antitrust regulators from finding exclusivity rebates to be abusive without any effects-based analysis.

Commission Decisions

SU/CEZ (Case AT.39.958)

On May 29, 2014, the Commission published its rejection of a complaint from Sokolovská uhelná, právní nástupce ("SU") alleging an Article 102 TFEU infringement by Czech electricity incumbent CEZ.[57] In its complaint of November 2011, SU had alleged that CEZ was abusing its dominant position in the Czech electricity market by applying discriminatory prices (CEZ paid SU's competitors more for lignite) and imposing unfair trading conditions and unfairly low prices.

[53] *Ibid*, para. 444.

[54] *Ibid*, para. 469.

[55] *Ibid*, para 155.

[56] *Ibid*, para 161-166.

[57] *SU/CEZ* (Case COMP/39.958), Commission decision of March 24, 2014.

SU had previously complained about CEZ's similar conduct to the Czech Competition Authority UOHS (*Úřad pro Ochranu Hospodářské Soutěže*). Following its first complaint in 2006, UOHS had imposed binding remedial measures on CEZ for abuse of dominance. In parallel to its 2011 complaint to the Commission, SU submitted a second complaint to UOHS in May 2012, which UOHS rejected based on lack of evidence. SU submitted a third complaint to UOHS in 2013, alleging that the 2006 measures were based on inaccurate information provided by CEZ.

Based on Article 13 of Regulation 1/2003, the Commission rejected SU's complaint, noting that UOHS had already addressed all of SU's allegations. The Commission considered that the complaints related to the same alleged infringements on the same market and within the same timeframe. The Commission concluded that it was not required to assess the adequacy of the arguments used, conclusions reached, and methods applied by the national competition authority as this was a matter for the appellate bodies in a national judiciary system.

With regard to the 2013 complaint, UOHS notified the Commission that it was in the process of dealing with this complaint. In any event, the Commission considered that the complaint related to proceedings under Czech law which fell outside the scope of Article 102 TFEU.

VERTICAL RESTRAINTS

ECJ Judgments

***Bright Service v. Repsol* (Case C–142/13)**[58]

On March 27, 2014, the Court of Justice held that an agreement between a supplier and a distributor including a non-compete clause, which was exempted from the application of Article 85 (now 101) of the Treaty establishing the European Economic Community ("EC") [59] under the 1983 exclusive purchasing agreements regulation,[60] but not under the 1999 vertical agreements regulation,[61] lost the benefit of the exemption at the end of the transitional period provided for in Article 12 of the 1999 regulation (*i.e.*, on December 31, 2001).

In 1987, Bright Service, the operator of a service station, entered into a lease agreement with Campsa SA (then Repsol), which included an exclusive purchasing obligation valid until 2012. This obligation [62] qualified for exemption under the 1983 regulation. However, the 1999 regulation repealed the 1983 regulation and stated that the relevant exemptions would no longer apply if the supplier has a market share above 30%, or if the non-compete obligations lasted for longer than five years. Because Repsol held more than 40% of the market for the distribution of petroleum products, the agreement lost the benefit of the relevant exemptions under the 1999 regulation.

In 2008, Bright Service sought to have the agreement annulled by a commercial court in Barcelona on the grounds that it breached Article 81 EC. The commercial court upheld the claim and annulled the agreement. Repsol appealed the judgment to the *Audiencia Provincial de Barcelona*, a court of second instance for the province, and claimed that by virtue of the 1999 regulation, the non-compete clause should have benefited from a five-year exemption until December 31, 2006 (five years being the maximum duration of the non-compete obligations exempted by the 1999 regulation).

The *Audiencia Provincial de Barcelona* referred the matter to the Court of Justice through the preliminary ruling procedure.[63] The question referred to the Court of Justice was whether, under the 1999 regulation, a vertical agreement that includes a non-compete clause, in force on May 31, 2000, and exempt under the 1983 regulation, should continue to be exempt until December 31, 2001 (*i.e.*, the end of the transitional period), or until December 31, 2006 (*i.e.*, the end of the transitional period plus another five years).

The Court of Justice first reconfirmed its ability to rule by order "[w]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt."[64] Indeed, as the referring appeal court noted, the Court of Justice had already ruled

[58] *Bright Service SA v Repsol Comercial de Productos Petrolíferos SA.* (Case C-142/13) EU:C:2014:204.

[59] Now Article 101 TFEU.

[60] Commission Regulation (EEC) No 1984/83 of June 22, 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements, OJ 1983 L 173/5 ("the 1983 regulation").

[61] Commission Regulation (EC) No 2790/1999 of December 22, 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L 336/21 ("the 1999 regulation").

[62] Article 1 of the 1999 regulation defines "non-compete obligation" as "any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value of its purchases in the preceding calendar year."

[63] Article 267 TFEU ("The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon").

[64] Rules of Procedure of the Court of Justice, Article 99, OJ 2012 L 265/1.

in *CEPSA* [65] and *Pedro IV Servicios*[66] that the validity of previously exempted non-compete clauses should be limited to the transitional period ending on December 31, 2001. Both cases were also references for preliminary rulings from Spanish appeal courts concerning service station operators.

The Court of Justice noted that, when the supplier's market share exceeds 30%—as was the case here—it is not necessary to consider the duration of the non-compete clause. Indeed, a market share above 30% makes the agreement ineligible for exemptions under the 1999 regulation. The Court of Justice thus agreed with the referring court that the contract was not exempt under the 1999 regulation.

Finally, the Court of Justice reiterated that agreements that cannot benefit from the block exemption under the 1999 regulation may nevertheless benefit from an individual exemption on the basis of Article 81(3) EC (now Article 101(3) TFEU). This, the Court of Justice added, remains for the national court to decide.

As the Spanish judge noted in its referral, several judgments by the Spanish Supreme Court held that similar non-compete clauses should be exempted until 2006, despite the Court of Justice's *CEPSA* and *Pedro IV Servicios* precedents. This order from the Court of Justice should give the referring appeal court a stronger basis to oppose the view of the Spanish Supreme Court.

65 *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL* (Case C-279/06) EU:C:2008:485, paras. 59-60.

66 *Pedro IV Servicios SL v. Total España SA* (Case C-260/07) EU:C:2009:215, para. 67.

INTELLECTUAL PROPERTY AND LICENSING

Commission Decisions

***Samsung and Motorola Cases on Standard Essential Patents* (Cases AT.39939 and AT.39985)**

On April 29, 2014, the Commission adopted final decisions in the Samsung[67] and Motorola[68] cases, both of which concern the compatibility of seeking injunctions based on standard essential patents ("SEPs") with EU competition law.[69]

Standards set out the requirements for a specific item, material, component, system or service, or describe in detail a particular method or procedure. Standards are of great importance to many industries, such as telecommunications, and bring benefits to consumers by facilitating interoperability and innovation. If a patent is "essential" to an industry standard, standard-compliant products cannot be produced without the technology that is covered by that patent – *i.e.*, it is not possible to comply with the standard by using another technology, patented or not. As a result, owners of such patents (SEPs), can acquire significant market power, particularly when manufacturers are "locked-in" to the standard due to the absence of competing standards or technologies. This is because, once manufacturers have made significant investments in developing and implementing standard-compliant products, the costs associated with switching away from the standardized technology can be substantial. In an effort to alleviate competition concerns associated with this conduct, ensure the availability of SEPs to manufacturers of standard-compliant products, and, at the same time, allow SEP holders to reap financial benefits from their innovations, many standard setting organizations ("SSOs") require SEP holders to commit to license patents that become part of a standard on fair, reasonable, and non-discriminatory ("FRAND") or similar (*e.g.*, "RAND") terms.

The Commission's cases against Samsung and Motorola considered whether the companies had abused their dominant position in breach of Article 102 TFEU by seeking injunctions based on SEPs, which they had previously committed to license on FRAND terms. The Commission concluded that, although "the seeking and enforcement of injunctions by a patent holder will typically be a legitimate exercise of an IP right in order to obtain the removal of the infringing products from the market and protect the patent owner from further losses,"[70] such practice may be abusive in "exceptional circumstances" where the SEP holder has committed to license its SEPs on FRAND terms in the context of a standard-setting process. While the SEP holder may be objectively justified in seeking and enforcing an injunction against a user who is *unwilling* to enter into a license agreement, it cannot seek injunctions against a *willing* licensee.

The Samsung Case

In 2011, Samsung sought injunctions against Apple in a number of Member States based on its SEPs relating to the 3G UMTS mobile technology standard, which Samsung had committed to license on FRAND terms. The Commission launched a formal investigation against Samsung in January 2012, and informed Samsung in its preliminary assessment that it believed that Apple had been willing to enter into a license agreement on FRAND terms. In light of Samsung's FRAND commitment and Apple's willingness to enter into a license agreement on FRAND terms, the Commission was concerned that Samsung may have abused its dominant position by seeking injunctions against Apple based on Samsung's SEPs.

67 *Samsung – Enforcement of UMTS Standard Essential Patents* (Case COMP AT.39939), Commission decision of April 29, 2014.

68 *Motorola – Enforcement of GPRS Standard Essential Patents* (Case COMP AT.39985), Commission decision of April 29, 2014.

69 In June 2014, the Commission issued a policy brief, in which it further explains its position as regards the use of injunctions based on SEPs, as demonstrated in the Samsung and Motorola cases. *See* http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf.

70 *Motorola – Enforcement of GPRS Standard Essential Patents* (Case AT.39985), Commission decision of April 29, 2014, para. 283.

The Commission investigated whether Samsung's conduct could: (i) exclude Apple from the mobile devices market; and (ii) force Apple to accept less advantageous licensing terms, compared to those which Apple may have accepted in the absence of injunctions being sought. The Commission concluded that Samsung's conduct could ultimately lead to higher prices, reduced product choice, and the stifling of differentiating innovation in the markets for smartphones and tablets, to the ultimate detriment of consumers.

To address the Commission's concerns, Samsung committed not to seek any injunctions in the EEA on the basis of any of its SEPs for a period of five years against any company that agrees to a licensing framework that consists of: (i) a mandatory negotiation period of up to 12 months; and (ii) if the negotiation fails, a third party determination of FRAND terms by a court if either party chooses, or by an arbitrator if both parties agree. The Commission rendered Samsung's commitments legally binding under Article 9 of Regulation 1/2003.

The Motorola Case

In 2012, Motorola obtained an injunction against Apple before a German court, based on an SEP relating to the GPRS mobile technology standard. Motorola proceeded to enforce the injunction in Germany, leading to a temporary ban on Apple's online sales of iPhones and iPads to consumers in Germany, despite Apple's offer to enter into a licensing agreement in which it agreed to be bound by a determination of FRAND royalties by the German court. Following Motorola's enforcement of the injunction, Apple entered into a settlement agreement with Motorola that contained disadvantageous licensing terms for Apple, including Motorola's entitlement to terminate the license if Apple challenged the validity of Motorola's SEP.

The Commission found that "it was abusive for Motorola to both seek and enforce an injunction against Apple in Germany on the basis of an SEP, which Motorola had committed to licencing on FRAND terms, where Apple had agreed to take a license and be bound by a determination of the FRAND royalties by the relevant German court."[71] The Commission also found abusive Motorola's practice of insisting, under the threat of enforcing the injunction, that Apple agree to disadvantageous licensing terms. Despite the finding of abuse, the Commission decided not to impose a fine on Motorola in recognition of the absence of case-law from the EU courts dealing with the legality of SEP-based injunctions under Article 102 TFEU, and divergent conclusions from national courts.

Implications of the Decisions

The Samsung and Motorola decisions have drastic implications for SEP owners and patent users. First, the Commission has significantly expanded the "exceptional circumstances" doctrine, under which it may be abusive for a patent owner to refuse to grant a license to its IP. Prior to these decisions, under the established Court of Justice and Commission precedent, "exceptional circumstances" only existed where the refusal to license: (i) related to a product or service indispensable to the exercise of a particular activity on a neighboring market; (ii) was of such a kind to exclude any effective competition on that neighboring market; and (iii) prevented the appearance of a new product for which there was potential consumer demand.[72] Under the new doctrine, the myriad of industry participants taking part in the standard setting process will now find themselves in "exceptional circumstances" if they declare their patents as essential to a standard or otherwise commit to an SSO to license their patents on FRAND or similar terms. Moreover, by requiring SEP owners to show that a user is "unwilling" to take a license to justify the SEP owner's resort to injunctions, the Commission has effectively shifted the burden of proof in Article 102 from the user to the SEP owner.

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71 Commission Press Release of April 29, 2014, "Antitrust: Commission finds that Motorola Mobility infringed EU competition rules by misusing standard essential patents," available at http://europa.eu/rapid/press-release_IP-14-489_en.htm.

72 *See, e.g.*, *Oscar Bronner GmbH & Co KG v. Mediaprint* (Case C-7/97) EU:C:1998:569; *P RTE and ITP v. Commission (Magill)* (Joined Cases C-241 and C-242/91 P) EU:C:1995:98; and *IMS Health GmbH & Co v. NDC Health GmbH & Co KG* (Case C-418/01) EU:C:2004:257.

However, arguably the most significant impact of these decisions lies in its implications for SEP owners' right of access to court. Prior to these decisions, an SEP owner was free to seek an injunction based on its SEPs against a user. A user was then able to argue that an injunction would be abusive and contrary to Article 102. However, under the Commission's new framework, the SEP owner's abuse begins the moment it seeks an injunction, and before any court has determined whether the user is willing or unwilling to take a license. This effectively limits the SEP owner's ability to ask the court to determine whether or not injunction proceedings would breach Article 102.

For SEP users, the Samsung and Motorola decisions effectively provide a "safe harbor" from injunctions. Standard users can demonstrate that they are willing licensees by agreeing to a judicial setting of a FRAND rate in case of a dispute. However, these decisions do not provide SEP owners with an equivalent "safe harbor," because a user's refusal to agree to a judicial setting of a FRAND rate will not be considered a sign of "unwillingness." Rather, situations that fall outside of the "safe harbor" (*i.e.*, those in which the would-be licensee does not agree to a judicial setting of a FRAND rate in case of a dispute) will be assessed on a case-by-case basis.

MERGERS AND ACQUISITIONS

Commission Decisions

First-phase Decisions With Undertakings

***Kuraray/GLSV Business* (Case COMP/M.7115)**

On April 29, 2014, the Commission approved, subject to commitments, the acquisition of the glass laminating solutions and vinyl business unit ("GLSV") of E.I Du Pont de Nemours ("DuPont") by Kuraray Co., Ltd ("Kuraray"). Kuraray is a Japanese manufacturer of specialty chemicals, fibers, and other materials. Among other products, Kuraray manufactures vinyl acetate monomer ("VAM"), polyvinyl alcohol ("PVA"), polyvinyl butyral ("PVB") resin, and PVB film. GLSV also manufactures these four products, which are part of the same vertical chain: VAM is used to produce PVA; PVA is used to produce PVB resin; and PVB resin is used to produce PVB film. PVB film is then sold to glass manufacturers to be used as an adhesive interlayer in the production of laminated safety glass for automotive (*e.g.* windshields) or architecture (*e.g.* windows) applications. PVB film ensures that when the glass breaks, the fragments remain in the film.

The Commission left the product market definition for PVA open, but suggested that PVA should not be segmented further by specific grades in the context of PVB resin production because PVB resin can be produced using all standard PVA grades and because of the high degree of supply-side substitution between all grades of PVA. The Commission also left open the geographic market definition, though it suggested that the market was global in scope. With respect to VAM, the Commission considered its previous decisional practice, defining a single global market for all VAM.[73]

The Commission's investigation focused on the horizontal overlaps in the parties' activities in PVB film. Kuraray argued that there was a single market for PVB film, regardless of end use/application. The Commission ultimately left the market definition open, but noted that its market investigation suggested that PVB film for architectural applications and PVB film for automotive applications formed separate markets given the differences in *e.g.*, the respective technical specifications and equipment required for production. The Commission's investigation also indicated that a further segmentation for PVB film could be made on the basis of origin (PVB film from recycled material versus PVB film from non-recycled material) and color. Based on the differences in the quality of the products and purchasing patterns, the Commission noted that the markets for PVB film appeared to be no broader than EEA-wide.

The Commission found that the transaction would reduce the number of competitors in the hypothetical overall PVB film market from four to three, and that it would reduce the number of competitors in the narrower segment of PVB film for architectural applications from three to two. The Commission concluded that this reduction of the number of suppliers of PVB film for architectural applications could result in price increases by limiting the customers' ability to negotiate better pricing by playing pre-approved suppliers against one another. The Commission additionally rejected the possibility of Chinese or Taiwanese entry, noting that there was no evidence of any entry in the EEA, and that reputational and logistical difficulties would impede entry.[74]

To address the Commission's concerns in the PVB film market, the parties agreed to divest GLSV's PVB film manufacturing facilities in Uentrop, Germany, to transfer to the divestiture buyer all the necessary technical and commercial staff, and to provide the buyer with sufficient long-term support and input supply to ensure the viability of the business, including access to the "Butacite" trademark.

The Commission's market test of the remedy found that the divestiture would remove almost the entirety of the increment resulting from the transaction, and would result in a new profitable player in the market with a share of

[73] *See Blackstone/Acetex* (Case COMP/M.3625), Commission decision of July 13, 2005, para. 20.

[74] The Commission also considered the vertical links between the parties' production of VAM and PVB film, but ruled out foreclosure concerns.

[5-10]%. Based on its market test, the Commission concluded that the remedy would address its serious doubts, and cleared the transaction subject to compliance with the commitments.

First-phase Decisions Without Undertakings

***BNP Paribas/Royal Bank of Scotland* (Case COMP/M.7151)**

On April 11, 2014, following a Phase I investigation, the Commission approved the acquisition by BNP Paribas ("BNPP") of certain assets which form part of The Royal Bank of Scotland's ("RBS") structured investment products and equity derivatives business. BNPP provides retail banking services as well as corporate and investment banking worldwide. RBS operates retail and commercial businesses; its core business segments include personal banking and corporate banking in the United Kingdom and retail and commercial banking in the United States.

The Commission identified horizontal overlaps in the segments for equity derivatives and structured investments.

Derivatives are financial contracts deriving their value from another asset, which could, for instance, be a commodity, equity, or fixed income instrument, or an equity index. In the segment for over-the-counter ("OTC") sales and trading of equity derivatives, the Commission suggested that separate sub-markets could be identified for: (i) flow equity derivatives (*i.e.*, options, swaps and futures on a single stock or on an index of stocks); (ii) equity financing (*i.e.*, stock lending and borrowing activities); and (iii) corporate derivatives (*i.e.*, hedging or financing activities of equity participations of corporate clients) but ultimately left market definition open due to the lack of competition concerns.[75]

Structured products are securities that can be issued as stock and other equities listed and traded on exchanges. They are issued by banks and based on an underlying asset such as an index, a company-issued equity, a currency, or a commodity. They offer a return which is fixed at issuance and are often designed for local (retail) investors. In relation to structured investment products, the Commission suggested that the market could be further segmented into: (i) exchange of trade structured investment products ("ETSIP"); and (ii) OTC wholesale structured investment products ("WSIP"), but ultimately left market definition open due to a lack of competition concerns.

The Commission considered that the geographic markets for equity derivatives and OTC WSIP were at least EEA-wide, and possibly global, but ultimately left this issue open. It found that the geographic market for ETSIP was national in scope.

With respect to equity derivatives, the Commission concluded that the transaction would not result in any affected markets because, regardless of market definition, the parties' combined shares would not exceed 30% at an EEA level, and would be even lower at a global level. Furthermore, the Commission noted that the parties are not particularly close competitors in the market for equity derivatives, and there are several other strong competitors, including Commerzbank, Deutsche Bank, and Société Générale. The Commission also found that the majority of the respondents in the market investigation did not consider RBS an aggressive competitor. Based on these findings, the Commission concluded that no competitive concerns would arise in the equity derivatives market.

With respect to ETSIP, the Commission identified affected markets in the Netherlands and Sweden. The Commission concluded that the transaction would not raise competitive concerns in the Netherlands, because, although the parties' combined share was around 40-50%, the increment (0-5%) was minimal. The Commission also concluded that the transaction would not raise competitive concerns in Sweden. Although the combined company would be the leader, with a 30-40% share, there was evidence of low customer loyalty to specific suppliers, high volatility of competitors' market shares, and low barriers to entry.

[75] OTC trading refers to any exchange of commodities, financial instruments, or derivatives that takes place directly between two parties, *i.e.*, "off-exchange".

With respect to WSIP, the Commission concluded that the transaction would not raise competitive concerns due to the parties' low shares and the small increment resulting from the transaction.

Accordingly, the Commission approved the transaction unconditionally.

Agroneri/Neova Pellets/JV **(Case COMP/M.7185)**

On May 5, 2014 the Commission approved the creation of a joint venture by Agronergi AB, owned by Lantmännen; and Neova Pellets, owned by Vapo Oy. The joint venture will be active in the production and sale of wood pellets in Sweden, and will consist of the assets and business of Agroenergi and Neova Pellets.

Lantmännen is a Swedish corporate group active in food, energy, machinery, and agriculture. Its subsidiary, Agroenergi, is active in the wood pellets business in Latvia and Sweden. Vapo is a Finnish timber, sawmill, and bioenergy company. Its subsidiary, Neova Pellets, is active in the wood pellets business in Sweden.

The Commission noted that the joint venture will be jointly controlled by Lantmännen and Neova Pellets due to the equal board representation and the fact that resolutions of the board will be adopted by simple majority. The Commission held that the joint venture will be a full-function undertaking because it will have sufficient resources to operate independently, with its own staffing, facilities, customers, and supply arrangements.

Wood pellets are a refined wood fuel within the sector of biofuels. The Commission noted that there were strong indications to support the parties' view that wood pellets form a distinct market from other types of biofuels, but ultimately left the question open due to the lack of competition concern. The Commission additionally considered, again, leaving the precise market definition open, and that the product market could be further segmented based on sales channel, possibly resulting in sub-segments for retail, non-retail (*i.e.*, resellers) and industrial wholesale; or based on customer type, possibly resulting in sub-segments for large, medium, and small purchasers.

The Commission considered that the geographic market for the sale of wood pellets was at least national in scope.

The parties' combined share in the Swedish market for wood pellets amounted to [20-30]%. In one hypothetical sub-segment (*i.e.*, sales to medium customers), the parties' share would amount to [30-40]%, making the joint venture the largest supplier in Sweden. The Commission concluded, however, that the proposed transaction would not give rise to competition concerns. The Commission's market investigation showed that: (i) customers regularly multisource and that a sufficient number of alternative suppliers would remain under any approach to market definition; (ii) none of the parties is perceived as an inevitable supplier; and (iii) barriers to entry are low. The Commission also concluded that other types of fuel exerted a competitive constraint on the sale of wood pellets in Sweden.

The Commission also identified a potential vertical relationship between the joint venture's supply of food pellets, and the parties' supply of district heating services. However, given the parties' low combined share and the fact that both parties were already supplied by their respective subsidiaries prior to the transaction, the Commission identified no competition concern.

In light of the above findings, the Commission approved the transaction unconditionally.

STATE AID

ECJ Judgments

***Commission v. Netherlands and ING Groep* (Case C-224/12 P)**

On April 3, 2014, the Court of Justice issued a judgment clarifying that the private investor test applies to a public funding measure that amends an earlier public funding measure that has been determined to constitute state aid. The private investor test provides that a public funding measure does not constitute state aid if it is economically rational and would be carried out by a private investor in a comparable position.

In its decision of November 18, 2009[76], the Commission declared that an amendment to the repayment terms of a capital injection granted by the Netherlands to ING on November 11, 2008, submitted by the Netherlands, constituted state aid but was compatible with the internal market subject to commitments. The Commission concluded that the amendment to the repayment terms could not be assessed pursuant to the private investor test, because the original measure (*i.e.*, capital injection the repayment terms of which were being amended) constituted state aid. Accordingly, the Commission rejected the argument whereby the amendment to the repayment terms would be an economically rational measure and would thus not constitute state aid.

However, in its judgment of March 2, 2012, on ING's and the Netherlands' appeal, the General Court established that "the Commission cannot evade . . . its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor principle solely on the ground that the capital injection subject to repayment already itself constitutes State aid."[77]

[76] Commission Decision of November 18, 2009, on the state aid No C 10/2009 (ex N 138/2009) implemented by the Netherlands for ING's Illiquid Assets Back-Up Facility and Restructuring Plan.

[77] *Netherlands and ING Groep v. Commission* (Case T-29/10) EU:T:2012:98, para. 99.

The Commission appealed this ruling to the Court of Justice, arguing that it is only appropriate to apply the private investor test to the behaviour of public authorities when they are in a position comparable to that in which private operators may find themselves. According to the Commission, the private investor test could not be applied in the present case because a private investor could never find itself in a situation in which it had previously provided state aid to an enterprise such as ING.

The Court of Justice upheld the finding of the General Court, establishing that an economic advantage must be assessed in light of the private investor test if the Member State concerned has conferred that advantage in its capacity as shareholder of the recipient undertaking. In this scenario, it is necessary to assess the economic rationality of the amendment to the repayment terms by comparing the behaviour of the State with that of a hypothetical private investor in a comparable position.

The Court of Justice concluded that only after such an assessment has been carried out is the Commission in a position to determine whether an additional advantage within the meaning of Article 107(1) TFEU has been granted and whether a given measure may therefore be considered state aid.

General Court Judgments

***Tisza Erőmű v. Commission* (Case T-468/08) & *Dunamenti Erőmű v. Commission* (Case T-179/09)**

On April 30, 2014, the General Court dismissed two appeals against a Commission decision finding state aid granted by Hungary through power purchase agreements incompatible with the common market.

The underlying dispute arose in the context of the privatization of the Hungarian electricity sector in the 1990s, when the state-owned monopoly electricity network operator MVM concluded long-term power purchase agreements ("PPAs") with several Hungarian electricity generators. Under the PPAs, MVM was required to purchase specific capacity and a minimum quantity of electricity at a fixed price covering fixed and variable costs over a significant part of the power plants' life. In June 2008, the Commission issued a decision finding that the PPAs conferred on the generators state aid incompatible with the common market and ordered its recovery.[78] Two Hungarian electricity generators brought separate actions before the General Court seeking the annulment of the Commission decision.

The General Court assessed, *inter alia*, whether the Commission had correctly applied the private investor test, and thus whether, under the conditions prevailing in Hungary at the time of its accession to the EU, a market operator in a similar position as MVM and acting on purely commercial grounds would have granted to the electricity generators a guarantee similar to that contained in the PPAs.

First, the General Court agreed with the Commission that the PPAs entailed a lower risk for the generators due to a combination of long-term capacity reservation, minimum guaranteed off-take provisions, and a price-setting mechanism covering variable, fixed, and capital costs, and thus did not correspond to the customary contracts on the European wholesale markets. Accordingly, the PPAs structurally placed the generators in a better position than that they would have found themselves in under standard commercial contracts.

Second, the General Court noted that the PPAs did not provide the public authorities with hedging on energy prices that a market operator would typically require under a long-term contract. Accordingly, a prudent operator acting on purely commercial grounds would not agree to such provisions.

Therefore, the General Court ruled that the Commission had accurately applied the private investor test, and thus did not err in its conclusion that the PPAs amounted to an improper advantage within the meaning of Article 107(1) of the TFEU.

[78] Commission Decision 2009/609/EC of June 4, 2008 on state aid C 41/05.

Frucona Kosice SA v. Commission **(Case T-103/14 R)**

On May 6, 2014, the General Court dismissed an application by Frucona Košice ("Frucona") for interim measures and confirmed the requirements for state aid interim measure applications.[79]

The underlying dispute concerned state aid granted by the Slovak tax authorities to Frucona, a Slovak producer of spirits and alcoholic drinks. Frucona had accumulated tax debts of SKK 641 million (€16.9 million), and in 2004 the Slovak tax authorities wrote off 65% of those debts. The Commission issued decisions determining that this constituted illegal state aid, and ordered that it be recovered by the Slovak authorities.[80] Frucona appealed the decision and applied for interim measures to suspend the operation of the decision pending the outcome of the appeal.

The General Court considered the two cumulative conditions for the granting of interim measures: (i) the existence of a *prima facie* case – *i.e.*, whether there exists a major legal disagreement that does not have an obvious resolution; and (ii) urgency – *i.e.*, whether the order is necessary to avoid serious and irreparable harm. It concluded that neither condition was met.

To determine whether the first condition was fulfilled, the General Court assessed the manner in which the Commission had arrived at the contested decision. The General Court rejected Frucona's allegations that the Commission had breached its defense rights and failed to apply the private investor test. The General Court found that Frucona had not established that there existed a major legal disagreement to which a solution was not obvious.[81]

With regard to the second condition, Frucona claimed that, without interim relief it would have to cease trading and sell

[79] *Frucona Košice a.s. v. Commission* (Case T-11/07) EU:T:2014:173.

[80] *Decision 2007/254 OJ 2007 L 112/14, and Decision C(2013) 6261 final of October 16, 2013 on State aid SA.18211 (C 25/2005) (ex NN 21/2005).*

[81] *Frucona Košice v. Commission (Case C-73/11 P) EU:C:2013:32, paras. 68-90.*

every asset it possessed to repay a fraction of the alleged aid, and that it would go bankrupt as a consequence. In response, the General Court underlined that, to assess the material circumstances and financial viability of a company, it must take into account the characteristics of the group of companies to which it belongs. On this basis, the General Court found that Frucona had not succeeded in establishing serious and irreparable damage. The General Court explained that Frucona's application did not provide evidence enabling it to evaluate the financial characteristics of the group of which it, through its shareholders, forms a part, or that showed that its objective interests were distinguishable to those of its shareholders.

The General Court confirmed that, in interim applications before the EU courts, the test for "urgency" requires an assessment of whether the applicant can prevent the occurrence of serious and irreparable damage by bringing the matter before the national court. The General Court observed that that the information Frucona had provided on the relevant national court proceedings was ambiguous. The General Court further noted, in particular, that Frucona had not provided information on whether—by pleading its individual financial situation and the illegality of those measures—Slovak law would allow it to avoid serious and irreparable damage.

The General Court explained that its decision on urgency was consistent with weighing the interests involved; that the interest of the Union must normally take precedence over that of the recipient of state aid in avoiding enforcement of the obligation to repay the aid before judgment is given in the main proceedings; and that Frucona had not established any extraordinary circumstance that would alter this balance.

POLICY AND PROCEDURE

ECJ Judgments

Nexans SA v. Commission **(Case C-37/13 P)**

On June 25, 2014, the Court of Justice confirmed the Commission's broad discretion to define the scope of its inspections in cartel cases.[82]

On January 28, 2009, the Commission ordered Nexans to submit to an inspection on its premises.[83] According to the inspection decision, the Commission suspected Nexans of engaging in anticompetitive practices in relation to "the supply of electric cables and material associated with such supply including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables."[84] The information received by the Commission lead it to believe that the practices were still being implemented at the time of the decision and "probably [had] a global reach."[85] On November 14, 2012, the General Court annulled the inspection decision on the ground that its material scope was too broad, because the Commission had not demonstrated that it had reasonable grounds for ordering an inspection covering electric cables other than high voltage underwater and underground electric cables.[86] It, however, rejected Nexans's arguments that the geographic scope of the dawn raid decision was overly broad and insufficiently precisely defined.

Nexans appealed this aspect of the General Court's decision to the Court of Justice. The Court of Justice dismissed the appeal in its entirety.

Nexans first argued that the General Court had failed to consider the argument that the Commission lacked jurisdiction over the suspected anticompetitive practices because cable projects were markets situated outside the EU. The Court of Justice rejected this argument. It held that it was sufficient that the General Court had implicitly addressed this argument by stating that the Commission's powers of inspection allowed it to examine documents related to non-EU local markets as long as the suspected infringement might have been liable to affect trade between Member States.

Nexans also argued that the General Court had failed to observe the requirements applicable to the statement of reasons for an inspection decision. According to Nexans, the General Court should have recognized that the inspection decision did not appropriately define the geographic scope of the alleged infringement. The Court of Justice rejected this argument as well. The Court of Justice explained that the Commission's inspection decisions must be drafted with enough precision for the company to understand the scope of its duty to cooperate. While the inspection decision must specify the conduct under investigation, the Commission is not required to disclose all the information it has on the suspected infringements or to conduct a precise legal analysis at this stage. As a result, it is not necessary for the Commission precisely to define the relevant market, or to set out the exact nature of the presumed infringements. In this case, it was sufficient that the decision mentioned that the inspection covered agreements and/or concerted practices with a global reach that, if established, would constitute a serious infringement of Article 101 TFEU. The Court further clarified that the Commission was not required to limit its investigation to documents relating to projects that had an effect on the EU market; it is entitled to inspect documents that relate to conduct outside the EU to determine whether they are relevant to the alleged infringement that may affect the EU.

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[82] *Nexans France and Nexans v. Commission* (Case C-37/13) EU:C:2014:2030.

[83] Commission Decision C(2009) 92/1 of 9 January 2009 ordering Nexans and its subsidiary Nexans France to submit to an inspection in accordance with Article 20, para. 4, of Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rule of competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1

[84] *Nexans France and Nexans v. Commission*, *supra* n **Error! Bookmark not defined.**, para. 4.

[85] *Ibid.*, para. 5.

[86] *Nexans France and Nexans v. Commission* (Case T‑135/09) EU:T:2012:596.

General Court Judgments

Quimitécnica.com and Others v. Commission **(Case T-564/10)**

On June 26, 2014, the General Court held that, when approving an extended payment plan for an antitrust fine, the Commission may lawfully require the fined company to provide a financial guarantee only from banks with a long-term "AA" rating.[87]

On July 20, 2010, the Commission imposed a fine on Quimitécnica.com Comércio e Indústria Química, SA ("Quimitécnica.com") and José de Mello Sociedade Gestora de Participações Sociais, SA ("José de Mello") for their participation in the animal feed phosphates cartel.[88] Both companies applied to the Commission for approval of a payment plan, under Article 85 of Regulation 2342/2002,[89] which sets out two condition for the approval of such payment plans: (i) the debtor must pay interest rates; and (ii) the debtor must provide a bank guarantee accepted by the Commission accountant. By a letter of October 8, 2010, the Commission granted payment facilities to the claimants, but rejected the guarantee offered by the claimants' bank, BCP, because the bank did not have a long-term "AA" rating. Quimitécnica.com and José de Mello appealed to the General Court.

Quimitécnica.com claimed that the Commission had failed to state reasons for the rating requirement. The General Court disagreed. It explained that the obligation to state reasons should be assessed according to the nature of the act in question and in the context of the specific facts at issue, including the content of the act, the nature of the reasons and the interest the addressees may have in receiving an explanation. The Commission is not required to specify all factual and legal elements that underpin its decision and its reasoning can be implicit. In the present case, the General Court found that, even if the decision did not expressly substantiate its requirement to provide a financial guarantee with a long-term "AA" rating, it was nonetheless clear that this requirement aimed to protect the financial interests of the EU.

Quimitécnica.com further argued that the requirement imposed by the Commission was disproportionate to the objective pursued, *i.e.*, the protection of the EU's financial interests, because the criteria laid by Article 85 of Regulation 2342/2002 were sufficient to protect these interests and BCP successfully passed the stress test coordinated by the Committee of European Banking Supervisors. In assessing this argument, the General Court noted that Regulation 2342/2002 gives the Commission broad discretion to decide whether to approve a payment plan. In line with settled case law, judicial control over the Commission's decision in that regard is limited to manifest errors of law. The Court may thus only assess whether the long-term "AA" rating requirement is manifestly inappropriate.

The Court found that the "AA" requirement was not manifestly inappropriate. First, this requirement was objectively appropriate to ensure the solvency of guarantee issuers. Without a solvency requirement, the Commission would find itself in a position at odds with the objective of Regulation 2342/2002 – *i.e.*, to ensure that the EU suffers no cost or risk in cases where a payment extension is granted. Second, the claimants did not adduce any evidence that the cost of providing a guarantee from a bank with a long-term "AA" rating would be disproportionate or that obtaining such guarantee would be impossible.

Commission Developments

Commission Report on Competition Policy 2013

On May 6, 2014, the Commission published its 2013 annual report on competition policy, an overview of the main developments and decisions in EU competition law, showing how competition policy contributes to boosting competitiveness of EU markets.

[87] *Quimitécnica.com and others v. Commission* (Case T-564/10) EU:T:2014:583.

[88] *Animal Feeds Phosphates* (Case COMP/38.886), Commission decision of July 20, 2010.

[89] Regulation 2342/2002 laying down detailed rules for the implementation of Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L 357/1.

The Commission first discussed cartel enforcement, reconfirming that robust cartel enforcement is vital to prevent artificial inflation of input costs, which affects competitiveness on global markets and leads to higher final prices for consumers. The Commission therefore focused its enforcement efforts in recent years on cartels that concerned input and intermediate goods, such as car glass, DRAMs, synthetic rubbers and automotive wire harnesses.[90] It also recently uncovered cartel activity in various services sectors, in particular in the area of financial services, where it settled two cases in the market for financial derivatives.[91]

The Commission assessed cooperation with national competition authorities ("NCAs") in the framework of the European Competition Network ("ECN") since the entry into force of Regulation 1/2003,[92] which has helped develop enforcement powers of NCAs, and foster convergence and facilitate interaction within the ECN. To complete the existing rules, the Commission adopted a proposal for a directive to facilitate antitrust damages actions,[93] and a "merger simplification initiative package"[94] whose stated aim is to promote growth and competitiveness by reducing regulatory burdens for businesses.

The state aid modernization process, whose purpose is to steer public resources toward competitiveness-enhancing objectives, also made significant progress in 2013. In particular, the Commission reviewed a number of its Guidelines,[95] broadened the scope of the Block Exemption Regulation,[96] and amended the Procedural Regulation,[97] to make the procedure more efficient.

State aid policy and antitrust enforcement also help reduce systemic risks and increase the transparency of financial markets. The Commissions underlined that stable, safe, open, competitive, and fair financial markets are necessary to maintain a balanced and sustainable phase of economic expansion. In that framework, the Commission adapted its crisis rules for state aid to banks,[98] issued a statement of objections regarding an alleged cartel on the CDS market, [99] and concluded its investigation of the antitrust cases relating to the Libor, Euribor, and Tibor benchmark rates. [100]

The Commission observed that, in the energy sector, competition policy should help address the challenges of increasing dependence on imported energy, increasing energy prices, and lack of investment. Antitrust

90 *See*, respectively, *Car Glass* (Case COMP.9125), Commission decision of December 11, 2008; *DRAM* (Case COMP.38511), Commission decision of May 19, 2010; *Synthetic Rubber* (Case COMP.38628 and AT. 40032), Commission decision of January 23, 2008 and Statement of Objections of March 1, 2013; *Automotive wire harnesses* (Case AT.39748), Commission decision of July 10, 2013.

91 *Euro interest rate derivatives* (Case COMP.39914) and *Yen interest rate derivatives* (Case COMP.39861), Commission decisions of December 4, 2013.

92 Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

93 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404.

94 Commission Implementing Regulation 1269/2013 amending Regulation 802/2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings, OJ 2013 L 336/1; Notice on a simplified procedure for the treatment of certain mergers under the Merger Regulation, OJ 2013 C 366/5.

95 Guidelines on regional State aid for 2014-2020, OJ 2013 C 209/1; Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ 2013 C 25/1; Guidelines on risk finance aid for 2014-2020, OJ 2014 C 19/4; Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ 2014, C 249/1; Framework for State aid for Research and Development and Innovation, OJ 2014 C 198/1; and Guidelines on State aid for environmental protection and energy 2014-2020, OJ 2014 C 200/1.

96 Commission Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L 198/1.

97 Council Regulation 734/2013 amending Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 2013 L 204/15.

98 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in context of the financial crisis, OJ 2013 C 216/1.

99 *CDS – Information market* (Case AT.39745), Statement of Objections of July 1, 2013.

100 *Euro interest rate derivatives* (Case COMP.39914) and *Yen interest rate derivatives* (Case COMP.39861), Commission decisions of December 4, 2013.

enforcement actions have helped lower energy prices by combatting abusive or collusive behavior leading to segmentation of markets and inefficient allocation of energy.[101] The Commission also accepted divestiture commitments from CEZ, the Czech electric incumbent, allowing a new player to enter the electricity market.[102]

In the digital economy sector, the Commission used a range of tools to address the challenges of fast-moving markets such as information and communication technology and e-communication. The joint application of *ex-ante* regulations and ex-post competition enforcement is necessary to safeguard the proper functioning of this sector. To that end, the Commission reviewed its policy framework on technology-transfer agreements [103] to facilitate the dissemination of intellectual property and knowledge, and made progress in tackling single market fragmentation in the telecom sector [104] and in removing obstacles in the knowledge economy, in particular as regards standard essential patents ("SEPs").[105]

On the matter of SEPs, the Commission published on June 4, 2014 a policy brief [106] that provides background to the Commission April 29 decisions in the *Samsung* and *Motorola* cases.[107] The policy brief explains that SEPs can present competition issues because they confer market power on their holders, who may try to exclude competing products by imposing unfavorable licensing terms. To alleviate these risks, standard setting organizations usually require SEP holders to license SEPs on fair, reasonable, non-discriminatory ("FRAND") terms. In the *Samsung* and *Motorola* cases, the Commission clarified that it is anticompetitive for SEP holders to seek to exclude competitors by seeking injunctions on the basis of SEPs if the licensee is willing to take a license on FRAND terms. In conclusion, the Commission stressed that, while IP rights are important for innovation and growth, they should not be abused to the detriment of competition and ultimately consumers.

Finally, the Commission continued to promote convergence on competition rules through policy dialogues with competition authorities outside the EU, tackling the challenges of globalization. In particular, it signed an agreement with Switzerland,[108] which will enable both competition authorities to exchange information obtained in their respective investigations. Negotiations on a similar agreement with Canada have also been progressing. In addition, the Commission continued to engage in technical cooperation activities with China and India. [109]

[101] *Oil and biofuel Markets* (Case AT. 40054), MEMO/13/435 of May 14, 2013; *Upstream Gas Supplies in Central and Eastern Europe* (Case AT.39816), MEMO/12/937 of September 4, 2012; *BEH electricity* (Case AT.39952), IP/121307 of December 3, 2012; *Power Exchanges* (Case AT.39952) MEMO/12/78 of February 7, 2012.

[102] *CEZ* (Case AT.39727), Commission decision of April 10, 2013.

[103] 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; 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.

[104] *Hutchison 3G UK/Telefonica Ireland* (Case M.6992), Commission decision of November 6, 2013; *Telefonica Deutschland/E-Plus* (Case M.7018), Commission decision of December 20, 2013.

[105] *Motorola – Enforcement of GPRS standard essential patents* (Case AT.39985), Statement of Objections of May 6, 2013; *Samsung – Enforcement of UMTS standards essential patents* (Case AT.39939), Statement of Objections of December 21, 2012.

[106] A Policy Brief is a paper published by DG Competition which considers recent development and case-law in particular areas.

[107] *Samsung – Enforcement of UMTS Standard Essential Patents* (Case COMP AT.39939), and *Motorola – Enforcement of GPRS Standard Essential Patents* (Case COMP AT.39985), Commission decisions of April 29, 2014. *See above*, Intellectual Property And Licensing section.

[108] Agreement of May 17, 2013 between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws.

[109] Memorandum of Understanding on Cooperation of November 21, 2013.

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