VERTICAL RESTRAINTS

Advocate General Opinion

Case C-279/06 *CEPSA, Estaciones de Servicio SA v. LV Tobar e Hijos SL*.

On March 13, 2008, Advocate General Mengozzi advised the European Court of Justice to confirm its case law on the exclusion of a principal-agent relationship from the scope of Article 81 EC where the agent is not an independent trader, *i.e.* where the agent does not bear any of the risks, or only negligible risks, resulting from the contracts negotiated with third parties on behalf of the principal,[1] but that, even in the case of a genuine agency agreement, Article 81 applies to a non-competition or exclusivity clause requiring the agent to source its fuel exclusively from the principal. The clause then restricts the agent's commercial freedom as an operator on the agency services market.

Such clause may nonetheless merit exemption if the relevant conditions are met. In particular, a ten-year exclusivity clause could be justified if the financial and commercial benefits conceded by the supplier are so important that, in their absence, the service-station operator could not have entered the agency services market for the sale of fuel.

HORIZONTAL AGREEMENTS

Commission Decisions

***Synthetic Rubber Cartel*.**

On January 23, 2008, the Commission fined Bayer and Zeon € 34.2 million for fixing prices between 2000 and 2002 for nitrile butadiene rubber (NBR).[2] This is the fourth case in which the Commission applied its 2006 Fining Guidelines.[3]

The Commission increased Bayer's fine by 50% because of a prior antitrust violation. Interestingly, the Commission did not take account of Bayer's role in three other infringements in the synthetic rubber sector[4] because these infringements "*took place in a similar period of time and therefore are parallel infringements.*"[5] This case thus suggests that the Commission will increase fines for recidivism only with regard to infringements that pre-date the infringement under review.

Both Bayer and Zeon cooperated with the Commission under the EU leniency program; Bayer's fine was reduced by 30% and Zeon's by 20%. In addition, Zeon received an additional reduction as it was the first undertaking to disclose the initial period of the cartel to the Commission.

MERGERS & ACQUISITIONS

Prohibition Decisions

Case COMP/M.4439 *Ryanair/Aer Lingus*.

The Commission published its decision of June 27, 2007, prohibiting Ryanair's acquisition of Aer Lingus, the first airline merger to be blocked by the European Commission. At the time, the parties competed on 35 routes to and from Ireland, and had particularly strong positions on routes to and from Dublin, for which the merged entity would have accounted for around 80% of all intra-European traffic. On 22 of these routes, the merger would have left customers with no alternative. On the remaining routes, the merger would have significantly reduced consumer choice, with the merged entity holding market shares of over 60%.

In spite of the significant competitive overlap, Ryanair claimed that the merger would not have anti-competitive effects because the two airlines did not compete to any significant extent. It argued that its low-cost approach, flying to secondary airports rather than to the primary airports served by Aer Lingus, implied that Ryanair and Aer Lingus served different pools of passengers. Ryanair also argued that

1 See Case C-217/05 P *Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA*.

2 Case COMP/38.628 – *Synthetic Rubber*.

3 The three previous decisions applying the 2006 Fining Guidelines include Case COMP/38.432 – *Professional Videotape*, Commission decision of November 20, 2007; Case COMP/39.265 – Flat Glass, Commission decision of November 28, 2007; and Case COMP/38.629 – Chloroprene Rubber, Commission decision of December 5, 2007.

4 See Case COMP/38.443 – *Rubber Chemicals*, Commission decision of December 21, 2005; Case COMP/38.638 – *Synthetic Rubber*, Commission decision of November 29, 2006; and COMP/ 38.629 – *Chloroprene Rubber*, Commission decision of December 5, 2007.

5 See IP/08/78, Commission press release of January 23, 2008.

the two airlines would continue to compete after the merger, and that the merger would have the effect of lowering Aer Lingus's fares. The Commission's investigation showed that, for 20 of the 35 overlapping routes, Ryanair and Aer Lingus indeed served different destination airports from Ireland, and therefore overlapped only on a city-pair, rather than on an airport-pair basis. However, an extensive passenger survey carried out at Dublin Airport revealed that leisure passengers, in particular, generally consider secondary airports as acceptable substitutes, if fares are sufficiently lower than the fares to and from primary airports.

The Commission also found that no airline had expressed any meaningful interest in entering into direct competition against a merged Ryanair/Aer Lingus in Ireland. New entrants would have had to operate from Ryanair's and Aer Lingus's bases in Ireland. Furthermore, Ryanair's reputation for aggressive retaliation against any attempted entry by competitors suggested that its combination with Aer Lingus would further strengthen its ability to dissuade entry. The Commission considered that a merged Ryanair/Aer Lingus would have had the means and incentive of protecting its market position by engaging in selective short-term price undercutting and capacity increases if competitors entered routes to/from Ireland, in order to protect its market position.

Ryanair offered various slot-related and non slot-related commitments to solve the competition issues raised by the Commission. In particular, Ryanair committed to make available, for an unlimited period of time, slots for the London-Heathrow route and, if necessary, for other overlapping routes from and to Dublin, Shannon and Cork. Furthermore, Ryanair committed to reduce Aer Lingus' fares by at least 10%, retaining Aer Lingus's brand and continuing to operate Ryanair and Aer Lingus separately. Ryanair further committed not to increase capacity on any of the overlap routes in the event of new entry on the route.

However, the Commission considered that the proposed remedies' intended lowering of entry barriers would not lead with a sufficient degree of certainty to the entry of new competitors in the affected markets, because obtaining slots to operate a route would not suffice to stimulate entry and to ensure that one or more entrants would actually compete effectively against the merged entity. The Commission found that other factors would have prevented competitors from entering into direct competition with Ryanair/Aer Lingus, including the merged entity's strong brands, their large bases at Dublin, and Ryanair's low cost model.

This is the first case in which the Commission has had to assess a proposed merger of the two main airlines in a EU Member State, both operating from the same home airport (Dublin). Given the extent and nature of the overlaps, the proposed remedies (which the Commission has accepted in previous cases) were insufficient to prevent harm to competition and consumers. Ryanair's appeal against the Commission's prohibition decision is pending before the Court of First Instance.

Second-Phase Decisions Without Undertakings

Case COMP/M.4731 *Google/DoubleClick*.
On March 11, 2008, the Commission approved Google's acquisition of DoubleClick. The Commission reviewed the transaction following a request by the parties under Article 4(5) of the EC Merger Regulation, which provides for the possible referral to the Commission of transactions that are capable of being reviewed in at least three Member States. The parties' activities did not overlap, but the Commission assessed the transaction's effect on potential competition arising from products being developed by the parties, and reviewed a number of non-horizontal theories of harm advanced by third parties.

The transaction concerns the online advertising industry. The main actors in this industry are web publishers that provide content or services on their internet sites (*e.g.*, large publishers like CNN.com or very small publishers like an individual blog) and sell empty space on their internet sites in order to generate revenue, and advertisers, which pay for the empty space on internet sites to place their advertisements.

Online ads can be categorized in a number of different ways: based on their selection mechanism (ads that appear as a result of a search query (search ads) and those that do not), based on their visual appearance (ads that appear as text on the screen (text ads) and those that appear as graphics (display ads)), and based on their distribution channel (ads that are sold directly by web publishers (direct sales) and intermediated sales of ads (ad intermediation) sold by ad networks and ad exchanges, *i.e.*, online platforms and marketplaces that enable web publishers with free space on their internet sites to be matched to advertisers looking for space to place their ads online.

Although both parties were active in this industry, they supplied different products and services in the online advertising value chain.

Google's main activity was the provision of advertising space for text ads on its website and on the websites of its network of publishers (the AdSense network). DoubleClick primarily sold the technology infrastructure needed for advertisers, advertising agencies and web publishers to deliver display ads to web sites and for managing and reporting the effectiveness of those ads (display ad serving).

The Commission focused on the following product markets: the provision of online advertising space (on which Google is active primarily in the provision of text-based ads); intermediation of online advertising (on which Google is active through its AdSense network and DoubleClick was a potential entrant); and the provision of display ad serving technology to advertisers and to publishers (on which DoubleClick is active and Google was a potential entrant).

As regards shares, while estimates varied, the Commission considered that Google accounted for 20-30% of sales of online ad space in the EEA. On the narrower segment for search ads – which was not defined as a relevant market – the Commission found that Google accounted for 40-70% of EEA-wide sales. In online ad intermediation, Google's AdSense network accounted for 40-60% of EEA sales, and DoubleClick was a potential entrant with its ad exchange, which it was developing. In the provision of display ad serving, the Commission found that DoubleClick accounted for 40-50% of EEA-wide sales on the publisher side and for 30-40% of EEA-wide sales on the advertiser side, and that Google was a potential entrant through the publisher-side and advertiser-side display ad serving products that it was then developing.

Concerning any restriction on actual competition between the parties, the Commission found that the parties did not compete: DoubleClick did not sell ad space and Google's primarily text-based ad serving technology was provided only as an ancillary service and did not compete with DoubleClick's product since it did not provide the detailed metrics required for display ad serving. The Commission also found that Google's "bundled" solution (comprising the sale of ad space and serving of the ads) and the "unbundled" combination of stand-alone ad serving technology (as provided by DoubleClick) and the sale of ad space through direct and intermediated channels did not constrain each other. This was because the cost of ad serving represented only a very small part of the total cost of the unbundled solution, such that a small but significant change in its price could have only a very small impact on the total cost of the unbundled solution and was very unlikely to result in switching to the bundled solution. Moreover, DoubleClick faced strong competition from other display ad serving companies and in-house solutions, and Google's bundled solution for text ads was only a distant competitor to an unbundled solution including DoubleClick's products for display ads, given the differences in the type of ad served, the reporting metrics offered, and the types of customer and ad inventory.

Concerning any restriction on potential competition between the parties, the Commission held that, while each party was developing products that would overlap with those offered by the other, the transaction would not give rise to any concerns. In online ad intermediation, the Commission found that advantages alleged to accrue to DoubleClick as a potential entrant were in fact unfounded. In particular:

- The integration of DoubleClick's ad serving and ad intermediation did not confer an advantage, as DoubleClick anticipated acquiring only a modest presence in this market and its vertical integration was not unique amongst competitors.
- DoubleClick's existing customer base did not confer any unique benefits, as many ad networks and ad exchanges had even larger customer bases, DoubleClick's ad serving customers were not the typical customers targeted by ad exchanges (DoubleClick's customers tended to be publishers with premium content using direct sales channels), and ad serving customers already using intermediation platform would likely continue to use multiple platforms in addition to DoubleClick's.
- The use of ad serving data did not generate direct network effects that would benefit DoubleClick in ad intermediation because DoubleClick was contractually prohibited from using data in this way and had no ability or incentive to force contractual changes. In any event, many competitors were able to gather the same or even more extensive data.

Similarly, in the provision of display ad serving no concerns were identified and Google was not regarded as uniquely well placed to enter: it had no significant experience with display advertising or the advanced metrics required by customers, and its existing relationships with publishers and advertisers are based on the provision of text ads. The Commission found that other potential entrants, such as rich media companies, ad agencies and portals, were in fact better placed to enter the market.

The Commission also considered non-horizontal theories of harm advanced by third parties. These fell broadly into vertical theories (as Google would acquire a major supplier of a key input for ad distribution channels that compete with Google's AdSense network) and conglomerate theories (as Google would acquire a major supplier of a product that can be combined with intermediation services such as those offered by Google's AdSense network). The Commission rejected all these theories of harm.

The merged entity would have neither the ability nor the incentive to use DoubleClick's leading position to enhance the market position of Google's intermediation platform at the expense of rivals through methods such as pure bundling, mixed bundling (either through increasing the price or degrading the functionality of unbundled DoubleClick products), or tweaking DoubleClick's functionality to favor serving ads from AdSense.

DoubleClick could not do so because it was unable to exercise any significant market power and customers were able to switch. Even if it could impose a price increase for non-bundled DoubleClick products, it would be unlikely to induce switching to AdSense, as the price increase would account for such a small percentage of the total cost of online advertising. The Commission also found that there was no evidence that benefits would accrue either from an alleged direct network effect (*i.e.*, data obtained from DoubleClick's publisher customer base making DoubleClick's ad targeting more effective) or an alleged indirect network effect (*i.e.*, increased size of Google's AdSense network leading to tipping to AdSense).

Neither would there be an incentive to do so, as ad serving comprised a small percentage of the cost of advertising, making it unlikely that price reductions for ad serving would trigger switching to AdSense, and as margins earned on additional AdSense sales would likely be insufficient to compensate for the opportunity cost of reducing the price of DoubleClick products. Any attempt to bundle or degrade the quality of DoubleClick would trigger switching away from DoubleClick, rather than switching to AdSense. Even if bundling were implemented, rivals could offer similar bundles, and the absence of significant network effects and evidence of entry and expansion in intermediation supported the view that the merged entity would not be able to exert market power.

The Commission also found that the merged entity would have neither the ability nor the incentive to engage in foreclosure strategies based on Google's market position in search ads and search ad intermediation (*i.e.*, bundling of these Google products with those of DoubleClick). Google would not be able to bundle, as simultaneously setting the price of the products in the bundle would be difficult in practice, there would be only a limited pool of common customers, and vertically-integrated competitors could replicate the bundle. Google would lack the incentive to bundle, as the difference in margin would mean that even small losses of search advertising or search ad intermediation customers would likely outweigh the gain in profits from ad serving customers. The highly individualized nature of pricing also made bundling unattractive. Even if bundling were implemented, large vertically integrated competitors such as Microsoft, Yahoo! and AOL could replicate the bundle.

Finally, the Commission held that the combination of data held by Google and DoubleClick was unlikely to result in foreclosure, as the merged entity would have neither the ability nor the incentive to remove contractual restrictions preventing data combination. Even if data could be combined, the competitiveness of the merged entity would not be enhanced because competitors were able to access comparable pools of data.

Case COMP/M.4747 – *IBM/Telelogic*.

On March 5, 2008, the Commission approved IBM's acquisition of sole control of Telelogic. The Commission reviewed the transaction following a request by the parties under Article 4(5) of the EC Merger Regulation.

The Commission's investigation focused on competitive overlaps between IBM and Telelogic in the supply of modeling tools (which developers use to create visual models, data definitions, and programming specifications for complex software-powered systems), and requirements management tools (which software developers use to collect, structure, store, manage, and track requirements for complex software-powered systems). Having identified three possible theories of harm (unilateral price increases, decreased incentive to innovate, and decrease in interoperability of software tools), the Commission nevertheless unconditionally authorized the transaction following an in-depth investigation, without issuing a statement of objections.

Concerning the merged entity's alleged ability to increase prices unilaterally, the Commission considered that its market shares in excess of 60% in both modeling and requirement management tools did not reliably indicate market power on these markets due, *inter alia*, to the high degree of product heterogeneity that reduced the substitutability of the individual tools. Consequently, the Commission assessed the merger's potential anti-competitive effects on the basis of an analysis of closeness of substitution, concluding that the parties' offerings could not be considered close substitutes, and that the merged entity would thus be unable to increase prices post merger.

Concerning the merged entity's alleged decreased incentive to innovate, the Commission concluded that this was unlikely, notably because: (i) competition between IBM and Telelogic had not been a major driver for innovation in the recent past; (ii) innovation in the markets for modeling and requirement management tools was not driven by competition between software vendors, but mainly by customers' needs; (iii) innovation in these markets in the coming years would probably be promoted by competitive pressure posed by the further expected development of open-source offerings for these two categories of tools; and (iv) IBM's and Telelogic's products were, as noted, not close substitutes in terms of the functionalities that they provided and the customer groups they primarily targeted.

Concerning the vertical unilateral effects, the Commission was initially concerned that the merged entity would have had fewer incentives to provide open interfaces allowing integration with third parties' software development tools. An overall assessment of the likely impact on prices and choice of a hypothetic foreclosure strategy followed by the merged entity led the Commission to discard such concern because the characteristics of the markets ruled out a successful foreclosure strategy and, in any event, while it would not be a problem technically to obscure communication protocols and file formats to thwart interoperability, the merged entity would have had no incentive to engage in such a strategy because the potential costs far outweigh the potential benefits.

ABUSE OF DOMINANT POSITION

Advocate General Opinion

Case C-49/07 *Motosykletisktiki Omospnodia Ellados NPID*. On March 6, 2008, Advocate General Kokott advised the European Court of Justice that the special characteristics of sport do not exempt sports organizations from scrutiny under antitrust laws, even where they exercise a power delegated by the government, and that laws that permit individual sports organizations to regulate activities in which they themselves participate create a conflict of interest and invite abuse. Though the exercise of regulatory authority under such laws is not necessarily abusive, the risks of discriminatory abuse created by the conflict of interest render the law (in this case Article 49 of Law 2696/1999) incompatible with the Treaty, and in particular with Articles 82 EC in combination with Article 86 EC. Article 86 provides that national measures granting exclusive rights to undertakings must be compatible with the provisions of the Treaty, including Article 82, which prohibits abuses of a dominant position.

Article 49 of Greek Law 2696/1999 required organizations wishing to hold motorcycle competitions to obtain prior approval from the Greek Minister for Public Order. The Minister's decision was contingent upon consent being granted by Greece's representative to the Fédération Internationale de Motocyclisme (FIM). Greece's FIM representative was Ethnikos Athlitikos Kanonismos Motosikletas (ELPA), a non-profit sports organization. In addition to licensing motorcycling competitions, ELPA organized and marketed its own motorcycling events.

On two occasions in 2000, Motsykletistiki Omospondia Ellados NPID (MOTOE) applied to the Greek Ministry to organize a number of sporting events. The Ministry referred the application to ELPA, which did not grant permission despite the fact that the applications proposed motorcycling events compliant with the Traffic Code. MOTOE sued the Ministry and submitted that Article 49 of the Traffic Code violated Articles 82 and 86 EC.

The Advocate General took the view that ELPA's organization and marketing of motorcycle events are each an economic activity, for which motorcyclists and their clubs request and pay. The fact that these services relate to sport, that the participants in the sporting event may be amateurs, or that ELPA is a not-for-profit organization, was deemed irrelevant to this assessment.

The Advocate General defined the organization and the marketing of motorcycling events in Greece to be the two relevant markets in this case, and concluded that ELPA has a dominant position because it organizes the vast majority of Greek motorcycling events.

Concerning the requirement that there be an effect on trade between Member States, the Advocate General noted that foreign firms may have an interest in organizing or marketing motorcycle events in Greece, that ELPA's position as the authorizing body for motorcycle events allowed it to exclude other event organizers, and that the rules of ELPA forbade advertising at motorcycling events without its permission. As foreign organizers may be interested in the Greek market, the Advocate General concluded that abuses by ELPA of its authorizing authority could affect trade between Member States.

Since Article 49 of the Traffic Code named ELPA as the only authorizing body for motorcycling events, the Advocate General noted that ELPA enjoyed exclusive rights within the meaning of Article 86 EC.

The Advocate General went on to observe that not every denial by ELPA of an application to organize a motorcycling event would *per se* constitute an abuse of its dominant position. The denial would be justifiable if it was based on objective reasons, which are in the legitimate interest of the sport. Objective reasons for rejecting an application include the safety of racers and spectators at proposed events, among others. However, where the reason for the denial is ELPA's own interest in prospering as organizer/marketer, to the detriment of competing organizations, denial would be abusive.

The Advocate General observed that Article 49 of the Traffic Code created ELPA's dual role, and that this dual role invited the risk that ELPA would abuse its dominant position as an organizer/marketer by denying event applications of other organizations. Since it was in ELPA's economic interest to deny the application of competing motorcycle event organizers, ELPA's dual role gave rise to a conflict of interest. Aggravating the problem was the fact that ELPA's conflict of interest was unchecked by any restrictions on its authority to deny applications.

Joined Cases C-468/06 to C-478/06 *Sot. Lélos Kai Sia EE (and Others) v GlaxoSmithKline AEVE*.

On April 1, Advocate General Ruiz-Jarabo Colomer, rendered his opinion in the context of a preliminary reference to the European Court of Justice requesting clarification on the application of Article 82 EC to a dominant undertaking's reduction in customary sales to Greek wholesalers aimed at restricting parallel trade.

Advocate General Ruiz-Jarabo Colomer advised the Court to qualify the reduction as abusive, contrary to Advocate General Jacobs's opinion in *Syfait*[6] who advised that the same conduct could be objectively justified in light of the highly regulated nature of the pharmaceutical sector.

The scope of this opinion is limited to a reduction in customary sales to wholesalers aimed at restricting parallel trade. It does not concern the question whether a dominant manufacturer must: (i) sell any quantities ordered by wholesalers, even if they exceed those customarily purchased by those wholesalers;[7] (ii) refrain from decreasing the quantities sold to wholesalers, even if such reduction is justified on objective commercial grounds, including, for example, forecast decreased domestic demand supported by objective and reliable evidence; or (iii) supply new customers.

Having ascertained that Greek wholesalers were selling surplus amounts in Germany and in the United Kingdom, GlaxoSmithKline (GSK), through its subsidiary, GSK AEVE, sought to restrict exports by first suspending supplies of the relevant products to the wholesalers, and then resuming supplies, but only in quantities sufficient to satisfy domestic demand.

Citing the Court's judgments in *Commercial Solvents* and in *United Brands,*[8] the Advocate General considered that a dominant company refusing to supply customers in order to reserve the export market for itself abuses in principle its dominant position. Despite GSK's clear intention to restrict parallel trade, the Advocate General nevertheless advised the Court to refrain from holding that this behavior should qualify as a *per se* abuse.[9] The Advocate General observed that the Court has to date identified three *per se* abuses, namely the conclusion of excusive purchasing contracts, the granting of loyalty rebates, and predatory pricing, but that, even then, the Court's more recent case law, for example with respect to rebates, allows for the possible justification of such conduct.[10] The Advocate General referred to a number of additional factors, including the need to assess behavior in light of the circumstances of each case, and the right of defense, to conclude that a *per se* approach would be inappropriate.

The rejection of a *per se* approach led the Advocate General to consider the potential objective justifications for the conduct under scrutiny. He referred to three possible categories of justification, namely (i) market regulation, (ii) the protection of legitimate business interests, and (iii) the creation of efficiencies benefiting consumers. The Advocate General found that GSK had adduced insufficient evidence to justify its conduct.

In rejecting GSK's arguments that its conduct was justified in light of the characteristics of the pharmaceutical sector, Advocate General Ruiz-Jarabo Colomer pointed to the Court's holding in *Merck v. Primecrown* that distortions of competition flowing from price and reimbursement regulation cannot restrict the fundamental objective

6 Case C-53/03 *Syfait and Others* [2005] ECR 4609. The Court did not rule in this case because it lacked jurisdiction as a result of the reference having been made by an entity that was not a national court or tribunal.

7 The wholesalers emphasized in their submissions that the national court's question should not be interpreted as asking whether GlaxoSmithKline must supply any quantities ordered, even if they exceed customary orders (paras. 31-33).

8 Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp v Commission* [1974] ECR 223; Case 27/76 *United Brand v Commission* [1978] ECR 207.

9 Advocate General Jacobs adopted a similar position in *Syfait*.

10 See Case C-95/04P *British Airways v. Commission* [2007] ECR I-2331.

of ensuring the free movement of goods between Member States,[11] adding that manufacturers in any event benefit from a margin of negotiation with national authorities concerning price and reimbursement levels.

Concerning GSK's second argument relating to the statutory obligation to maintain a sufficient stock of product to cover domestic patient needs, the Advocate General observed that wholesalers are subject to the same obligation and that domestic patient needs can normally be reliably forecast. As a result, he failed to see a nexus between this statutory obligation and any reduction in quantities sold to wholesalers in order to restrict parallel trade.

The Advocate General then considered whether GSK's behavior could be justified by the need to protect its legitimate business interests, namely, as sustained by GSK, the need to preserve revenue to finance R&D activities, given the 12 to 13-year delay between obtaining a patent for an active ingredient and the commercialization of the corresponding product. The Advocate General was not persuaded that any nexus exists between the need to restrict parallel trade and the need to preserve revenue to finance R&D activities. He suggested that GSK could also have mitigated its losses by not establishing commercial relations with wholesalers in Greece when it began selling there, and that GSK's conduct appeared designed more to wrest back profits from the wholesalers using R&D as a pretext. The Advocate General's opinion on this point is nevertheless somewhat unclear.

The third possible objective justification, namely the so-called "efficiency defense", relates to the conduct's efficiencies benefiting consumers. Advocate General Ruiz-Jarabo Colomer took the view that GSK had failed to demonstrate any efficiencies because it emphasized only the negative effects of parallel trade, without mentioning any positive effect flowing from its limitation of supplies to wholesalers. However, he explored this point only very briefly.

During a number of years, pharmaceutical companies felt that the highly regulated nature of the pharmaceutical sector meant that EC competition law should not prohibit restrictions on parallel trade: differences in national price and reimbursement levels and other national state regulations should not be corrected by applying EC competition law without restriction to practices designed to protect legitimate business interests.

Advocate General Jacobs's opinion in *Syfait* confirmed this view, finding that GSK's conduct could be objectively justified as a reasonable and proportionate measure in defense of its commercial interests on the grounds that "[s]uch a restriction does not protect price disparities which are of the undertaking's own making, nor does it directly impede trade, which is rather blocked by public service obligations imposed by the Member States. To require the undertaking to supply all export orders placed with it would in many cases impose a disproportionate burden given the moral and legal obligations on it to maintain supplies in all Member States. Given the specific economic characteristics of the pharmaceutical industry, a requirement to supply would not necessarily promote either free movement or competition, and might harm the incentive for pharmaceutical undertakings to innovate. Moreover, it cannot be assumed that parallel trade would in fact benefit either the ultimate consumers of pharmaceutical products or the Member States, as primary purchasers of such products".

The opinion of Advocate General Ruiz-Jarabo Colomer brings the clock back to 1996, when the Court held in *Merck v. Primecrown* that the EC Treaty's rules apply to the pharmaceuticals sector, regardless of how significantly it is regulated. In short, the Member States are responsible for addressing any unfair or illogical consequences flowing from the different national pharmaceutical regulations; the Court should not be expected to do so by suspending the full application of EC competition law

Secondly, the facts of the case are strictly limited to a reduction of customary sales designed to stop parallel trade. This case does not concern the question whether a dominant manufacturer must sell any quantities ordered by wholesalers, even if they exceed those customarily purchased by those wholesalers. Sufficient principles exist under EC competition law to reject any such obligation. As a result, a dominant manufacturer may continue to set a maximum amount it is prepared to sell to any wholesaler during any reference period. In addition, the opinion would not prevent a dominant manufacturer from decreasing the quantities sold to any wholesaler, if such reduction is justified on objective commercial grounds, including, for example, forecast decreased domestic demand supported by objective and reliable evidence. Finally, the opinion clearly does not require dominant undertakings to begin selling to new customers.

11 In Joined Cases C-267/95 and C-268/95 *Merck v. Primecrown* [1996] ECR I-6285 para.47 the Court stated that "*[a]s to that, although the imposition of price controls is indeed a factor which may, in certain conditions, distort competition between Member States, that circumstance cannot justify a derogation from the principle of free movement of goods*".

The opinion's scope is limited, but still a reminder that the authorities' "benign neglect" during the last few years of practices restricting parallel trade may not be grounded in the case law of the Court. Furthermore, the opinion may well signal an end to the regulatory holiday enjoyed by companies concerning any of their practices designed to have or having the effect of restricting parallel trade. The opinion is not binding on the Court. The final judgment is expected before the end of the year.

STATE AID

ECJ Judgment

Case C-199/06 *Centre d'Exportation du livre français (CELF), Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)*.

On February 12, 2008, the European Court of Justice clarified the scope of Article 88(3) EC, which requires Member States to refrain from granting state aid until it has been notified and authorized by the Commission. Where the Commission has already decided to authorize unlawful state aid, *i.e.*, state aid granted to its recipient prior to notification and authorization, the Court held that national courts faced with an action requesting the repayment to the Member State of that unlawful state aid must require the beneficiary to pay back interest on the aid received for the period during which the aid was granted in breach of Article 88(3) EC, but not to return the entire amount of the aid to the Member State.

The Court reasoned that, as a matter of European law, to require the repayment of the interest which the aid recipient would have had to pay to borrow on the market an amount equal to the aid granted to it for the period between the implementation of the aid and the Commission's authorization decision would be sufficient to eliminate any undue advantage enjoyed by the aid recipient as a result of the unlawfulness of the aid. However, the Court also noted that, as a matter of national law, a national court may also, as appropriate, order the recovery of the unlawful aid (without prejudice to the Member State's right to re-implement it) and/or uphold claims for damages deriving from the unlawfulness of the aid.

In this case, CELF had received operating subsidies from the French State from 1980 to 2002 which had not been notified. Following a complaint lodged by CELF's competitor SIDE, the Commission concluded that the relevant measures constituted state aid, but were compatible with the common market. Litigation followed both at the Community level and at the national level. In France, SIDE brought an action before the Paris Administrative Court for the annulment of the decision of the French Minister for Culture rejecting SIDE's request to stop the payment of the aid to CELF and to order the repayment of the aid already granted. When the controversy reached the Council of State, the national court referred the matter to the Court.

CFI Judgment

Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd, BUPA Ireland Ltd v. Commission*.

On February 12, 2008, the Court of First Instance dismissed BUPA's appeal against a Commission decision declaring an Irish Risk Equalization Scheme (RES) for the private medical insurance sector compatible with EC State aid rules.

Between 1957 and 1996, the Voluntary Health Insurance Board (VHI) was the only player on the private health insurance (PMI) market in Ireland. When the Irish PMI market was liberalized on January 1, 1997, BUPA started its activities and became VHI's major competitor. At the time of the liberalization of the market, an RES was established that was administered by the Health Insurance Authority. The RES is a mechanism providing for payment of a levy by PMI insurers with a risk profile below the average market risk profile and for a corresponding payment to PMI insurers with a risk profile higher than the average. In practice, the application of the RES led to a transfer of funds from BUPA to VHI.

The creation of the RES was notified to the Commission, which did not raise any objections under EC State aid rules. The Commission held that the compensation provided by the RES constituted an amount intended as compensation for the obligations associated with the provision of services in the general economic interest (SGEI) aimed at ensuring that all persons living in Ireland would receive a minimum level of PMI services at the same price, independently of their health, age and/or sex. BUPA challenged the Commission's decision before the Court.

The Court upheld the Commission's decision, noting, in particular, that the conditions that must be satisfied when a Member State invokes the existence of an SGEI mission were met in this case since (1) the Irish legislation, which defined the public service obligations in detail, is an act of a public authority, and (2) the fact that the insurers are required to cover any person requesting insurance means that the PMI services are compulsory and universal. The Court further noted that the Commission concluded correctly that the compensation system provided for by the RES was necessary and proportionate by reference to the costs incurred by the insurers in discharging the PMI obligations.

POLICY AND PROCEDURE

Commission Decisions

E.ON.

On January 30, 2008, the Commission imposed a fine of € 38 million on E.ON for breaching a Commission seal at E.ON's premises in May 2006. Commission officials had affixed the seal during an unannounced inspection. These inspections related to alleged anti-competitive practices in the German electricity sector. When the Commission's case team returned to E.ON's premises the next day, the seal showed "void" signs on its surface.[12] According to the Commission, the seal also showed traces of glue as if attempts had been made to reattach the seal after it had been removed.

The seal was intended to secure the room in which all documents previously collected by the Commission, *i.e.*, highly sensitive documents, were stored. As no index of these documents had yet been drawn up, the Commission was unable to ascertain whether and which documents were taken by E.ON.

E.ON denied having tampered with the seal, but could not offer any credible explanation for the appearance of the "void" signs on the seal. E.ON first claimed that cleaning staff might have moved the seal when wiping over it. It then proposed alternative explanations, including vibrations, a high level of humidity, or the use of an aggressive cleaning product. According to the Commission, E.ON also claimed that the Commission had the only key to the room in question, while it later turned out that 20 keys to that room were in circulation among E.ON employees.

Regulation 1/2003 requires companies not to impede, mislead or otherwise endanger the integrity and effectiveness of a Commission investigation.[13] Breaking a seal, whether intentionally or through negligence, in the Commission's view, inevitably compromises the Commission's investigation because incriminating documents might have been removed from the sealed premises. Accordingly, the Commission did not address in its decision the question whether E.ON acted intentionally, as E.ON's liability resulted from the negligent breach of the seal.

Pursuant to Article 23(1) of Regulation 1/2003, the Commission may impose fines of up to 1% of the company's annual worldwide turnover for certain violations of the duty to cooperate with the Commission, *e.g.*, for wrong, incomplete or misleading responses to factual questions, obstructive behavior, or breaking a Commission seal. The fine imposed on E.ON remained below the maximum of 1% of E.ON's relevant turnover of around € 56.4 billion (the fine corresponds to 0.67% of that turnover). The Commission's fining guidelines do not apply to violations of the procedural rules of Regulation 1/2003, but only to violations of Articles 81 and 82 EC. However, the Commission acknowledged that it was bound by the principle of proportionality also when setting fines under Article 23(1) of Regulation 1/2003.[14] The Commission also claimed to have taken into account that this case is the first to impose a fine on an undertaking for breach of a seal. E.ON's appeal against the decision is pending.

Microsoft.

On February 27, 2008, the Commission fined Microsoft € 899 million for non-compliance with its obligations under the Commission's decision of March 24, 2004, fining Microsoft € 497.2 million for abusing its near-monopoly position by, among other things, deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers, and directing Microsoft to grant access to complete and accurate interface information to third parties, within 120 days of the Decision, in order to allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers,[15] which the Court of First Instance upheld on September 17, 2007.[16] This is the largest fine ever imposed on a company by the Commission for a breach of competition law and it is the first time the Commission has fined a company for failure to comply with an antitrust decision.

On July 12, 2006, the Commission had fined Microsoft € 280.5 million for non-compliance because it failed to disclose complete and accurate information. The fine period ran from December 16, 2005 to June 20, 2006. The Commission could have imposed a maximum

12 The Commission's seals are made of plastic film. If they are removed, they do not tear, but show irreversible "void" signs on their surface.

13 See in particular Article 23(1) of Regulation 1/2003.

14 See MEMO/08/61, Commission memorandum of January 30, 2008.

15 Case COMP/C-3/37.792 *Microsoft*.

16 Case T-201/04 *Microsoft v. Commission*, not yet reported.

€ 2 million per day fine but imposed 75% of this or € 1.5 million per day. The severity of the fine reflected Microsoft's failure to heed the Commission's repeated warnings along with due regard to Microsoft's size and large financial resources. Importantly, this decision warned Microsoft that the maximum possible daily penalty payment would increase to € 3 million. This increase was confirmed in a Statement of Objections issued on March 1, 2007.

In this latest Statement of Objections, the Commission found that Microsoft had continued to frustrate interoperability by setting its royalty rates for access to interoperability information too high. Additionally, the Commission found that Microsoft should not have been allowed to demand royalties for technology which was either publicly available, not state-of-the-art or lacking innovative input. Microsoft argued that the Commission's views on innovation were too narrow in scope and that innovation could come about through the incremental development of previous technologies. The Commission, however, found that comparative patented technologies were provided for free, in effect undermining Microsoft's claims that innovation required such recompense. Further, the Commission found that Microsoft's claims to innovation were true in only 6 cases out of 167 technologies.

In response, Microsoft lowered the initial royalty rates on May 21, 2007. The Commission, however, was not satisfied with Microsoft's compliance until it made a second reduction on October 22, 2007. The € 899 million fine was based on the period from July 21, 2006, (the date of the first penalty payment for non-compliance) until October 21, 2007, or 488 days. Microsoft could therefore have been subject to a maximum fine of € 1,464 million but instead received 61% of this figure. This translates to approximately € 1.8 million per day. How the Commission calculated the exact fine is unclear. The Commission made clear, however, that the first royalty rate reduction on May 21, 2007, was considered an attenuating circumstance. It is notable that the second penalty payment (61%) was lower as a proportion of the maximum possible fine allowable than the first one (75%). The Commission points out, in particular, that, even after the Statement of Objections of March 1, 2007 Microsoft did not comply and adopted its remuneration scheme of May 21, 2007, which continued to contain unreasonable terms. The Commission sought to take into account the fact that Microsoft "was able to reap the benefits of non-compliance for a total of two years and 10 months." Microsoft could not make up for previous non-compliance by retroactively applying a new remuneration scheme since the dissuasive effect on potential licensees during that period could not now be remedied. As of October 22, 2007, Microsoft was in full compliance with the decision. There is, however, a continuous duty on it to comply with the Commission's initial 2004 decision. Microsoft's appeal against this latest decision is pending.

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