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HORIZONTAL AGREEMENTS

Commission Decisions

Case COMP/38.344 Prestressing Steel

On June 30, 2010, the Commission found 17 steel producers in Europe had conspired to fix quotas and individual prices of prestressing steel,[1] allocated customers across the EU amongst themselves, and exchanged significant commercial information. Although initially the total fine for all participants was set at over €500 million, subsequent amendments decreased the overall fine significantly, to approximately €250 million.

Because the first meetings of the cartel were held in Zurich, Switzerland, in the 1980s, the cartel was named as "Club Zurich" (later changed to "Club Europe"). The Commission established that there were over 550 meetings of the Club Zurich cartel over an 18-year period (1984 2002). The anti-competitive agreements reached in those meetings were monitored and enforced through an intricate system of national coordinators and bilateral contacts. The cartel came to light when one of the participants, DWK/Saarstahl, approached the Commission for immunity under the Leniency Program that had been introduced that year, and based on information provided by DWK/Saarstahl the Commission carried out surprise inspections at the premises of the suspected cartel members.

In setting the fines, the Commission originally took into account the sales of the companies involved in the market concerned in the last year of the cartel (2001), the very serious nature of the infringement, the geographic scope of the cartel, and its long duration. The Commission increased the fines for one participant's (ArcelorMittal's) Belgian and French subsidiaries by 60% because they had been fined twice for cartels in the steel sector.[2]

In its Decision, the Commission fined the 17 participants a total of €518.5 million for their involvement. In October 2010, four of the fines imposed on the 17 suppliers involved in the cartel were amended, because of "errors in the calculation of the fines," with the total amount changed to €458.4 million to take account of lower "entry fees." The fine for ArcelorMittal, most affected by the amendments to the fine, was reduced by 17% (from €276.4 million to €230.4 million).[3] On April 4, 2011, the Commission further reduced the level of fines imposed on ArcelorMittal by nearly 80%, resulting in a fine of €45.7 million. The Commission had concluded that since ArcelorMittal had not been found jointly and severally liable for the conduct of its French and Belgian subsidiaries for the entire duration of the cartel, the 10% ceiling of the undertaking's global turnover was to be applied to the turnover achieved by the subsidiaries participating in the infringement, rather than the whole ArcelorMittal group, and this reduced the fine considerably.

Case COMP/39.482 Exotic Fruit ("Bananas")

On October 12, 2011, the Commission found that the Chiquita and Pacific Fruit groups, two of the main banana importers and sellers into the EU, had operated a price fixing cartel in Southern Europe (Italy, Portugal, and Greece) from July 28, 2004, to April 8, 2005, fining Pacific Fruit a total of €8.9 million.[4] Chiquita received immunity from fines for providing the Commission with information about the cartel through the Commission's Leniency Program. The infringement related to both un-ripened (green) and ripened (yellow) bananas.[5] The cartel covered around 50% of the market in Italy, 30%-40% in Portugal, and 60-65% in Greece. At the time of the infringement, annual banana sales in the countries concerned amounted to an estimated €525 million. The evidence consisted of contemporaneous documents showing continuous collusive arrangements (coordination and information exchange regarding future prices and trends), which were more than sporadic, trivial, or cryptic "market trend indications."

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1 Prestressing steel comprises long, curled steel wires used with concrete in construction sites to make foundation, balconies or bridges.

2 *See* IP/89/627 (welded steel mesh) and IP/94/134 (steel beams).

3 The German producer WDI/Pampus had its fine reduced by over 16% to €46.5 million, and Rautaruuki and Ovako's joint fine was reduced by 8.5%, to €4.3 million. The Spanish companies Emesa and Galycas were issued with a joint fine together with ArcelorMittal, reflecting their shared ownership during some of the operation of the cartel, reduced from €40.8 million to €36.7 million.

4 Case COMP/39.482, Commission decision of October 12, 2011, *Exotic Fruit (Bananas)*.

5 Green bananas are usually sold to independent ripeners, who in turn sold them yellow about one week later to customers such as supermarkets.

Initially, a meeting took place on July 28, 2004 (the "Meeting") whereby the parties set up a three step price coordination scheme for Portugal, Italy, and Greece. Pacific, in its reply to the December 2009 Statement of Objections, argued that the Meeting had a legitimate purpose and content, namely the co-shipping and co-sourcing of bananas. The Commission rejected this based on the follow-up contacts between the companies. Furthermore, Pacific's argument that the contemporaneous notes of the Meeting were purely internal and/or personal, not shared with or reviewed by anyone, and thus inconsistent and fragmentary, was rejected since the source of the information had direct knowledge of the matters reported and such documents were corroborated by other facts and evidence, including Chiquita's statements.

Pacific submitted that the Commission failed to satisfy the level of proof required to support its objections against Pacific. The Commission explained that although it is a requirement for precise and consistent evidence to be produced, it is sufficient if, in its entirety, evidence relied on by the Commission satisfies this requirement, rather than each piece of evidence separately.

Pacific further alleged that the Commission failed to demonstrate that the relevant conduct formed a single and continuous infringement and that there was a long gap (in particular, given that prices are negotiated on a weekly basis) between July 2004 and April 2005 where the Commission had no documentary evidence of any infringement. However, based on a series of regular (almost weekly) bilateral follow-up contacts (phone calls and emails), the Commission concluded that there was not a significant gap in the meetings/communications. This was especially the case in Portugal, where the parties viewed the market as "less stable" and cooperated on a weekly basis to "hold price." Various follow-up contacts took place in August 2004 and February-April 2005 for the continuation and implementation of the price coordination scheme.

The Commission also rejected a series of other procedural arguments put forward by the parties, such as whether the Commission should have access to documents seized in a tax investigation, attempts by the Commission to steer the immunity applicant, limited access to the file, limited access to documents provided by third parties, as well as allegations of breach of Pacific's rights of defense (relating to application of legal professional privilege).

ABUSE OF DOMINANT POSITION

ECJ – Judgments

Case C-209/10 Post Danmark A/S v. Konkurrenceradet

On March 27, 2012, the ECJ issued an opinion following a reference for a preliminary ruling from the Supreme Court of Denmark (Hojesteret), considering whether selective price cuts by a dominant universal service provider may constitute an abuse of a dominant position.

The Danish court's request arose out of a dispute between Post Danmark and Forburger Kontakt ("FK"), competitors in the supply of postal services in Denmark. Post Danmark was a regulated monopoly for the delivery of "regular mail," *i.e.*, letters and parcels (within certain standard weight limits) sent to named addressees. Post Danmark was also active in the fully liberalized "bulk mail" segment, *i.e.*, the delivery of promotional and marketing materials with no named addressee sent to residential customers. Post Danmark used the same distribution network for both sets of mail.

Competition in the supply of bulk mail clients was organized around yearly tenders. During the tender for 2003, Post Danmark won a number of FK's largest current clients, including national supermarket chains, by offering more favorable rates than FK. Post Danmark did not extend these offers to other customers. The Danish competition authority and later the Danish lower court found that Post Danmark had engaged in anti-competitive selective discounting and predatory pricing in the bulk mail segment, cross-subsidized by its dominant position in the regular mail segment.

A number of issues had been resolved prior to the referral by the Danish court to the ECJ: the Danish court found that Post Danmark was dominant in the regulated sector and that its selective pricing practices were unrelated to economies of scale. The Danish court also determined that there was no evidence Post Danmark had intentionally sought to eliminate competition. Accordingly, applying the *AKZO* test (*i.e.*, that prices below average total costs but above average variable costs are abusive only if they are part of a plan for eliminating a competitor), the Danish Court found that there was no basis to find predatory pricing.

Post Danmark's appeal argued that the *AKZO* rule should be applied in combination with the Commission's decision in *Deutsche Post*, another case considering whether it is unlawful for a universal service operator to subsidize prices in a liberalized market segment using its activities in a reserved, monopoly segment. In *Deutsche Post*, the Commission held that the dominant company's pricing in the non-reserved segment would be abusive if lower than the incremental cost of the non-reserved activity (comprising both fixed and variable costs). Post Danmark argued that reading *AKZO* and *Deutsche* Post together, the dominant company's pricing policy could only be considered abusive where it could be shown that the dominant company had an exclusionary intent.

The Danish court therefore asked the ECJ for a preliminary ruling on the circumstances in which a dominant company's policy of charging low prices to certain of its competitors' customers may be considered an exclusionary abuse and, specifically, whether a price below average total cost but above average incremental cost could be abusive absent exclusionary intent.

The ECJ considered the Danish competition authority's methodology for calculating the "average incremental costs" of the non-reserved service, noting that this analysis considered not only fixed and variable costs attributable solely to the non-reserved segment but also a portion of common costs attributable to both the reserved and non-reserved segments. The ECJ approved this calculation, stating that "*in the specific circumstances of the case*" the Danish court's estimate reflected *"the great bulk of the costs attributable"* to the non-reserved activity.

The ECJ observed that the prices charged to one national supermarket chain were below average total cost but nevertheless allowed Post Danmark to cover its incremental costs of supplying the non-reserved service to that chain. The ECJ observed that where a dominant company is recovering the bulk of its costs relating to the service supplied, it would generally be possible for an "equally efficient competitor" to remain in the market without suffering unsustainable losses. Accordingly, an abuse could not be inferred merely from evidence that the dominant company had priced below average total cost but above average incremental cost. Rather, it was necessary to examine whether the dominant company's pricing policy resulted in an actual or likely exclusionary effect and was without objective justification. In this regard, the ECJ observed that FK had remained in the market following the alleged abusive conduct and had even succeeded in winning back the business of the supermarket chain concerned.

The ECJ concluded that in order to assess the existence of anti-competitive effects, the Danish court must consider whether the dominant undertaking's pricing policy, without objective justification, produced an actual or likely exclusionary effect, to the detriment of competition. This assessment should consider also whether Post Danmark's conduct could be objectively justified by countervailing efficiencies.

Case C-549/10 P Tomra Systems & Others v. Commission

On April 19, 2012, the ECJ dismissed an appeal brought by Tomra Group ("Tomra") against the General Court's judgment upholding a 2006 decision of the Commission (the "Decision") fining Tomra for abuse of dominance. The ECJ found that Tomra had abused a dominant position in the supply of reverse vending machines ("RVMs") in Austria, Germany, the Netherlands, Norway, and Sweden through an exclusionary strategy. The ECJ's endorsement of the Commission's decision and the General Court's ruling reflects the traditional, formalistic approach of the case law to anti competitive rebate practices.

Tomra is a Norwegian producer of RVMs. RVMs are automated machines used for recycling empty beverage containers. The user places the recyclable materials in the RVM feed unit. The container is identified by an imaging camera. The RVM compacts and sorts the beverage container, which can then be transferred to a recycling centre for further processing. The RVM calculates and distributes the refund to the user, typically in the form of a receipt that can be exchanged for cash using a different machine or from the beverage distributor.

The Commission's decision of March 2006 found that Tomra abused its dominant position in Austria, Germany, the Netherlands, Norway, and Sweden through an exclusionary strategy, comprising exclusivity agreements, individualized quantity commitments, and individualized rebate scheme agreements with supermarket chains. The Commission found that Tomra had deliberately employed these means as part of an exclusionary strategy.

Having lost on all grounds before the General Court, Tomra's subsequent appeal to the ECJ raised five grounds of appeal, challenging: (i) the Commission's finding of anti-competitive intent to foreclose the market; (ii) the portion of total demand that the agreements had to cover in order to be abusive; (iii) the assessment of the retroactive rebates; (iv) the classification of the agreements concluded by Tomra as "exclusive"; and (v) the fine imposed. The ECJ's findings with respect to the first three of these pleas were as follows:

- Tomra argued that the General Court had erred in approving the Commission's examination of Tomra's anti-competitive intent, by (i) refusing to consider evidence showing Tomra's intent to compete on the merits and (ii) erroneously using Tomra's internal documents as evidence of anti-competitive intent and strategy. The ECJ observed that the concept of "abuse" was an objective one and that, accordingly, intent was not a pre-requisite for finding an abuse. The dominant company's business strategy was, however, one of several factors that the Commission was required to take into account and which could inform the Commission's *"understanding of the economic rationale of [the undertaking's] behaviour, its strategic aspects and its likely effects."*

- Tomra argued that the General Court had failed to adequately explain why it had rejected the argument that the agreements at issue did not cover a sufficient portion of total demand to be capable of having a restrictive effect on competition. The ECJ acknowledged that the Commission had not identified a specific threshold proportion of the market over which the conduct in question would have had an exclusionary effect. However, the ECJ concluded that it was sufficient for the General Court to have found that "*by foreclosing a significant part of the market, the Tomra group had restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole."* The ECJ noted later that the General Court had observed, *"a considerable proportion (two fifths) of total demand… was foreclosed to competition."* In response to Tomra's argument that part of the market remained contestable, the ECJ confirmed that *"the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors."* In the ECJ's view, *"competitors should be able to compete on the merits for the entire market and not just for a part of it… [and] it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand."*

- Tomra argued that the General Court had committed a procedural error by not taking into account the Commission's failure to establish whether the retroactive rebates led to below-cost prices. Contrary to AG Mazak, who had rejected this ground of appeal as improperly plead, the ECJ considered the plea. The ECJ, however, found that it would not in any event have affected the conclusion reached by the General Court. It was not necessary for purposes of establishing an anti-competitive rebate to show that the prices charged by Tomra were lower than its long run average incremental costs and/or that Tomra's competitors were obliged to ask for negative prices from Tomra's customers. It was sufficient that Tomra's system of loyalty rebates tended to or was capable of restricting competition. The General Court had properly identified a number of factors particular to the rebate scheme indicating that Tomra's loyalty rebates had a "suction effect" on the contestable portion of demand. The ECJ, like AG Mazak, confirmed that the *"comparative analysis of prices and costs"* proposed by Tomra, taken from the Commission's Article 102 Guidance Paper published in 2009, was irrelevant to the assessment of a contested decision published in 2006.

The ECJ's ruling in *Tomra* reflects the formalistic, near-per se approach of the case law to the assessment of loyalty rebates. This is at odds with the "effects-based" analysis set out in the Commission's Guidance Paper. However, as the ECJ noted, the Commission's decision in *Tomra* pre-dates the Guidance Paper by several years. Accordingly, the ECJ's judgment should not be interpreted as excluding the possibility of an economics-based assessment of the anti competitive effect of loyalty rebates in future cases. The ECJ's judgment is more circumspect in its discussion of the proportion of the market that must be foreclosed in order to show anti-competitive effect. In rejecting Tomra's grounds of appeal in relation to the foreclosed portion of the market, the ECJ does not prescribe a bright-line threshold for assessing the degree of market foreclosure required to show anti-competitive effect, and a case-by-case assessment will remain necessary.

GC – Judgments

Case T-336/07 Telefónica S.A. and Telefónica de España SA v. Commission

On March 29, 2012, the General Court dismissed an appeal by Telefonica against the decision of the Commission in *Wanadoo Espana/Telefonica*, in which the Commission found that Telefonica had abused a dominant position implemented in the market for access to broadband Internet in Spain. The reasoning of the General Court is consistent with two recent rulings of the ECJ in cases involving former monopoly telecoms network operators, *Deutsche Telekom* and *Telia Sonera,* providing further guidance on the elements required to show an abusive margin squeeze, the application of the "as efficient" competitor test, and the interaction between sector-specific regulation and EU competition rules.

In Spain (and across most of the EU), ADSL broadband remains the most common form of broadband Internet connection. ADSL technology enables broadband Internet access via existing copper-line fixed telephone networks without the need for the user to disconnect from the Internet in order to use the fixed line phone at the same time. Telefonica, the former Spanish state telecommunications monopoly, operated the only nationwide fixed telephone network in Spain. Telefonica was active in both the retail supply of broadband products to consumers (using ADSL technology) and the wholesale supply of access to competitors wishing to offer retail broadband services to consumers. Competitors wishing to provide ADSL-based retail broadband services could choose between three alternative products offered by Telefonica – two national wholesale offers, and one regional wholesale offer.

In July 2007, the Commission found that Telefonica had imposed an illegal margin squeeze in the Spanish broadband market from September 2001 to December 2006 – rivals purchasing wholesale broadband access from Telefonica were left with an insufficient margin on downstream sales to compete with Telefonica in the retail supply of Internet access.

Telefonica raised a number of procedural and substantive arguments on appeal, including in relation to market definition, dominance, the elements required to show an anti-competitive margin squeeze, the effect of the alleged abusive conduct, and the calculation of the fine. The General Court rejected each of these grounds of appeal. The judgment confirms and clarifies a number of principles developed in the ECJ's TeliaSonera and *Deutsche Telekom* rulings in relation to margin squeeze cases:

- First, the General Court's ruling confirms that margin squeeze is an abuse in its own right, distinct from predatory pricing, excessive pricing, discrimination, and refusal to deal. Margin squeeze examines whether there is an unfair spread between two vertically related prices, regardless of whether either or both of these prices were themselves excessive, discriminatory, or predatory. By contrast, the Commission's Guidance Paper on Article 102 TFEU classifies margin squeeze as a form of refusal to deal.
- Second, the General Court confirmed that since margin squeeze was a category of abuse in its own right, distinct from a refusal to deal, there was no need for the Commission to show (as in *Bronner*) that the upstream input was indispensable to competition downstream. The Advocate General in TeliaSonera had taken the contrary view, proposing that there can be no margin squeeze absent a duty to deal, irrespective of whether a duty derives from sector-specific regulation or the application of antitrust rules.
- Third, the General Court endorsed the Commission's application of the "equally efficient competitor" test in determining whether the spread between upstream and downstream prices was anti-competitive. The General Court also confirmed that the costs of the dominant company were the relevant benchmark when applying this test and that the Commission was not required to take into account the costs of actual or potential competitors.
- Fourth, the judgment in *Deutsche Telekom* had established that it was necessary to show both the existence of a margin squeeze and the anticompetitive effect. In Telefonica, the General Court clarifies that while an anti-competitive effect must be shown that effect need not be concrete. It is sufficient to show that the margin squeeze tends to restrict competition or is capable of having or is likely to have that effect.

Telefonica has appealed the judgment to the ECJ.

MERGERS & ACQUISITIONS

First-phase decisions without Undertakings

Case COMP/M.6381 Google/Motorola Mobility

On February 13, 2012, the Commission unconditionally cleared Google's $12.5 billion acquisition of Motorola Mobility, formerly the Mobile Devices and Home division of Motorola Inc. In clearing the transaction, the Commission noted the lack of merger-specific effects arising from Google's acquisition of Motorola Mobility's extensive patent portfolio, in particular its standard essential patents ("SEPs"), but indicated that it would continue to monitor potential antitrust problems related to the use of SEPs in the market in general.

As regards market definition, with respect to end products and services, the Commission in all cases declined to define the relevant market, since the transaction would not give rise to competition concerns under any relevant market. Nevertheless, the Commission analyzed potential upstream markets for (i) mobile operating systems ("OS") for smartphones, and (ii) mobile OS for tablets. The Commission noted that most respondents to the market investigation considered that mobile OS for smartphones and tablets should belong to the same market given their very similar functionality and the significant convergence between the two types of devices. On the downstream level, the Commission concluded that the relevant markets would likely be for smart mobile devices (with potential further differentiation according to smartphones and tablets). With respect to patented technologies, the Commission concluded that each SEP can be considered as a separate market in itself as it is necessary to comply with a standard and thus cannot be designed around.

The transaction did not give rise to any horizontally affected markets and the Commission focused in its assessment on the vertical relationships between Google as the supplier of the open source mobile OS, Android, and Motorola Mobility as a supplier of mobile devices and as a holder of important intellectual property ("IP") for mobile devices.

As regards the Android mobile OS, the Commission considered whether Google would have the incentive to favor Motorola Mobility and to foreclose access to Android for other mobile device manufacturers ("OEMs"). The Commission concluded that although Google would in principle have the ability to favor a specific OEM by granting privileged access to the latest version of Android, this would not be a merger-specific effect. Further, any favoring of Motorola Mobility would risk jeopardizing Google's search revenues and alienating other Android OEMs. Accordingly, Google's overriding incentive would likely be to ensure that Android is distributed as widely as possible to maximize Google's search and advertising revenue. In any event, the Commission concluded that even if Google were to favor Motorola Mobility's access to Android, a significant impediment to competition would be unlikely to arise, since (i) roughly half of Android OEMs would consider manufacturing devices using another OS, (ii) large competing OEMs with proprietary OS such as Apple, RIM, and Nokia would not be affected in any case, and (iii) many Android OEMs also manufacture devices running other mobile OSs.

The Commission rejected concerns that the acquisition of Motorola Mobility's SEPs would create or strengthen Google's position in mobile OS by either (i) raising royalty rates, (ii) forcing licensees into cross-licenses, or (iii) excluding competitors from the market. Although the Commission considered that Google would gain some ability to impede competition (in particular through seeking injunctive relief), the Commission nevertheless concluded that (i) this ability would be restricted to companies that do not have an existing license to Motorola Mobility's SEPs (in particular Apple and Microsoft), and (ii) there would be limited merger-specific effects, since Motorola Mobility has already sought injunctions against Apple and Microsoft.

In the Decision, the Commission paid particular attention to Google's letter of February 8, 2012, to a number of standard setting organizations ("SSOs"), in which it reiterated that it would follow and be bound by Motorola Mobility's FRAND obligations, including its historic 2.25% FRAND royalty rate, and is committed to engaging in FRAND licenses and good faith negotiations with licensees to Motorola Mobility's SEPs, including by making available a cash-only offer to license Motorola Mobility's SEPs.[6]

Finally, the Commission concluded that the transaction would not give rise to anti competitive conglomerate effects due to the combination of Motorola Mobility's smart mobile devices and IP rights and Google's mobile online services. In particular, the Commission concluded that Google would gain only limited merger-specific abilities to tie or bundle Motorola Mobility's SEPs with Google's mobile services, since Motorola Mobility's patents are already subject to cross-licenses with a large number of OEMs, and, according to the Commission, Google already has powerful tools to ensure that its products are installed on Android products. Further, Google's incentive to do so would be constrained by Motorola Mobility's FRAND commitments. Finally, the Commission noted that even if Google were to tie Motorola Mobility's SEPs to the distribution of Google's mobile services, end users could still download competing services, change defaults, or access competing services through web browsers.

Case COMP/M.6411 Advent/Maxam

On February 6, 2012, the European Commission decided that Advent could acquire joint control of Maxam together with a group of approximately 110 individuals including Maxam's current managers, technical experts, other employees and co-investors (the "TDA Group").

The principal competition concern raised by the transaction was a vertical relationship between Advent's production of oxo-alcohol 2-ethylhexanol ("2-EH") and Maxam's downstream production of 2-ethyhexyl nitrate ("2-EHN"), a cetane number improver for diesel fuel.

During the market investigation, respondents argued that the merger could cause customer foreclosure if Maxam were required to buy 2-EH exclusively from Advent. However, the Commission dismissed this concern on the ground that, under the shareholders' agreement, for exclusivity to be enforced it would require the consent of both Advent and the TDA Group. While Advent might benefit from customer foreclosure, the TDA Group, as shareholders, would gain no benefit from Maxam dealing exclusively with Advent. On the contrary, the TDA Group would have a strong interest in Maxam

6 Fair, reasonable, and non-discriminatory.

continuing to source 2-EH from multiple sources in order to (i) purchase 2-EH from the lowest cost supplier; and (ii) ensure security of supplies. The Commission also explained that 2-EHN is not the main application for 2-EH and therefore even if customer foreclosure occurred, with Maxam reducing its purchases of 2-EH from Advent's rivals, those competitors would continue to have a large number of potential customers.

Concerns were also expressed that the transaction could give rise to input foreclosure, with Advent refusing to supply Maxam's competitors. The Commission viewed this concern as being remote as (i) Advent is not the main supplier of 2-EH to Maxam's competitors; (ii) EEA imports of 2-EH have increased in the last three years as Russia and the Middle East have entered the market; and (iii) the evidence suggests that rival manufacturers would offset any effect of a possible foreclosure strategy by Advent.

The Commission also identified vertical relationships between Advent's upstream activities in the market for tungsten metal powder, boron amorphous, and butyl acetate, and Maxam's downstream activities with regard to initiating systems for military applications and illuminating and smoking military projectiles. However, given the parties' moderate market shares, the presence of strong competitors at each level of the supply chain, and the relatively small volumes of input required to manufacture the downstream products, the Commission concluded that there was no risk of foreclosure.

Case COMP/M.6091 Galenica/Fresenius Medical Care/Vifor Fresenius Medical Care Renal Pharma JV

On October 5, 2011, the European Commission approved the establishment of a joint venture by Galenica of Switzerland and Fresenius of Germany in the human health sector ("JV"). The principal antitrust issues arose out of Galenica and Fresenius' relatively high market shares in the markets for iron preparations and dialysis provision respectively.

Galenica will transfer certain rights in relation to intravenous iron preparations in the renal field to the JV while maintaining its right to produce, market, and distribute its own oral and intravenous iron preparations in all non-renal fields. Therefore, Galenica and the JV will both be active in the market of intravenous iron preparations, albeit in different medical fields. As the change will not lead to an incremental rise in market share, but rather a redistribution of Galenica's existing total market share, the Commission concluded that the transaction would not give rise to a horizontally affected market.

Fresenius will remain active in the provision of dialysis services, which creates a vertical overlap because the JV would develop intravenous iron preparations used for dialysis services. In certain EEA countries, for example Estonia, Portugal, Romania, and Slovakia, Galenica's (and therefore an estimate of the JV's) market share for IV iron preparations is above 90%, while Fresenius' national market share of dialysis services in these countries is over 30% (with regional shares above 90%). Despite these high shares, the Commission concluded that post-merger, doctors will continue to choose the iron preparation for reasons relating to the patient's health and well being regardless of the entity that provides the dialysis service downstream. This is because in most doctors are free to choose which products they prescribe to their patients, and doctors prescribe IV iron preparations separately from dialysis services.

The parties also submitted that the JV would have no incentive to foreclose competitors in the downstream market. Although Galenica has a near monopoly in numerous regional and national markets, in the downstream market Fresenius' competitors still hold significant market shares in certain countries, including Sweden, Slovenia, and Portugal, and thus an input foreclosure strategy would cause significant loss of profits for the JV.

The Commission agreed with the parties' arguments and noted that barriers to entry in both the market for IV iron preparations and market for provision of dialysis services were low, with new companies likely to enter the market this year.

STATE AID

GC – Judgments

Joined Cases T-115/09 and T-116/09 Electrolux and Whirlpool v. Commission

On February 14, 2012, the General Court annulled the Commission decision of October 21, 2008, concerning State aid that France planned to implement in favor of the company FagorBrandt ("the Decision") and clarified how compensatory measures should be assessed in the context of restructuring aid and the application of the Deggendorf principle, concerning how previous unlawful aid granted and not recovered should be taken into consideration by the Commission in its appraisal.[7]

7 Commission Decision 2009/485/EC of October 21, 2008, on State aid C 44/07 (ex N 460/07), OJ 2009 L 160/1.

In the Decision, the Commission found that €31 million that France intended to grant to FagorBrandt constituted restructuring aid which was compatible with the common market, on condition that certain compensatory measures were adopted. Electrolux and Whirlpool ("the applicants"), competitors of FagorBrandt, appealed the Decision, contesting (among other points) that the Commission had erroneously applied the conditions laid down in the Guidelines necessary for restructuring aid to be declared compatible with the common market.[8] According to the applicants, the Commission because it considered that the earlier sale, in March 2004, of a subsidiary of FagorBrandt could be regarded as an appropriate compensatory measure to reduce the negative effects on competition created by the grant of the aid at issue.

The General Court agreed with the applicants' arguments. In particular, it noted that compensatory measures must be adopted in the context of the grant of restructuring aid and must be appropriate and proportionate to the distortive effects of the aid. According to the General Court, the Commission had admitted that the sale of the subsidiary had not reduced the presence of FagorBrandt in the washing machine market (the main market in which the company was active). The Commission could not, therefore, have reasonably regarded the sale as a compensatory measure, nor could it legitimately conclude that the combination of the sale with the other compensatory measures limited proportionately the negative effects on competition generated by the grant of the aid at issue. Furthermore, the General Court considered that, depending on the circumstances of the case, compensatory measures can be adopted before the implementation of the restructuring plan. However, the sale of FagorBrand's subsidiary, implemented three and a half years before the notification of the aid, did not have the intention of reducing, and could not have the effect of reducing, the distortions of competition resulting from the aid.

Finally, the General Court also held that the Commission committed a manifest error of assessment in examining the distortion of competition, as it had failed to consider the cumulative effect of the aid at issue with unlawful and incompatible aid previously granted to an Italian subsidiary of FagorBrandt which had not yet been fully recovered. According to the Deggendorf judgment, the Commission must in principle examine the cumulative effect of the aid with any earlier aid not yet recovered, as the advantages conferred by the earlier aid continue to produce effects on competition.[9] However, if the Commission makes the grant of the planned aid subject to the prior recovery of the earlier aid, it is not obliged to examine the cumulative effect of the aid on competition. The Commission did not make the grant of the aid at issue conditional on the recovery of the previous incompatible Italian aid, it should therefore have examined the cumulative effect of the aid. Having failed to do so, the Commission committed a manifest error of assessment.

Joined Cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T 69/06 RENV Ireland and Others v. Commission

On March 21, 2012, the General Court annulled the Commission's Decision ordering reimbursement of tax exemptions granted by France, Ireland, and Italy for the production of alumina.[10] The judgment underscores that the acts of the European institutions must be consistent and must comply with the principle of legal certainty.

Alumina is used in smelters to produce aluminum and uses, among other inputs, mineral oil as a fuel. Council Directives in force since 1992 harmonize excise duties on mineral oils and fix the minimum rate of duty on heavy fuel oils, also allowing the Council to authorize Member States to introduce further exemptions. On this basis, Ireland, Italy, and France have exempted mineral oils used in alumina production from excise duty since 1983, 1993, and 1997 respectively ("the exemptions"). With several decisions the Council had authorized the exemptions until December 31, 2006.[11] However, on December 7, 2005, the Commission adopted a Decision finding that the exemptions were State aid until December 31, 2003,[12] and that the aid granted between February 3, 2002, and December 31, 2003, had to be recovered to the extent that the beneficiaries had not paid the minimum rate fixed by EU legislation.[13]

8 Community Guidelines on State aid for rescuing and restructuring firm in difficulty, OJ 2004 C 244/2.

9 Case C-355/95 P, *TWD v. Commission* 1997 ECR I-2549.

10 Commission Decision 2006/323/EC concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia respectively implemented by France, Ireland and Italy, OJ 2006 L 119/12.

11 The most recent authorisation decision is Council Decision 2001/224 of March 12, 2001, OJ 2001 L 84/23.

12 Date after which significant amendments took effect in relation to the Community taxation of energy products due to Council Directive 2003/96/EC of October 27, 2003 restructuring the Community framework for the taxation of energy products and electricity, OJ 2003 L 283/51.

13 The minimum rate was €13.01 per 1,000 kg of heavy fuel oils. The Commission decided that the aid granted before February 2, 2002, when it opened the formal investigation procedure, did not have to be recovered as that would have been contrary to the principles of legitimate expectations and legal certainty.

In 2006, France, Ireland, and Italy appealed the Decision before the General Court, which annulled the measure on the ground that the Commission had breached its obligation to state reasons.[14] On appeal, the ECJ annulled this judgment for infringement of the rights of defense and referred the case to the General Court.[15] In front of the General Court, the applicants alleged a violation of the principle of legal certainty and/or the principle of the presumption of lawfulness attaching to European measures, as the contested Decision partially nullified the legal effects produced by the Council's decisions of authorization.

The General Court first restated that the principle of legal certainty aims to ensure that situations and legal relationships governed by EU law remain foreseeable. Respect for the principle of legal certainty also requires that the institutions of the EU must, as a matter of principle, avoid inconsistencies that might arise in the implementation of the various provisions of EU law. This is all the more necessary when those provisions pursue the same objective, such as undistorted competition in the common market. According to the General Court, the rules governing the harmonization of domestic fiscal legislation, including rules on excise duties, and the rules on State aid pursue the same objective, namely to promote the proper functioning of the internal market by combating distortion of competition. Moreover, distortion of competition has the same scope and meaning both for the harmonization of domestic fiscal legislation and State aid. Accordingly, the EU institutions must apply the different set of rules consistently. In addition, the General Court held that the Commission had never used the powers available to it to propose that the Council not authorize the exemption, abolish it, or amend it, nor had it asked the EU judicature to annul the Council's decision granting the exemptions because they distorted competition in the internal market.

The General Court concluded that the Decision could not classify the exemptions as State aid as long as the Council's authorization decision remained in force. The General Court therefore annulled the contested Decision as it infringed the principle of legal certainty and the principle of the presumption of legality attaching to EU measures.

Cases T-29/10 and T-33/10 Kingdom of the Netherlands and ING v. European Commission

On March 2, 2012, the General Court partially annulled the Commission's Decision of November 18, 2009, concerning various forms of aid granted by the Netherlands to ING Group NV ("ING"), a financial institution offering banking, investment, life insurance, and retirement services to private, corporate, and institutional clients in over 40 countries.[16]

In the context of the financial crisis, the Netherlands had granted ING three State aid measures designed to maintain the continuity of the payments system and the inter-bank market in the country. The first aid measure was an increase in capital, the second an exchange of cash flows applied to impaired assets, and the third took the form of guarantees given on ING liabilities. The increase in capital was undertaken through the creation of one billion ING securities, without voting rights or dividend entitlement and which were fully subscribed by the Netherlands at an issue price of €10 per security. This measure allowed ING to increase its category 1 base capital by €10 billion. The repayment terms initially agreed[17] were subsequently amended,[18] reducing the bank's premium by approximately €2 billion. In the contested Decision, the Commission classified the increase in capital as restructuring aid and found that the amendment of the redemption premium also constituted aid of approximately €2 billion. The Commission then concluded that the aid measures were compatible with the common market subject to a series of commitments that the Netherlands undertook in relation to ING's restructuring plan.

The Netherlands and ING subsequently challenged the Decision in front of the General Court in so far as the Commission considered that the amendment to the repayment terms for the capital injection represented additional aid. The General Court annulled this part of the Decision and held that the Commission could not find that the amendment constituted by its very nature State aid, without first verifying whether the measure conferred on ING an advantage. According to the General Court, the Commission limited itself to finding that the amendment resulted in an additional benefit for ING, because the Netherlands had waived their right to obtain revenues.

14 Joined Cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06, *Ireland and Others v. Commission* 2007 ECR II-172.

15 Case C-89/08 P, *Commission v. Ireland and Others* 2009 ECR I-11245.

16 Commission Decision 2010/608/EC on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan, OJ 2010 L 274/139.

17 Under the repayment terms set out in the agreement, the securities were, on ING's initiative, either to be repurchased at €15 per security or, after three years, converted into ordinary shares. If ING chose the conversion option, the Netherlands would, however, have the choice of opting for the alternative redemption of the ING securities at a unit price of €10, plus accrued interest. A coupon on the securities would be paid to the State only if a dividend was paid by ING on ordinary shares.

18 The new terms provided that ING may repurchase up to 50% of the securities at their issue price of €10 per security, plus the accrued interest in relation to the annual coupon of 8.5% and an early redemption premium if ING's share price traded above €10. This transaction ensured the Netherlands a minimum internal rate of return of 15%.

The Commission should have, on the other hand, compared the initial terms with the amended terms in order to consider whether a private investor could still be attracted to the transaction. Among others, according to the General Court, the Commission did not consider: (i) that the initial terms of repayment provided only an option, not an obligation, for ING to repurchase the securities at the agreed terms; (ii) that in 2008 the Commission had indicated its satisfaction with a return of more than 10% for the securities of the type issued at the time of the capital injection, thus considering that private investors could be attracted by such securities, and therefore it could not be ruled out that they would still have an interest in them in 2009 when the crisis was less strong; and (iii) how a minimum return rate of 15% following the amendment did not correspond to that which could reasonably have been accepted by a private investor in a similar situation.

The General Court therefore partially annulled the Decision. However, it did not make a final finding concerning the compensatory measures agreed in the framework of the restructuring plan of ING, which included a number of divestments and changes to its business model. These measures were based on the incorrect assumption that the restructuring aid had been correctly classified, thus the Commission is now required to reconsider exactly how much financial assistance was given to ING before looking at the conditions it can impose. This entails that, in implementing the restructuring plan, ING now has some room to negotiate less onerous conditions and obligations.

FINING POLICY

ECJ – Judgments

Case C-17/10 Toshiba Corporation and Others

On February 14, 2012, the ECJ responded to a Czech court application for a preliminary ruling in Toshiba related to the respective boundaries of enforcement actions by national competition authorities (“NCAs”) and the Commission in cartel proceedings.[19]

In 2007, the Commission fined 11 European and Japanese undertakings a total of €750 million for dividing the market for worldwide gas insulated switchgears from 1988-2004 (the leniency applicant ABB received full immunity). The Czech competition authority initiated proceedings after the Commission had done so, and imposed a total fine of CZK 979,221 million (approximately €39 million) for the effects of the cartel in the Czech territory for the period up to March 3, 2004 (the Czech Republic acceded to the EU on May 1, 2004). The decision was contested before the Czech national courts, which applied to the ECJ for a preliminary ruling.

First, in applying Articles 3(1) and 11(6) of Regulation 1/2003 dividing the powers of the NCAs and the Commission to initiate cartel proceedings, the ECJ confirmed that although jurisdiction to apply EU competition rules is shared between the Commission and NCAs, the latter cannot apply EU competition law or part of their domestic competition law once the Commission initiates proceedings under Article 101. However, depending on the conclusion of the Commission’s proceedings, national competition laws may be applied by NCAs following the Commission’s decision, but the NCAs may not adopt decisions contrary to a decision adopted by the Commission. The ECJ concluded that the Czech competition authority was permitted to rule on the anti-competitive effects produced by the cartel in the Czech Republic prior to its EU accession given that Article 101 TFEU and Article 3(1) of Regulation 1/2003 did not apply to that conduct (prior to accession to the EU).

Second, although the ECJ affirmed the applicability of the *ne bis in idem* principle, it found that no breach of the principle was established in this case. In particular, the ECJ stated that it did not matter that the decision of a competition authority related to a period prior to the accession of a Member State to the EU, since the principle does not depend on the date on which the relevant actions occur, but rather on when the proceedings for the imposition of fines are opened. As the Czech Republic was already a Member State when the proceedings were initiated, the Czech competition authority was required to abide by the principle. However, the ECJ confirmed that no breach of the principle had been committed since the Commission did not penalize the anti-competitive effects produced by the cartel in the Czech Republic, nor did it take account of the Member States which acceded to the EU on May 1, 2004, when calculating the fine.

19 Case C-17/10, *Toshiba Corporation and Others* v. *Úřad pro ochranu hospodářské soutěže* (the Czech competition authority).

AG Opinions

Case C-628/10 P and C-14/11 P Alliance One International Inc. and others v European Commission and Others

On January 12, 2012, Advocate General Kokott advised the ECJ to uphold the General Court's judgment related to the Spanish raw tobacco cartel. The General Court had annulled the Commission's decision with respect to one of one of the processors' parent companies while confirming the Commission's decision with respect to the liability of the other companies.[20] The Commission had held Alliance One International ("AOI"), Standard Commercial Tobacco Company ("SCTC") and Trans-Continental Leaf Tobacco Corp. Ltd ("TCLT") jointly and severally liable for the participation of World Wide Tobacco España SA ("WWTE") given their direct or indirect parental relationship to WWTE.

The Advocate General agreed with the General Court that the Commission violated the principle of equal treatment by making the liability of some parent companies dependent on a higher standard of proof than the liability of other parent companies. Specifically, the General Court had annulled the Commission's decision with respect to TCLT to the extent that the Commission relied on the 100% presumption to find TCLT jointly and severally liable. At the same time, the General Court also took account of additional evidence (applying the so-called "dual basis concept") to refrain from imposing fines on other processors' parent companies. The Advocate General recalled that although the Commission enjoys discretion to decide on which legal person it will impose a fine, the Commission does not have complete freedom and must observe the general legal principles of EU law, in particular the principle of equal treatment. The Commission can use the concept of the dual basis rather than the 100% presumption alone for holding parent companies liable if there is an objective reason to do so, but is required to apply the same criteria to all the parent companies involved in the same cartel.

Concerning the attribution of liability to one of the parent companies alone in the case of joint control, the Advocate General agreed with the General Court, which had confirmed the Commission's finding of liability with respect to AOI and SCTC even though they did not have exclusive control of WWTE during the first two years of the infringement. The Advocate General argued that there may be cases where, despite joint control, only one parent exercises decisive influence over the subsidiary. In those cases, the economic unity exists only between that parent company and the subsidiary, despite the legal structure of the group, and makes them jointly liable for any cartel offences.

GC – Judgments

Cases T-77/08 Dow Chemical v. Commission and T-76/08 El DuPont de Nemours and Others v Commission

On February 2, 2012, the General Court upheld the Commission's 2007 decision imposing a fine of €243.2 million on eleven participants in a market-sharing and price-fixing cartel in relation to chloroprene rubber.[21] In that decision, DuPont and Dow were held to be jointly and severally liable for the conduct of their 50/50 joint venture, DDE, as they jointly controlled DDE.

The General Court agreed with the Commission and found that the two parent companies and DDE formed a single undertaking. First, DDE's Members Committee was established to supervise the business of DDE and to approve certain matters pertaining to the strategic direction of DDE. Second, the establishment of DDE was approved by the Commission under the EU Merger Regulation in February 1996, where it was ruled that the parent companies acquired joint control of DDE.[22] Third, the Members Committee of DDE filled top managerial positions in the parent companies and participated in anti-competitive meetings. The decisive influence was further evidenced by the closure of a DDE production facility, which could not have been done without the consent of the parent companies. Lastly, fact that the parents ordered an internal investigation in 2003 to investigate if DDE participated in the cartel indicated that the parents assumed that they could instruct DDE on matters of competition law.

The General Court also ruled that the economic autonomy from an operational viewpoint that a full function joint venture (such as DDE) is considered to enjoy does not necessarily imply autonomy for strategic decisions.[23] Furthermore, the fact that the joint control in the case of DDE was only "negative" was not sufficient to exclude decisive influence over DDE. Finally, the conclusion that the DDE and its parents formed a single undertaking was not inconsistent with the application of Article 101 to the relationship between a joint venture and its parents.

20 Case T-24/05, *Alliance One International and Others v Commission* 2010 ECR II-0000.

21 Case COMP/38.629 – *Chloroprene Rubber*, Commission decision of December 5, 2007, OJ 2008 C 251/11. See also Cleary Gottlieb EU Competition Report January – March 2011.

22 Case IV/M.663 – *DuPont/Dow*.

23 Case COMP/38.443 – *Rubber Chemicals,* para. 263.

Cases T-53/06 UPM-Kymmene v. Commission, T-64/06 FLS Plast v Commission and T-65/06 FLSmidth v Commission

On March 6, 2012, the General Court partially annulled the Commission's decision of November 30, 2005, in which 16 makers of industrial plastic bags had been fined for having participated in a cartel.[24] In short, the General Court reduced the fine imposed on UPM Kymmene, because it could not be held liable for the cartel prior to October 10, 1995, and the fine jointly imposed on FLSmidth and FLS Plast, because the Commission wrongly found that these undertakings had infringed Article 101 TFEU from December 31, 1990, to December 31, 1991.

With respect to UPM-Kymmene, the General Court criticized the Commission's findings with respect to the appellant's initial participation in the cartel. The General Court acknowledged that Rosenlew Saint-Frères Emballage ("RSFE"), a subsidiary of UPM Kymmene, participated in an anticompetitive meeting of the European Association of Plastic Valve Bag Manufacturers ("Valveplast") on December 20, 1994. However, it explained that, under the circumstances of the case, RSFE's attendance at this anticompetitive meeting to have exploratory discussions was not, as such, sufficient to establish the start date of its participation in the cartel. Quite to the contrary, the General Court found that RSFE became a member of Valveplast only as of November 21, 1997, *i.e.*, almost three years after the "exploratory meeting." Although not rejecting UMP-Kymmene's subsequent participation, the General Court found that it could not be held liable for the cartel prior to October 10, 1995, when it joined the so-called "France" sub-group. This resulted in a reduction of the fine previously imposed from €56.6 million to €50.7 million. However, according to the General Court the above did not invalidate the Commission's conclusion that the appellant participated in a single and continuous infringement.

With respect to FLS Plast and FLSmidth, the General Court partially rejected the attribution of Trioplast Wittenheim's liability to its former parental company tree, *i.e.*, FLS Plast, which was itself a subsidiary of FLSmidth. The General Court considered participation in the infringement to two time segments: (i) during 1991, when the share capital of the subsidiary was held by the appellants (60%) and Saint Gobain (40%); and (ii) as of 1992, when the appellants held 100% of the share capital. The General Court noted that, while the Commission could rely on the presumption that the appellants exercised control over the conduct of Trioplast Wittenheim during the second segment, it was required to put forward evidence that such control had actually been exercised with respect to the first segment.

The General Court rejected evidence advanced by the Commission. First, the fact that, during 1991, two members of Trioplast Wittenheim's board concurrently held management positions with the FLS Plast and FLSmidth was immaterial because the Commission failed to establish that those two managers had control of the board. Second, the General Court noted that the Commission failed to establish that the two managers knew or should have known that the subsidiary that had been recently acquired was involved in anticompetitive conduct. Finally, the Commission did not dispute that the day-to-day management of Trioplast Wittenheim was among the responsibilities of the subsidiary's managing director, who was a representative of the Saint Gobain group and had retained the post throughout 1991.

The General Court concluded that the Commission committed an error of assessment in holding the appellants liable for the anticompetitive actions of Trioplast Wittenheim in 1991. This resulted in a reduction of the fine imposed on FLS Plast and FLSmidth from €15.3 million to €14.45 million.

POLICY AND PROCEDURE

Commission Amicus Curiae Observations

Case National Grid v. ABB Ltd & others

On November 3, 2011, the EU Commission submitted *amicus curiae* observations to the U.K. High Court in the context of a damages action brought by National Grid, a U.K.-based utility company, against a number of companies that were held liable by the EU Commission in 2007 for their participation in the Gas Insulated Switchgear cartel.[25] This submission was made in response to the High Court's invitation to submit observations in light of the recent *Pfleiderer* judgment of the ECJ about the possible *inter partes* disclosure of various documents containing information specifically prepared for the purpose of an application under the Commission's leniency program.[26] In *Pfleiderer*, the ECJ ruled that it is for national courts to assess in each individual case whether to order disclosure

24 Case COMP/F/38.354, Commission Decision of November 30, 2005, *Industrial Tubes*, OJ 2007 L 282/41.

25 Observations from the Commission pursuant to Article 15(3) of Regulation 1/2003 of November 3, 2011 in case *National Grid v. ABB Ltd & others*. http://ec.europa.eu/competition/court/antitrust_requests.html.

26 Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, June 14, 2011, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0360:FR:HTML.

of leniency documents (submitted to national competition authorities) to private damage claimants, by balancing the interests of the plaintiff and those of the leniency applicant.

In its observations, the Commission first confirmed that national courts have jurisdiction to order the disclosure of leniency documents. It also stated that, in its view, the *Pfleiderer* principles were relevant to the case, even though the question referred to the ECJ in *Pfleiderer* related to leniency documents submitted in the framework of a national leniency program. The judgment does not distinguish between the Member State's or the Commission's leniency programs. Therefore, the principles laid down in *Pfleiderer* are also applicable to disclosure of leniency documents created for the purpose of a Commission investigation.

Finally, regarding the application of the *Pfleiderer*, the Commission highlighted that the willingness of companies to provide comprehensive and candid information is crucial to the success of its leniency program, which is the most effective tool at its disposal for the detection of cartels. Therefore, in conducting the balancing test between the plaintiff's and leniency applicants' interests, the national court should examine (i) whether disclosure of leniency documents would increase leniency applicants' exposure to liability, compared to the liability of parties that did not cooperate; and (ii) whether disclosure is proportionate in the light of possible interference with leniency programs. Taking into account these considerations, the Commission was of the opinion that disclosure of the confidential version of the Commission Decision would be disproportionate, since it would add little to National Grid's case and other sources of evidence are available. As regards responses to the Statement of Objections and to requests for information, the Commission believes that they can be disclosed only insofar as they do not contain materials derived from other leniency documents.

On April 4, 2012, the High Court handed down its ruling, granting limited disclosure of leniency documents. In particular, the Court rejected the argument that companies cooperating with the Commission had a legitimate expectation that their documents would be respected, since the Commission Notices setting out the leniency procedure did not grant immunity to civil suits. The Court also ruled that in the case of a serious and long-running cartel with potential exposure to high fines, a concern about later disclosure of leniency material would not have been sufficient to influence the immunity applicant and discourage cooperation with the Commission. As regards proportionality, it balanced the difficulty of obtaining information from other sources against the relevance of the leniency materials to the issues in the case. In conclusion the Court ordered disclosure only of selected paragraphs of the confidential decision and of responses to requests for information. The Court however declined to order disclosure of the immunity applicant's response to the Statement of Objections, which was not sufficiently relevant.

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