CLEARY GOTTLIEB

EU COMPETITION
QUARTERLY REPORT

JULY – SEPTEMBER 2014 clearygottlieb.com

HORIZONTAL AGREEMENTS

ECJ Judgments

Groupement des Cartes Bancaires v. Commission
(Case C-67/13 P)

On September 12, 2014, the Court of Justice set aside the General Court's judgment of November 29, 2012[1] dismissing the appeal of Groupement des Cartes Bancaires ("Cartes Bancaires") against the Commission's October 17, 2007 infringement decision in this matter.[2]

Cartes Bancaires is a French economic interest group that consists of 148 banking institutions and was set up to manage a system for bank card withdrawals and payments. In 2002, Cartes Bancaires notified to the Commission three new measures imposing circumstance-specific fees on card issuers. Cartes Bancaires claimed that these measures were designed to impede free riders and balance the credit card system by expanding acquisition activities. The Commission, however, concluded that these measures constituted an anti-competitive decision by an association of undertakings designed to limit competition on banking fees. The Commission did not impose fines because Cartes Bancaires had notified the measures.

On appeal, the General Court upheld the Commission's decision. Cartes Bancaires then appealed the General Court's judgment to the Court of Justice. Several banking institutions, including BNP Paribas, BPC, and Société Générale SA, intervened in the appeal in support of Cartes Bancaires.

Cartes Bancaires first argued that the General Court had erred in law in its assessment of whether the measures' constituted a restriction by object in light of their content, objectives, and context. With regard to the measures' content, Cartes Bancaires argued that the General Court had erroneously focused on the intentions of Cartes Bancaires' individual members, rather than on a factual assessment of their content. With regard to the measures' objectives, Cartes Bancaires claimed that the General Court had erroneously found the measures to be anticompetitive in nature, despite also finding that limiting free riders in the bank card system was a legitimate objective. Finally, with regard to context, Cartes Bancaires argued that the General Court had erred in restricting its examination to the measure's effects on the market for issuing cards to consumers, thereby not taking into account the measure's intended positive effects on the market for processing payments on behalf of merchants. According to Cartes Bancaires, the General Court had thus confused an analysis of the relevant market with the required analysis of the legal and economic context.

The Court of Justice noted that, while the General Court must not substitute its views for the Commission's, it must ascertain that, in reaching its decision, the Commission relied on accurate and complete evidence. The Court of Justice explained that, to determine whether a measure qualified as a restriction of competition by object, the central question is whether that measure created a sufficient degree of harm to competition that an analysis of its effects was unnecessary. The intention of the parties may—but is not required to—be taken into account.

The Court of Justice concluded that General Court had erred in finding a restriction of competition by object without analyzing whether the measures created the requisite degree of competitive harm. The Court of Justice agreed with Cartes Bancaires that, because the General Court had found both that the card payment system is two-sided and that restricting free riding in the system is a legitimate objective, it was not entitled also to find that the objective of balancing the two sides of the system and of restricting free riders was harmful in itself.

[1] *Groupement des cartes bancaires v. Commission* (Case T-491/07) EU:T:2012:633.

[2] *Groupement des cartes bancaires* (Case COMP/D1/38606), Commission decision of October 17, 2007.

© Cleary Gottlieb Steen & Hamilton LLP, 2014. All rights reserved.

This report was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Under the rules of certain jurisdictions, this report may constitute Attorney Advertising.

Instead, the General Court ought to have considered the economic and legal context of the measures. Furthermore, this analysis should not have been restricted to the relevant market, particularly where, as in this case, the relevant market interacted with a different market. The Court of Justice agreed with Cartes Bancaires' argument that the General Court had confused the definition of the relevant market with the assessment of the context of the restriction.

The Court of Justice concluded that, while they were liable hinder competition by limiting the commercial options of some of the banks involved, the measures at issue should not have been analysed as restrictions by object. The Court of Justice contrasted the measures at hand with those in the *BIDS* case,[3] in which the wording of the arrangement made clear that the object of the measures was anticompetitive. The restriction of competition could be seen in the very nature of the *BIDS* agreement, whereas, in the case at bar, an assessment of the effects of those measures was required.

Having upheld the first ground of appeal, the Court of Justice set the judgment aside and referred the case back to the General Court to determine whether the agreements at issue had the effect of restricting competition.

MasterCard and Others v. Commission (Case C-382/12 P)

On September 11, 2014, the Court of Justice, following AG Mengozzi's opinion,[4] upheld the General Court's judgment dismissing MasterCard's action against the Commission's decision on MasterCard's multilateral interchange fee ("MIF").[5] The case concerns the fees charged by banks for credit card transactions. An interchange fee is a fee charged by the cardholder's bank to the merchant's bank for processing a payment card transaction. Such fees may be set multilaterally (MIFs) or bilaterally between individual banks. MasterCard's MIF is binding on all banks that participate in the MasterCard scheme in the absence of bilateral arrangements between the cardholder's and merchant's banks (*i.e.*, the MIF is the default (or fallback) that applies unless other arrangements are made).

The MIF operates as follows: the cardholder's bank pays the merchant's bank the retail price less the agreed MIF. The merchant's bank recoups the MIF from a fixed fee it charges to the merchant (the merchant service charge), which is deducted from the price the merchant receives from the consumer. The fixed fee paid by the merchant for processing a card transaction may be passed on to consumers in the retail price goods or services.

In 2007, the Commission found that the MasterCard payment organization's setting of the EEA-wide fallback MIF constituted an anticompetitive decision by an association of undertakings, in breach of Article 101 TFEU. The General Court rejected MasterCard's arguments on appeal, and MasterCard appealed the General Court's findings to the Court of Justice. Lloyds TSB Bank plc and Bank of Scotland plc. (together, "LBG") and the Royal Bank of Scotland plc. ("RBS") cross-appealed, alongside MasterCard. Selected arguments of these appeals are discussed below.

Association of undertakings. The Court of Justice rejected the appellants' argument that, following its 2006 initial public offering ("IPO"), the payment organization was not an association of undertakings within the scope of article 101(1) TFEU because the participating banks could no longer directly take part in setting the MIF. The Court of Justice held that the deciding factor was whether MasterCard determined the MIF unilaterally and that the General Court had correctly found the existence of an association of undertakings by relying on the "residual decision-making powers of the banks after the IPO on

[3] *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*. (Case C-209/07) EU:C:2008:643.

[4] *MasterCard and Others v. Commission* (Case C-382/12) EU:C:2014:42, opinion of Advocate General Mengozzi of January 30, 2014.

[5] *MasterCard and Others v. Commission* (Case COMP/34.579), *EuroCommerce* (Case COMP/36.518), and *Commercial Cards* (Case COMP/38.580), Commission decisions of December 19, 2007, upheld by the General Court in *MasterCard v. Commission* (Case T-111/08) EU:T:2012:260.

matters other than the MIF"[6] and on the existing and continued commonality of interests between MasterCard and the banks.

Ancillary restriction. The appellants argued that the General Court had applied the wrong test in determining whether the restriction on competition (*i.e.*, the MIF) was ancillary to a non-restrictive economic activity. The Court of Justice rejected this argument. The Court of Justice held that the correct standard for fulfilling the "objective necessity" of the ancillary restriction test was whether the main operation would be impossible to implement, not just more difficult or less profitable, as MasterCard argued.

The applicants also criticized the Commission and the General Court for relying on a counterfactual in which the cardholder's and merchant's banks are prohibited from setting the amount of the interchange fees after a purchase has been made and the transaction has been submitted for payment (*i.e.* an *ex post* pricing prohibition) to find that the MIF was not objectively necessary. In the appellants' view, the counterfactual was inappropriate because it would not occur without regulatory intervention; the Commission's counterfactual should have been the competitive situation in the absence of both the MIF and the *ex post* pricing prohibition.

Rejecting the argument, the Court of Justice held that, in assessing the objective necessity of an ancillary activity, the Commission may rely on alternatives not limited to the situation resulting from the absence of the restriction and include "other counterfactual hypotheses based, *inter alia*, on realistic situations that might arise in the absence of that restriction," such as the *ex post* pricing prohibition.[7]

Restrictive effect of the MIF. The appellants claimed that the General Court had erred in law in its assessment of the existence of a restrictive effect on competition. The Court of Justice held that the assessment of the restriction on competition must consider the actual context in which it would occur. This includes taking account of likely developments that would occur on the market in the absence of the allegedly anticompetitive conduct. The General Court erred in law because it did not consider the likelihood – absent regulatory intervention – of the counterfactual the Commission relied on. The Court of Justice held that the judgment was nevertheless well supported on other grounds.

Application of Article 101(3) TFEU. The appellants argued that an assessment of the MIF under Article 101(3) TFEU should take into account the benefits of the MasterCard scheme as a whole. The Court of Justice held that, because the General Court had correctly found that the restrictions to competition resulting from the MIF were not part of a necessary ancillary restriction, only the benefits flowing from the MIF should be assessed, not the benefits of the MasterCard scheme as a whole. Because the MIF only affected the merchant market, only this market—and not the cardholder market—was relevant to an analysis of benefits under article 101(3) TFEU.

[6] *MasterCard and Others v. Commission* (Case C-382/12) EU:C:2014:2201, para. 72.

[7] *MasterCard and Others v. Commission* (Case C-382/12) EU:C:2014:2201, para. 111.

FINING POLICY

General Court Judgments

Esso and Others v. Commission **(Case T-540/08),** ***Sasol and Others v. Commission*** **(Case T-541/08)** ***and RWE and RWE Dea v. Commission*** **(Case T-543/08)**

On July 11, 2014, the General Court ruled on three appeals brought by: (i) Esso Société anonyme française and Esso Deutschland GmbH (together "Esso"), and ExxonMobil Petroleum and Chemical BVBA and Exxon Mobil Corp. (together "ExxonMobil"); (ii) Sasol Ltd., Sasol Holding in Germany GmbH, Sasol Wax International AG, and Sasol Wax GmbH (together "Sasol"); and (iii) RWE AG and RWE Dea AG (together "RWE"), against the Commission's decision in the candle wax cartel, imposing over €676 million in fines on nine groups, including ExxonMobil, Sasol, and RWE.[8] Following a leniency application by Shell, the Commission investigated and found that producers of candle waxes had participated in a cartel in the paraffin waxes market and the German slack wax market from September 1992 to April 2005.[9] Selected arguments in each case are discussed below.

Esso/ExxonMobil: In case T-540/08, Esso and ExxonMobil explained that, when calculating the fine, the Commission had taken into account the value of the sales after the merger of the ExxonMobil group (the Commission used the average of the years 2000 to 2002) and applied it to the period during which Mobil Corp. alone (later Esso) participated in the cartel (1992-1999). The appellants argued that this method imposed the same fine amount on Esso as if Exxon had participated in the infringement for the seven years before the merger, in breach of the principles of equal treatment and proportionality and of Article 23(3) of Regulation 1/2003, according to which, in setting the fine, the Commission must have regard to the gravity and duration of the infringement.[10] The General Court agreed. It held that, by taking into account the average of ExxonMobil's sales values during the last three years of ExxonMobil's participation (as it has done for the other cartel participants), the Commission infringed the principle of equal treatment because ExxonMobil was in a different situation: almost half of its paraffin waxes production was attributable to Exxon, and was not subject to the cartel before the merger in late 1999.

The General Court also referred to the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, which state that "[t]he combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement."[11] The General Court held however that using the average value of sales of ExxonMobil for 2000 to 2002 and multiplying it by the number of years that included those during which only Mobil Corp. participated in the cartel could not constitute such an "appropriate proxy" and infringed Article 23(3) of Regulation 1/2003 and the proportionality principle. The General Court therefore reduced the fine imposed on Esso from €83.6 million to €62.7 million.

Sasol: In case T-541/08, the arguments turned around parental liability for the infringement committed by Schümann Sasol GmbH ("Schümann Sasol"). Between May 1995 and June 2002 (the "joint venture period"), Schümann Sasol was a 99.9% subsidiary of Schümann Sasol International AG ("Schümann Sasol International"), one third of which was held by Vara Holding GmbH & Co. KG ("Vara"), and two thirds of which were held by Sasol Holding, itself a wholly owned subsidiary of Sasol Ltd. In July 2002, Sasol Holding acquired the remaining third of

[8] *Candle waxes* (Case COMP/39.181), Commission decision of October 1, 2008.

[9] The German slack wax cartel lasted from October 1997 to May 2004 and involved fewer participants.

[10] Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

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

Schümann Sasol International and, indirectly, Schümann Sasol, and remained the companies' sole owner until the end of the infringement in April 2005 (the "Sasol period"). Following their acquisition, Sasol Holding renamed Schümann Sasol International – Sasol Wax International, and Schümann Sasol – Sasol Wax.

Sasol argued that it was incorrectly found solely liable for the infringement during the joint venture period because the Commission made errors of assessment in determining Vara's influence on Schümann Sasol International's management board and on decisions in Schümann Sasol International's general meeting and supervisory board.

The General Court pointed out that the Commission had not expressly distinguished between the concepts of "control" and "power of control" on the one hand, and "economic unit" and "actual exercise of decisive influence" on the other. While "control" confers the *possibility* of exercising decisive influence over a company and is a concept used in merger review, the General Court recalled that, to impute one company's anticompetitive conduct to another because the two belong to a single economic unit, the Commission must ascertain that influence was *actually exercised*, using factual evidence. The General Court added that, in examining whether decisive influence was actually exercised, the Commission and EU Courts may presume that the legislation and agreements relating to the operation of an undertaking (*e.g.*, articles of incorporation and shareholders agreement) "have been implemented and complied with."[12] The Commission and the parties may, however, present evidence that the actual exercise of decisive influence differed from that envisaged under the agreements.

On review of the Commission's analysis, the General Court concluded that the Commission had failed to show, based on either an abstract analysis of the legislation and agreement or concrete evidence, that Sasol unilaterally determined the most important decisions in the joint venture's supervisory board and general meeting. Further, the Commission made an error of assessment in dismissing evidence with respect to members of the management board who could be associated with Vara, which contradicted the conclusion that Sasol exercised unilateral influence over decisions of Shümann Sasol International's management board. The General Court therefore held that the Commission had not established Sasol's unilateral actual exercise of decisive influence. For this reason in particular, the General Court reduced the fine imposed on Sasol for the joint venture period from €179.7 million to €48.1 million.

RWE: In case T-543/08, RWE claimed that it should not have been found liable for the infringement committed by Dea Minelaröl AG ("Dea Mineralöl"). RWE was held liable for a single and continuous infringement between September 1992 and June 2002. Dea Mineralöl was its solely controlled (99.4% owned) subsidiary until January 2002. Deutsche Shell ("Shell") acquired 50% of Dea Mineralöl's stock in January 2002; it acquired the remaining 50% on July 1, 2002.

The General Court rejected RWE's arguments with respect to the period during which Dea Mineralöl was its solely controlled subsidiary. With respect to the period during which Dea Mineralöl was jointly owned by RWE and Shell, RWE argued that the Commission had determined the joint exercise of decisive influence by RWE and Shell over Dea Mineralöl on the basis of an abstract analysis of the joint venture agreement and an analysis of the concept of 'control' applicable in EU merger reviews. However, while the joint venture agreement could point to joint control, this was not reflected in the actual operation of the joint venture. The General Court agreed, holding that the Commission had not presented evidence showing that the two parent companies had managed the joint venture in strict collaboration and that the adoption of board decisions necessarily reflected the will of both RWE and Shell. On the contrary, operational control belonged mostly to the management board, whose chairman had the decisive vote and was appointed by Shell. The General Court therefore found that the Commission had failed to establish that

[12] *Sasol v. Commission* (Case T-541/08) EU:T:2014:628, para. 49.

RWE had exercised decisive influence over the joint venture between January and July 2002 and reduced the fine imposed on RWE from €37.4 million to €35.9 million.

ECJ Judgments

***YKK Corp, YKK Holding Europe BV and YKK Stocko Fasteners GmbH v. Commission* (Case C-408/12 P)**

On September 4, 2014, the Court of Justice ruled on an appeal by several YKK group companies against the General Court's judgment that dismissed their appeal against the Commission's decision concerning the fasteners cartel.[13]

On September 19, 2007, the Commission fined seven groups of companies a total of €329 million for participating in four different cartels in the markets for zip fasteners, other fasteners (for example, press studs), and their attaching machines. YKK Corp, YKK Holding Europe BV, and YKK Stocko (together, the "YKK group") were fined €150 million for infringements by the group and some of its subsidiaries (including YKK Stocko). The YKK group appealed the Commission's decision to the General Court, which dismissed the appeal in its entirety.[14] The YKK group then appealed to the Court of Justice. On February 12, 2014, Advocate General Wathelet issued an opinion concluding that the Commission had: (i) erred in its interpretation of Article 23(2) of Regulation 1/2003 in relation to the fine imposed because it misapplied the 10% fine upper limit and infringed the principles of personal responsibility, individuality of penalties, proportionality, and equal treatment; (ii) misapplied the deterrence multiplier that was calculated on the large resources of the YKK group.[15]

On appeal to the Court of Justice, the YKK group argued that the General Court: (i) failed properly to state reasons for dismissing the plea that the starting amount of the fine was disproportionate; (ii) failed to apply the 2002 Leniency Notice[16] and, instead, applied the 1996 Leniency Notice[17] (which was less favorable); (iii) erred in law by calculating the upper limit of the fine based on the YKK group's turnover (rather than just the turnover of YKK Stocko); and (iv) erred in law by holding that the Commission was entitled to base the deterrence multiplier on the overall turnover of the YKK group.

The Court of Justice dismissed the first argument. The General Court had clearly set out why the Commission was entitled to consider the infringement "particularly serious", even without taking account of the infringement's market impact. Furthermore, the General Court had clearly explained that there is no contradiction between the Commission's finding that the infringement was likely to affect the market and its finding that this effect was not measurable.

The Court of Justice also dismissed the second argument. The Court of Justice noted that the Commission took as a mitigating circumstance (despite the absence of any provision in the 1996 Leniency Notice) the fact that the YKK group's co-operation enabled the Commission to establish a longer infringement and reduced the fine outside the provisions of the 1996 Leniency Notice. The General Court had held that the YKK group had not provided any evidence that would have enabled the Commission to reduce the fine under the 1996 Leniency Notice (which requires evidence contributing to establishing the existence of the infringement). The Commission assessed the cooperation in the light of the 1996 Leniency Notice.[18] It is, however, clear that both Leniency Notices require that, to claim a reduction in the fine, the undertakings provide evidence contributing to establishing

[13] *Fasteners* (COMP/E-1/39.168 PO), Commission decision of September 19, 2007.

[14] *YKK and Others v. Commission* (Case T – 448/07) EU:T:2012:322.

[15] *YKK and Others v. Commission* (Case T – 448/07) EU:T:2012:322, opinion of Advocate General Wathelet of February 12, 2014.

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

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

[18] Since the leniency applications were submitted before February 14, 2002, date from which the 2002 Leniency Notice replaced the 1996 Leniency Notice.

the infringement. The Court of Justice thus held that evidence that did not satisfy this condition in the 1996 Leniency Notice[19] also could not satisfy the corresponding condition in the 2002 Leniency Notice.[20] In addition, having benefited from a reduction in the basic amount of the fine (outside the scope of the 1996 Leniency Notice), the YKK group could not claim the right to a further reduction under any Leniency Notice. Allowing the YKK group to do so would improperly reward it twice for the same information.

As to the third argument, the Court of Justice agreed with the Advocate General, holding that the General Court had misinterpreted Article 23(2) of Regulation 1/2003 in determining the maximum amount of the fine based on the turnover of the entire YKK group, rather than basing it solely on the turnover of YKK Stocko. The Court of Justice held that the undertaking's structure evolved during the period of the infringement, and that the YKK group could not be held responsible for infringements committed by its now-subsidiary (YKK Stocko) prior to its acquisition by the YKK group. The Court of Justice concluded that the upper limit of the fine should have been calculated on YKK Stocko's turnover for the period of the infringement for which it was solely responsible.

Concerning the fourth argument, the Court of Justice disagreed with the Advocate General, dismissing the plea that the deterrence multiplier concerning the infringement for the period prior to the acquisition of YKK Stocko should have taken into account only the size and turnover of YKK Stocko and not of the entire YKK group. The Court of Justice ruled that, to maintain the deterrent effect of the fine, it should take into account the financial capacity of the undertaking at the time of the decision. The logic underlying Article 23(2) of Regulation 1/2003 and the logic underlying the deterrent multiplier should not be confused. The 10% upper limit must respect the principles of personal responsibility, individuality of penalties, proportionality, and equal treatment. On the other hand, the deterrence multiplier must only follow the logic of deterrence. While the former has to take into account the capacity of the undertaking to pay at the time of the infringement, the latter has to be based on the capacity of the undertaking to pay at the time it is fined.

Having set aside the General Court's judgment, the Court of Justice recalculated the fine, basing it only on YKK Stocko's turnover in the business year preceding the adoption of the decision. The fine was reduced from the original amount of€ 68,250,000 (of which the YKK group was jointly and severally liable for €49 million), to €2,792,800 (with no joint and several liability).

ECJ Advocate General Opinions

Commission v. Parker Hannifin Manufacturing and Parker-Hannifin (Case C-434/13 P*)*, opinion of AG Wathelet

On September 4, 2014, Advocate General Wathelet advised the Court of Justice to set aside the General Court's judgment that had reduced the fine imposed on Parker ITR Srl ("Parker ITR") and Parker-Hannifin Corp ("Parker-Hannifin") for participation in the marine hose cartel.[21]

On January 28, 2009, the Commission fined various companies for participating in a cartel, including Parker ITR

[19] The evidence must "contribute to establishing the existence of the infringement."

[20] The evidence must represent "significant added value with respect to the evidence already in the Commission's possession."

[21] *Parker ITR Srl and Parker-Hannifin Corp. v. European Commission* (Case T-146/09) EU:T:2013:258.

The ownership history of Parker ITR is as follows. A company called Pirelli Treg SpA, belonging to the Pirelli group, established the marine hose business, now owned by Parker ITR, in 1966. A company called ITR SpA ("ITR") took over that business in December 1990. ITR was acquired by Saiag SpA in 1993. After commencing negotiations with Parker-Hannifin regarding the possible sale of several businesses, including the marine hose business, ITR created a new subsidiary called ITR Rubber Srl ("ITR Rubber") on June 27, 2001. Following several internal reorganization steps, the relevant ITR businesses, including the marine hose business, were transferred to ITR Rubber effective as of January 1, 2002. (ITR Rubber was formed specifically for the purposes of the contemplated transaction with Parker-Hannifin and had no economic activities at all before that date.) Following the transfers, on January 31, 2002, Parker-Hannifin acquired ITR Rubber and later renamed it Parker ITR.

and Parker-Hannifin.[22] The Commission found Parker ITR liable for the infringement from 1986 to 2007, and found Parker-Hannifin liable from the date of its acquisition of Parker ITR (January 2002) to May 2007. The former parent companies/predecessors (the Saiag group) of Parker ITR were not fined. Parker ITR and Parker-Hannifin appealed to the General Court, which reduced the fine, concluding that there was no economic continuity between Parker ITR and the marine hose business of its former owners. The Commission appealed the judgment. It argued that: (i) the General Court had erred in law by ignoring or incorrectly applying the case law on intra-group economic succession and the case law on the transfer of liability between consecutive undertakings; (ii) the General Court acted *ultra petita*[23] by unlawfully reducing by €100,000 the fine on Parker-Hannifin due to its non-participation from January 1, 2002 to January 31, 2002.

As to the first ground of appeal, the Advocate General advised that the General Court failed to apply correctly the case law relating to economic continuity. The Advocate General found that there were two distinct transfers of assets: (i) an intra-group transfer within the Saiag group by which ITR assets were transferred to ITR Rubber; and, later; (ii) an inter-group between the Saiag group and the Parker-Hannifin group, though the sale by Saiag of ITR Rubber (now Parker ITR). The General Court incorrectly focused only on the second of these transfers. It wrongly based its conclusions on the absence of structural links between Saiag/ITR and Parker-Hannifin after the transfer of assets to Parker ITR.

Yet the Advocate General noted that such links had existed between ITR and its wholly owned subsidiary ITR Rubber: First, the entities had been under control of the same person (Saiag) and had close economic and organizational links between them, having carried out in all material respects the same instructions. Second, the assets were transferred to an entity (ITR Rubber) formed within the author of the infringement (ITR). That entity (ITR Rubber) was later sold to Parker Hannifin – thus giving rise to economic continuity. The Advocate General therefore concluded that the Commission had been correct to hold that there was intra-group economic continuity between Parker ITR and the undertaking that previously operated the business.

As to the second ground of appeal, the Advocate General advised that the General Court was not entitled to reduce the fine because Parker-Hannifin had not challenged either the duration of the participation in the infringement or the duration factor in the calculation of the fine, but had only challenged other aspects of the fine.

Versalis and Eni v. Commission (Cases C-93/13 and C-123/13), opinion of AG Cruz Villalón

On July 17, 2014, Advocate General Cruz Villalón handed down his opinion in the appeals brought by Versalis SpA (previously Polimeri Europa SpA) and its parent company Eni SpA against the General Court judgment[24] that dismissed their appeals from the European Commission's decision in the chloroprene rubber cartel.[25] He also issued an opinion on the Commission's appeal from the same General Court judgment

In 2007, the Commission fined Versalis and its parent company for Versalis's participation in a single and continuous infringement. In setting the fine, the Commission took into account, as an aggravating circumstance, the recidivism of the companies. The Commission thus increased the fine for two past infringements committed by companies wholly or partially owned by Eni, even though the two decisions establishing those infringements were addressed to Eni. The General Court upheld the Commission's findings regarding the imputation of liability but reduced the fine imposed on Eni

[22] *Marine Hoses* (Case COMP/39406), Commission decision of January 28, 2009.

[23] Beyond that which is sought *e.g.*, a judgment that exceeds a claimant's request.

[24] *Versalis and Eni v. Commission* (Case T-103/08) EU:T:2012:686.

[25] *Chloroprene rubber* (Case COMP/38.629), Commission decision of December 5, 2007.

and Polimeri. The General Court concluded that the Commission erred in its calculation of the increase of the fine for recidivism and the multiplier for deterrence.

Although the Commission, Eni, and Versalis raised several arguments on appeal, Advocate General Cruz Villalón focused primarily on the recidivism issue. The Advocate General assessed the General Court's judgment based on a recent Court of Justice judgment in *Versalis v. Commission*.[26]

The main question was whether the previous conduct of a subsidiary can be used to establish recidivism on the part of the parent company, where the parent is sanctioned for its own conduct in a later case. The Advocate General noted that the question of recidivism should be examined at the stage of the adoption of the decision finding recidivism, *i.e.*, the second infringement, and not at the stage of adoption of the decision finding the first infringement. Following the Court of Justice's reasoning in *Versalis v. Commission*, the Advocate General noted that the Commission may take into account the fact that a company had already been involved in an earlier infringement, as long as it provides a statement of reasons enabling the EU Courts and the company to understand in what capacity and to what extent it was involved in the earlier infringement.

In light of this principle, the Advocate General concluded that the General Court had erred in law in holding that the infringement by Eni could not be considered a repeat offence by relying only on the fact that it was neither sanctioned nor involved in the administrative procedure in the first case. The Advocate General found that the application of this rationale would result in the analysis being performed at the wrong stage of the case.

However, the Advocate General concluded that the Commission had failed to provide adequate reasoning because it did not set out in what quality or measure Eni was implicated in the first case. In this context, the Advocate General deemed the General Court's findings warranted and invited the Court of Justice to take the opportunity to address the issue in greater detail.

ABUSE/STATE ENTERPRISES

ECJ Judgments

Commission v. DEI (Case C-553/12 P)

On July 17, 2014, the European Court of Justice handed down its judgments on appeals against the General Court's judgments of September 20, 2012, which annulled the Commission's decision finding that Greece infringed Articles 106(1) and 102 TFEU by maintaining a quasi-exclusive rights for access to lignite granted to the state-owned electricity company Dimosia Epikhirisi Ilektrismou ("DEI") and the accompanying commitments accepted by Greece.[27]

DEI was created in 1950 and given the exclusive right to generate, transmit, and supply electricity in Greece. Additionally, DEI was granted the exploration and exploitation right to approximately 91% of Greek lignite deposits. Lignite is used mainly as a fuel for electricity generation, and more than half of the electricity generated in Greece comes from lignite-fired power plants.

Following receipt of a complaint, the Commission sent Greece a letter of formal notice expressing its concerns that its exclusive rights to lignite enabled DEI to protect its *de facto* monopoly on the Greek electricity market. This could potentially result in an abuse of DEI's dominant position in the market for electricity supply to industrial customers. On March 5, 2008, the Commission adopted a decision finding a breach of Articles 106 (1) and 102 TFEU. The Commission subsequently accepted commitments offered by Greece to ensure fair access to Greek lignite deposits by holding public tenders to grant exploitation rights to Greece's four lignite deposits.

[26] *Versalis v. Commission* (Case C-508/11 P and C-511/11 P) EU:C:2013:289; EU:C:2013:386.

[27] *European Commission v. Dimosia Epicheirisi Ilektrismou AE (DEI)* (Case C-553/12 P) EU:C:2014:2083.

DEI appealed the Commission's decision to the General Court, alleging manifest errors of assessment, including an incorrect market definition, a breach of the principle of proportionality, and a failure to provide full reasons for its decision. In September 2012, the General Court handed down two judgments annulling the Commission's decision and the commitments.[28] The General Court found that the infringement decision focused solely on whether the inequality of opportunities between economic operators resulting in a distortion of competition was the result of a state measure. It concluded that the Commission should first have identified and established conduct by DEI that constituted an actual or potential abuse of dominance resulting from the state measure at issue.

The Court of Justice disagreed. It concluded that the Commission does not have to show that the specific state measure grants or enhances special or exclusive rights. Instead, it is sufficient to show that the measure creates a situation in which a public undertaking, or an undertaking on which the State has conferred special/exclusive rights, may easily abuse its dominant position.

The Court of Justice further held that a state measure that distorts competition by resulting in unequal opportunities between economic operators infringes Articles 106(1) and 102 TFEU. In this context, the Commission is not required to establish actual abuse. Rather, the Commission need only identify a potential or actual anticompetitive consequence resulting from the state measure at issue.

Telefónica And Telefónica España v. Commission (Case C-295/12 P)

On July 10, 2014, the Court of Justice handed down its judgment, upholding the General Court's judgment of March 29, 2012 that upheld the Commission's decision concluding that Telefónica had abused its dominant position by imposing an unlawful margin squeeze.[29]

In July 2003, France Telecom España SA (formerly Wanadoo España SL) complained to the Commission that the margin between the wholesale prices that Telefónica's subsidiaries charged competitors for wholesale broadband access in Spain and the retail prices they charged end users was not sufficient to enable competitors to compete with Telefónica in the provision of broadband internet access to end users.

In July 2007, the Commission adopted a decision concluding that Telefónica had breached Article 102 TFEU by imposing an illegal margin squeeze in the Spanish broadband market between September 2001 and December 2006.

Telefónica and Spain appealed to the General Court, seeking an annulment of the Commission's decision. On March 29, 2012, the General Court dismissed both appeals and upheld the Commission's analysis in its entirety. The General Court found that the Commission had correctly defined the relevant market, concluded that Telefónica had a dominant position, established a margin squeeze, and fined Telefónica.[30] The General Court also confirmed that the regulatory framework for telecommunications does not release dominant firms from their obligation to respect EU competition law.

Telefónica appealed to the Court of Justice, claiming that the General Court had infringed its rights of defence: (1) due to the disproportionate duration of the proceedings; by (2) failing to admit claims supported by annexes, failing to admit claims relating to the fact that the inputs were not indispensable as a relevant factor when determining the effects of Telefónica's conduct; and by (3) admitting new facts not included in the statement of objections. Telefónica also asserted that the Commission committed errors of law in its definition of the wholesale markets, in its assessment of Telefónica's alleged conduct as a very serious infringement, and in its calculation of the fine.[31]

[28] *DEI v. Commission* (Case T-169/08) EU:T:2012:448, and *DEI v. Commission* (Case T-421/09), EU:T:2012:450 (Judgment on the commitment decision).

[29] *Telefónica and Telefónica de España v. Commission* (Case C-295/12 P) EU:C:2014:2062.

[30] *Telefónica, SA and Telefónica de España, SA v. Commission* (Case T-336/07) EU:T:2012:172.

[31] Telefónica's claims included that (1) the Commission was wrong to impose a fine for a margin squeeze as the illegality of such conduct was

Additionally, Telefónica claimed that the General Court had failed to conduct a full review of the Commission's decision.

In his opinion of September 2013, Advocate General Wathelet's had held that Telefónica's substantive grounds of appeal and its argument alleging breach of its rights of defence were inadmissible. On the General Court's review of the fine imposed by the Commission, the Advocate General concluded that the General Court had failed to conduct the required in-depth review of whether the Commission's decision complied with the principles of non-discrimination, proportionality, and individualization of penalties. While the Advocate General noted that it was not clear whether the principles had in fact been breached, it criticized the General Court's limited assessment of these issues. For example, in response to Telefónica's plea, the General Court had not sufficiently indicted why the fine imposed was so much higher than fines imposed for similar conduct in the past. The Advocate General noted that the General Court should not use the Commission's margin of discretion in fine calculations as a basis for not conducting a full review of the law and of the facts in respect of the fine imposed. The Advocate General proposed that the case be referred back to the General Court for a new ruling on the imposed fine.

The Court of Justice agreed that Telefónica's substantive arguments were inadmissible, in particular because the General Court's alleged errors were not precisely identified. On the review of the fine imposed, the Court of Justice concluded that the General Court had conducted the requisite in-depth review of the Commission's decision in response to Telefónica's pleas. The Court of Justice also held that Telefónica should have reasonably foreseen that its conduct was abusive. The Court of Justice concluded that the General Court did not err in finding that the Commission was entitled to impose a fine, and that the fine breached none of the principles of equal treatment, proportionality, or non-discrimination.

In sum, the Court of Justice confirmed that the Commission can apply Article 102 TFEU in regulated markets and that it is not required to demonstrate the current anticompetitive effects of a margin squeeze. Instead, it is sufficient to show potential anti-competitive effect that may have excluded competitors that were at least as efficient as the dominant undertaking.

MERGERS AND ACQUISITIONS

Court Judgments

Dismissal of Appeal Against Commission's Approval of a Purchaser of Divested Business – *Editions Odile Jacob SAS. v. Commission* (Case T-471/11)

On September 5, 2014, the General Court dismissed an appeal by Editions Odile Jacob SAS ("EOJ") against the Commission's decision of May 13, 2011[32] to retroactively re-approve Wendel Investissement SA ("Wendel") as a purchaser of Vivendi Universal Publishing ("VUP"), divested as a condition of the Commission's approval of the Lagardère/Natexis/VUP merger on January 7, 2004.[33] The Commission adopted the contested decision following the annulment by the Court of Justice[34] of the Commission's decision of July 30, 2004[35] that approved Wendel as the purchaser of VUP on the grounds that the trustee that reported on Wendel's suitability was not sufficiently independent of the divested business. EOJ was one of contenders that expressed an interest in acquiring VUP

not foreseeable, breaching the principle that all penalties must clearly be defined by law; (2) it was not aware of the anti-competitive nature of its conduct given the monitoring of and intervention in its activities by national regulatory authorities; and (3) the Commission breached the principle of proportionality and equal treatment because the fines it imposed previously for similar conduct were significantly lower than the fine imposed on Telefónica.

[32] *Lagardère/Natexis/VUP* (Case COMP/M.2978), Commission decision No. COM (2011) C/3503 of May 13, 2011.

[33] *Lagardère/Natexis/VUP* (Case COMP/M.2978), Commission decision of January 7, 2004.

[34] *Éditions Odile Jacob v. Commission* (Case T-452/04) ECR 2010 II-04713 and *Commission and Lagardère* (Joined Cases C-553/10P and C-554/10P), not yet published.

[35] *Lagardère/Natexis/VUP* (Case COMP/M.2978), Commission decision No. COM (2004) D/203365 of July 30, 2004.

and successfully appealed the Commission's first approval decision authorizing Wendel to purchase VUP.

The General Court confirmed the re-approval of Wendel, rejecting all of EOJ's pleas, in particular claims concerning: (i) the effect of the annulment of the first approval on the merger clearance decision; (ii) the Commission's assessment of the events that occurred following the annulment of the first approval; and (iii) the independence of Wendel from the seller of divested assets.

- **The annulment's effect on the merger clearance decision.** The General Court ruled that the annulment of the Commission's first approval of Wendel had no effect on the legality of the merger clearance decision. According to the General Court, the appointment of an independent trustee was an obligation of Lagardère and not a condition to the clearance decision. The General Court also concluded that the first approval became illegal upon the submission of the first trustee's report and not upon the appointment of the said trustee, who lacked independence. Therefore, the General Court judged that the divestiture's approval process had to be repeated only from the stage when the trustee's report was submitted.

- **Assessment of the events that occurred following the annulment of the first approval.** The General Court rejected EOJ's claim that the Commission's decision to re-approve Wendel should not have taken into account the events that followed the adoption of the annulled approval decision. When an institution re-adopts a decision, following its annulment, it must place itself at the date when the original decision was taken. However, the General Court noted that, in the context of merger control, the Commission must assess the facts prospectively and therefore account for the relevant events that follow the adoption of the annulled decision. Also, there was no basis for EOJ's arguments that the Commission's re-approval was illegal because Wendel sold VUP in May 2008 and VUP lost its leading market position. The fact that Wendel sold VUP four years later did not affect its suitability as a purchaser as long as it was able to maintain or develop effective competition following the merger. The General Court also rejected EOJ's argument that the Commission should have compared Wendel's ability and incentive to be an effective competitor, as well as its profitability, with those of other potential purchasers. The General Court explained that the Commission's mandate is not to establish "perfect competition" by deciding which entity should operate on a given market; rather, it must limit itself to ensuring that the purchaser is capable of maintaining and developing effective competition.

- **Independence of Wendel from the seller of divested assets.** The General Court ruled that the fact that a member of the supervisory and audit boards of Lagardère was also a member of Wendel's board of directors had no effect on the legality of re-approving Wendel. Such relationship did not lead to dependency between Wendel and Lagardère because it did not create an economic link and because Wendel honored its commitment to ensure that the relevant person would resign within a year of approval and would not be involved in discussions relating to Wendel's publishing activities.

COMMISSION DECISIONS

First-phase Decisions Without Undertakings

EDF/Dalkia en France (Case COMP/M.7137)

On June 25, 2014, the Commission authorized Électricité de France's (EDF) acquisition of Dalkia's business in France. EDF is active in the production, wholesale, transmission, distribution, and supply of electricity and gas. Dalkia's operations in France include district heating and cooling, multi-technical maintenance and management of facilities, waste management, and public lighting. The acquisition was part of Veolia Environnement and EDF's agreement to split up their joint venture Dalkia, under which Dalkia's international operations were transferred to Veolia Environnement and Dalkia's business in France was acquired by EDF. The Commission approved Veolia

Environnement's acquisition of sole control over Dalkia International in May 2014.

The Commission analyzed horizontal overlaps in: (i) the production and wholesale of electricity in France; (ii) electricity balancing and ancillary services; (iii) electricity load management; (iv) electricity capacity guarantees; (v) the retail supply of electricity; (vi) multi-technical maintenance and management of facilities (including energy management services); (vii) district heating; (viii) public lighting; (ix) EU carbon emission trading; (x) energy performance certificates; and (x) waste management. The Commission also considered possible non-horizontal effects.

The Commission's investigation primarily focused on: (i) the horizontal overlaps in electricity production and wholesale in France; (ii) the conglomerate effects arising from the possibility of bundling electricity supply with multi-technical management and maintenance of facilities or with public lighting services; and (iii) the combined entity's competitive advantage from having data on consumer electricity consumption.

With respect to horizontal overlaps, the Commission found that the combination of EDF's dominant position (with shares of between 70% and 90%) with Dalkia's limited presence (shares below 5%) in electricity production and wholesale would not give rise to competitive concerns. Dalkia did not exert significant competitive pressure on EDF and, post-transaction, the combined entity would be constrained by a number of strong competitors. Importantly, most of Dalkia's electricity production would continue to be purchased by EDF under French law that imposes on EDF a long-term obligation to purchase electricity produced by certain types of combined heat and power plants.

With respect to conglomerate effects, the Commission examined whether EDF could leverage its dominant position in electricity supply by combining it with Dalkia's services in: (i) multi-technical facility management and maintenance; or (ii) public lighting.

- **Multi-technical management and maintenance services.** The Commission found that combining these services with the supply of electricity was unlikely to be feasible because of the special regulatory framework that governs the supply of electricity to public entities, the absence of interest from customers in receiving combined services, and the differences in contract durations, costs structures, and factors of competitiveness.
- **Public lighting.** The Commission found no conglomerate concerns because: (i) services such as public lighting are subject to the "blue tariff" set by public authorities;[36] (ii) customers showed no interest in bundling electricity supply and public lighting; and (iii) the applicable public procurement rules would make it difficult to offer the services in a single package.

With respect to the combined entity's information advantage, the Commission examined whether EDF's possession of customer electricity consumption data would, post-transaction, give it a significant advantage in: (i) the market for multi-technical facility management and maintenance; or (ii) the market for public lighting and other urban electric equipment. The Commission excluded such concerns because: (i) the combined entity as a distribution system operator has an obligation to provide customers, which typically are public entities or large businesses, with all information concerning their electricity consumption, which they can then share with tenderers who offer the relevant services; and (ii) customers themselves have, or can procure, access to such information.

Accordingly, the Commission unconditionally approved the transaction.

[36] Even though the market for electricity supply is gradually being liberalized and prices are increasingly set by the market, certain segments of electricity supply are subject to tariffs determined by public authorities. There are several regulated tariffs, and the application of different tariffs depends on the customer's power supply capacity. The so-called "blue tariff" is applied to customers whose power supply does not exceed 36 kVA, including the vast majority of public entities. The blue tariff for street lighting, referred to as "blue street lighting," which is typically reserved for utilities companies and local authorities.

***Lenovo/Motorola Mobility* (Case COMP/M.7202)**

On June 26, 2014, the Commission unconditionally cleared Lenovo Group Limited's ("Lenovo") acquisition of Motorola Mobility Holdings LLC ("Motorola Mobility") from Google Inc. ("Google"). As part of the transaction, Lenovo acquired Motorola Mobility's mobile hardware business, design patents, patents relating to infrastructure network and mobile handsets, and broad licenses to certain other patents.

Lenovo develops, manufactures, and markets desktop and notebook computers, workstations, servers, storage drives, smart mobile devices, and IT management software, and offers IT services. Motorola is a supplier of smart mobile devices (smartphones and tablets).

The Commission concluded that the relevant product markets would likely be for smart mobile devices but did not reach a firm conclusion and referred to potential further differentiation between smartphones and tablets. With respect to patented technologies, the Commission took the view that each standard-essential patent ("SEP") can be considered a separate market as it is necessary to comply with a standard and thus cannot be designed around. The Commission did not identify concerns relating to any non-SEPs, because these are not deemed technically essential to implement a standard, and left open the product market definition. The Commission did not define the exact geographic market for smart mobile devices and SEPs reading on smart mobile devices but noted that its geographic scope was at least EEA-wide, if not worldwide.

The Commission found that the transaction did not give rise to any horizontal concerns because the parties' combined shares remained below 10% at EEA or worldwide level in the manufacture and sale of smartphones and tablets. The Commission's investigation focused on: (i) vertical relationships between each Lenovo SEP and the supply of smart mobile devices; (ii) vertical relationships between the acquired design and utility patents and patent applications and the supply of smart mobile devices; and (iii) Google's possible post-transaction licensing of the vast majority of Motorola Mobility's patent portfolio that was retained by Google.

The Commission concluded that Lenovo would have neither the ability nor the incentive to favor its smart mobile devices and foreclose other smart mobile device manufacturers' access to SEPs that it had recently acquired from Unwired Planet. The Commission concluded that Lenovo's ability to foreclose other smart mobile device manufacturers will be constrained because: (i) the patent purchase agreement between Lenovo and Unwired Planet provided that Lenovo was acquiring the SEPs subject to the pre-existing FRAND commitments;[37] (ii) Lenovo would be discouraged by the Commission's recent antitrust decision in *Motorola Mobility – Enforcement of GPRS standard essential patents*,[38] in which the Commission concluded that it would be an abuse of dominance for the holder of a FRAND-encumbered SEP to seek and enforce an injunction against a willing licensee; and (iii) the SEPs at issue had already been licensed to a number of other companies. Also, given the parties' low combined share (less than 10%) and the low (less than 5%) increment resulting from the transaction, the Commission found it unlikely that Lenovo would have an incentive to engage into an input foreclosure strategy post-transaction.

As regards the design and utility patents acquired by Lenovo from Google, the Commission rejected concerns that, because these patents were not SEPs and therefore not subject to FRAND commitments, Lenovo would be able to charge high royalties to its competitors in smart mobile devices. Such concerns were found to be unlikely to materialize because the Commission took the view that: (i) the total size of Lenovo's patent portfolio remained small relative to the patent portfolios of other smart mobile device suppliers and major patent holders (such as Samsung,

[37] In order to ensure that the technology that is covered by SEPs is accessible to all interested parties at reasonable conditions, standard-setting organizations require that patent holders commit to license their SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms.

[38] *Motorola Mobility* – Enforcement of GPRS standard essential patents (Case COMP/AT 39.985), Commission decision of April 29, 2014.

Apple, Microsoft, and Nokia, among others); (ii) these patents were not SEPs or commercially essential, it was possible to design around them; and (iii) Lenovo would remain bound by all existing encumbrances on these patents.

With respect to post-transaction patent licensing by Google, the Commission referred to its decisional practice in *Microsoft/Nokia*[39] and took the view that Google's post-transaction conduct in relation to its retained business was outside the scope of the Commission's jurisdiction under the Merger Regulation. In any event, the Commission concluded that Google's post-transaction conduct would not foreclose or marginalize other smart mobile device manufacturers, even had Google's conduct been within the scope of the Commission's assessment and were Google to offer more beneficial licensing terms to Motorola Mobility (Lenovo). First, there was no merger-specific effect because it was unlikely that Motorola Mobility would gain access to the patents on more favorable terms than when it was the owner of these patents prior to the transaction. Second, Lenovo's post-transaction market share in smart mobile devices remained low and therefore it was unlikely that other manufacturers of smart mobile devices could be foreclosed or marginalized.

Viacom/Channel 5 Broadcasting (Case COMP/M.7288)

On September 9, 2014, the Commission approved the acquisition by Viacom Inc. ("Viacom") of sole control of Channel 5 Broadcasting Limited ("Channel 5"). Viacom is a US-based global entertainment content company that creates television programs, motion pictures, and other entertainment content. Channel 5 is one of the four public sector broadcasters in the United Kingdom. It operates eight television channels, a catch-up and archive video-on-demand service, and owns an advertising ("ad") sales house. Ad sales houses sell TV advertising airtime on behalf of broadcasters. Channel 5 is therefore active as both a broadcaster and supplier of TV advertising.

The proposed transaction gave rise to horizontal overlaps in the UK markets for: (i) the licensing or acquisition of broadcasting rights to audio-visual content; (ii) the wholesale supply of television channels; (iii) the retail supply of audio-visual content; and (iv) the supply of advertising. The parties' combined share did not exceed 20% in any of the first three markets. The Commission left open the exact product and geographic market definitions because it concluded that the proposed transaction would not raise competition concerns under any approach.

In line with the overall results of its market investigation and its previous decisional practice,[40] the Commission found the supply of TV advertising and the supply of online advertising to form distinct product markets. The Commission reaffirmed its view that online and TV advertising differ in terms of pricing mechanism and the specificity with which the audience is targeted and monitored, despite the fact that several responses to the market investigation indicated that the line between online and TV advertising is becoming increasingly blurred.

In the absence of competition concerns in the market for online advertising, the Commission focused its investigation on the market for the supply of TV advertising. The Commission defined the geographic market as national in scope (*i.e.*, UK-wide), following its previous decisional practice.[41]

Although, in that market, the parties' combined share was below 20%, the Commission investigated the proposed transaction because it found there to be a high level of concentration, with the first four ad sales houses accounting for more than 90% of the total market. Further, the Commission was concerned that were Channel 5's ad sales house to close down post-transaction, the market would become even more highly concentrated.

[39] *Microsoft/Nokia* (Case COMP/M.7047), Commission decision of December 4, 2013, para. 224.

[40] *News Corp/BSkyB* (Case COMP/M.5932), Commission decision of December 21, 2010, para. 262; *Google/DoubleClick* (Case COMP/M.4731), Commission decision of March 11, 2008, para. 45-46.

[41] *Time Warner/CME* (Case COMP/M.6866), Commission decision of June 14, 2013, para. 68; *News Corp/BSkyB* (Case COMP/M.5932), Commission decision of December 21, 2010, para. 270.

The Commission found Channel 5 to have the smallest of the four main ad sales houses on the UK market. The Commission's investigation also pointed to recent entry in the market and the existence of buyer power, as well as the relative ease of switching between ad sales houses. Furthermore, the Commission found it unlikely that the proposed transaction would result in the cessation of the activities of Channel 5's ad sales house.

Accordingly, the Commission unconditionally approved the transaction.

First-phase Decisions With Undertakings

***CSAV/HGV/Kühne Maritime/Hapag-Lloyd* (Case COMP/M.7268)**

On September 11, 2014, the European Commission conditionally approved the joint acquisition of control over Hapag-Lloyd AG ("HLAG") by Compañía Sud Americana de Vapores S.A. ("CSAV"), Hamburger Gesell-schaft für Vermögens- und Beteiligungsmanagement mbH ("HGV"), and Kühne Maritime GmbH ("Kühne").[42]

HLAG and CSAV are container liner shipping firms, whereas HGV and Kühne operate in a number of sectors, including maritime logistics. The merger would create the fourth largest container liner shipping company by capacity worldwide, after Maersk, MSC, and CMA CGM.

The Commission agreed that each of CSAV, HGV, and Kühne would acquire joint control over HLAG in light of each company's veto rights over certain strategic decisions of HLAG under the terms of the shareholder agreement.

The Commission's assessment focused on overlaps in the activities of HLAG and CSAV in the provision of container liner shipping services,[43] which, in line with its decisional practice, were defined as the provision of "regular, scheduled services" for the carriage of cargo by container.[44] The geographic markets consisted of single trades defined by the range of ports that are at both ends of the service (*e.g.*, groups of ports in Northern Europe, the Mediterranean, and the North America's West Coast).

The Commission's investigation focused on overlaps on 12 different trade routes operated by HLAG and CSAV and their consortia.[45] In particular, the Commission found that the merger would create new links between previously unconnected consortia on two shipping corridors: (i) between Northern Europe and Central America and the Caribbean; and (ii) between Northern Europe and South America's West Coast. The Commission concluded that, on these routes, the combined entity would: (i) have an influence on decisions regarding the level and allocation of capacity; (ii) participate in the setting of ports of call and schedules; and (iii) have access to information on capacity for two pairs of competing consortia that operated independently before the merger.

The Commission conditionally cleared the transaction subject to the dissolution of CSAV and MSC's two consortia – the Euroandes consortium and the Ecuador Express consortium – that overlapped with HLAG's consortia on these two affected shipping corridors.

Second-phase Decisions Without Undertakings

***Holcim/Cemex West* (Case COMP/M.7009)**

On June 5, 2014, the Commission unconditionally cleared the acquisition of part of Cemex Central Europe GmbH's activities in cement, ready-mix concrete, aggregates, and cementitious materials in western Germany, including certain plants and sites located in France and the Netherlands ("Cemex West") by Holcim Beteiligungs GmbH

[42] *CSAV/HGV/Kühne Maritime/Hapag-Lloyd* (Case COMP/M.7268), Commission decision of September 11, 2014.

[43] Although some of the parties also provide port terminal services, the Commission found no geographic overlap in these services.

[44] *Kühne/HGV/TUI/Hapag-Lloyd* (Case COMP/M.5450), Commission decision of February 6, 2009.

[45] To offer cost-effective liner shipping services on a given trade with a regular schedule, a certain minimum volume is required. Therefore, most shipping companies, including the parties, offer their container liner shipping services in consortia through cooperation with other shipping companies. Consortia members may decide on capacity setting, scheduling, and the list of ports of call, as permitted under the Commission's Block Exemption Regulation for liner shipping consortia, OJ L 256/31.

(Deutschland). Cemex Central Europe GmbH is part of the Cemex Group ("Cemex"), headquartered in Mexico. Holcim Beteiligungs GmbH (Deutschland) is a company controlled by the Swiss company Holcim Ltd., the ultimate parent of Holcim Group ("Holcim"). Cemex and Holcim are global suppliers of cement, aggregates, ready-mix concrete, and related building materials.

During the investigation, on January 3, 2014, the Commission rejected the German Competition Authority's request for the case to be referred to it pursuant to Article 9 of the Merger Regulation, deciding that the transaction had effects also outside Germany.[46] The transaction related to another concentration by which Cemex acquired control of Holcim's business in cement, aggregates, and ready-mix concrete in the Czech Republic and Spain. The acquisition of Holcim's assets in the Czech Republic was unconditionally cleared by the Czech competition authority in Phase II proceedings on March 12, 2014.[47] The acquisition of Holcim's Spanish business was unconditionally cleared by the Commission in Phase II on September 9, 2014, following a referral from Spain under Article 22 of the Merger Regulation.[48]

The Commission examined the competitive effects of the transaction in grey cement and cementitious materials.

Grey cement. In line with its previous decisional practice, the Commission found that the manufacture and sale of grey cement across all grey cement grades formed a single product market. Because of a lack of overlap between Cemex West's and Holcim's activities in bagged cement and the relatively small size of Holcim's bagged cement sales in Belgium, France, and Germany, the Commission did not reach a definitive conclusion whether bulk and bagged grey cement formed part of a broader grey cement market. In line with the Commission's past decisions, the relevant geographic market was limited to circular areas with a radius of 150 to 250 km around each party's grey cement plant in Belgium, North-Eastern France, and Germany.

With respect to unilateral effects, the Commission found that the transaction would not raise serious competition concerns because: (i) the merged entity would continue to be subject to sufficient pressure from a number of competitors in the various geographic markets around Cemex West's and Holcim's grey cement plants; and (ii) Cemex West and Holcim did not impose significant competitive constraints on one another in the relevant markets pre-transaction.

With respect coordinated effects, the Commission took into account past coordination in the industry (in particular, the cartel that existed in Germany from 1991 to 2002) and concluded that the grey cement market exhibited certain features suggesting that certain coordination already existed, mainly in the form of customer allocation. The Commission determined that grey cement markets are prone to coordination due to the homogeneity of the product, inelasticity of demand, stable customer base, multi-market presence of a limited number of international competitors, stable market shares, relative symmetry of cost structures, as well as a high degree of transparency of market shares, cost structures, capacity, output, and prices. Notwithstanding these factors and certain indications of pre-existing coordination (such as relatively high gross margins and competitors' expectations of targeted reactions to aggressive competition), the Commission concluded that the proposed concentration would be unlikely to create or strengthen any potential coordination and a future risk of coordination would not be merger-specific.

Cementitious materials. The relevant cementitious materials, derived from blast furnace slag (a by-product of steel production), included: (i) granulated blast furnace slag ("GBS"); and (ii) ground granulated blast furnace slag ("GGBS"), which is obtained by grounding GBS separately, without other cement constituents. GBS is used as

[46] *Holcim/CEMEX West* (Case COMP/M.7009), Commission decision of January 3, 2014.

[47] *CEMEX Czech Republic/Holcim (Česko)* (Case S541/13), Czech competition authority decision of March 12, 2014.

[48] *CEMEX/Holcim Assets* (Case COMP/M.7054), Commission decision of September 9, 2014.

hydraulic binder in the production of cement, concrete, mortar, and grout. GGBS is blended with ground clinker and other cement constituents to produce blended cement. In some Member States, such as the United Kingdom, GGBS is also used as a substitute of cement in the production of concrete. The Commission left open whether GBS and GGBS constituted distinct relevant product markets. The relevant geographic market was limited to circular areas with a radius of 250 km around each GBS sourcing site of the parties, but ultimately left the exact geographic market definition open because the proposed transaction would be unlikely to distort effective competition.

The Commission concluded that no competitive concerns would arise in GBS and GGBS or in a broader market of cementitious materials because: (i) the merged entity would continue to face competition from steel producers that sell GBS directly; (ii) the parties use a large amount of their GBS captively for their own cement production; (iii) Cemex West and Holcim have significantly reduced their GBS sourcing volumes leading to increasing supply by steel producers; and (iv) Germany has an oversupply of GBS.

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

STATE AID

ECJ Judgments

***France v. Corsica Ferries France* (Case C-533/12 P)**

On September 4, 2014, the Court of Justice published its judgment upholding a decision of the General Court that had partially annulled a 2008 decision of the Commission that had approved various aid measures to the Société Nationale Maritime Corse-Méditerranée SA ("SNCM").

SNCM is a shipping company that provides regular services to Corsica, North Africa, and Sardinia from mainland France. In 2006, privatization measures by the French State included: (i) the sale of SNCM at a negative price;[49] (ii) a cash injection; (iii) contributions for redundancy payments that went beyond SNCM's legal and contractual obligations; and (iv) compensation for public service obligations. In 2008, the Commission decided that these measures did not constitute state aid.[50]

Corsica Ferries France SA, a competitor of SNCM that provides regular ferry services from Corsica to mainland France, appealed the Commission's decision to the General Court. The General Court found that the Commission had erred in law and partially annulled the Commission's decision insofar as it pertained to the aid measures mentioned above.[51] SNCM and France appealed to the Court of Justice. The Court of Justice rejected their appeals and upheld the General Court's decision.

First, the Court of Justice found that the General Court had correctly fully assessed the objective factors that the Commission considered as part of its decision-making process. Rejecting SNCM's arguments, the Court of Justice found that the General Court had neither called into question the work of the independent expert (on which the Commission's decision was based) nor disregarded the Commission's margin of discretion.

Next, the Court of Justice confirmed the General Court's approach to the market economy private investor test (the "private investor" test),[52] which the General Court had found the Commission to have performed incorrectly. The Court of Justice explained that it must be possible for the EU Courts to review the long-term economic rationale of

[49] Capital contribution of €142.5 million and payment of the costs of mutual benefit societies in the amount of €15.5 million.

[50] Commission Decision 2009/611/EC of July 8, 2008 (State Aid C 58/2002 (ex N 118/2002)), OJ 2009 L 225/180.

[51] *Corsica Ferries France v. Commission* (Case T-565/08) EU:T:2012:415.

[52] The private investor test involves an evaluation of whether a hypothetical private investor, in similar circumstances, would have acted in the same manner. The Commission had thus considered whether France had acted as a private investor would have in partially disposing of SNCM for a negative price, and whether additional redundancy payments had rightly been included in the minimum cost of liquidation because they were aimed at protecting the brand image of France as a global investor in the market economy.

the conduct at issue, and agreed with the finding of the General Court that the Commission had not defined the French State's economic activities sufficiently to permit such a review.

As a matter of principle, the Court of Justice accepted that a state's "brand image" could factor into the private investor analysis. The Court of Justice explained that the protection of the brand image of a Member State as a global investor in the market economy could, under specific circumstances and with a particularly cogent reason, support the long-term economic rationale for public undertakings to assume additional costs. However, the Court of Justice underlined that, to rely on such a justification, a Member State must support this claim with more than summary references.

For cash injections, the private investor test evaluates whether the capital placed at the undertaking's disposal by the State has been made available under investment conditions comparable to those granted by private investors. In the context of the sale of SNCM to Butler Capital Partners ("BCP") and Veoila Transport ("VT"), France agreed to inject €8.75 million into SNCM, and BCP and VT agreed to inject €26.25 million. The privatization agreement also included a clause allowing the cancellation of the sale of SNCM, to the benefit of BCP and VT. The Court of Justice agreed with the General Court that the Commission had failed to take into account all the relevant evidence when assessing the comparable nature of the investment conditions between those granted to France and those granted to BCP and VT: the Court of Justice confirmed that the Commission should have taken into account the economic impact of the sale cancellation clause. The Court of Justice held that, because the sale cancellation clause altered the risk profile of the purchasers, it had financial value and called into question the comparable nature of the investment conditions.

***Commerz Nederland NV v. Havenbedrijf Rotterdam NV* (Case C-242/13)**

On September 17, 2014, the Court of Justice issued a preliminary ruling concerning questions of the Dutch Supreme Court regarding the imputability to the State of guarantees provided by a public undertaking within the meaning of the Article 107(1) TFEU, where (1) the sole director of the company providing the guarantees acted improperly and deliberately concealed the provision of the guarantees, and (2) the public authority would have opposed the granting of the guarantees had it been informed.

The sole director of the port authority of Rotterdam's municipality provided guarantees in favor of Commerz Nederland in connection with credit lines provided by the latter to a third party. Hence, the port authority acted as a guarantor for the discharge of the third party's liabilities to Commerz Nederland. Following the cancellation of the credit lines by Commerz Nederland and failure of the third party to repay the outstanding amounts, Commerz Nederland requested that the port authority honor the guarantees. The port authority refused and Commerz Nederland sued the port authority in a Dutch court. The Dutch court dismissed the lawsuit, concluding that the guarantees constituted state aid within the meaning of Article 107(1) TFEU, which, in turn, required a notification to the Commission under Article 108(3) TFEU. In the absence of such a notification, the guarantees were rendered void. Commerz Nederland appealed to the Dutch Supreme Court, which stayed the proceedings and referred to the Court of Justice questions concerning the imputability to the State of guarantees provided by a public undertaking under the specific circumstances of the case at hand.

The Court of Justice reiterated that the imputability to the State cannot be inferred from the mere fact that the guarantees were provided by a public undertaking controlled by the State because "actual exercise of that control in a particular case cannot be automatically presumed."[53] Instead, it is necessary to examine whether the public authorities must be regarded as having been involved in the adoption of those measures. However, it is not necessary to demonstrate that the public authorities

[53] *Commerz Nederland NV v. Havenbedrijf Rotterdam NV* (Case C-242/13) EU:C:2014:2224, para. 31.

"specifically incited the public undertaking to take the aid measures concerned."[54] Imputability "may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken."[55]

According to the Court of Justice, the organizational links between the port authority and the municipality in Rotterdam generally tend to either affirmatively suggest that the public authorities were involved in the provision of the guarantees or, at the very least, to render it unlikely that they were not involved. Moreover, an improper act of the sole director of the public undertaking does not, in itself, exclude the involvement of the public authorities. However, the Court of Justice considered all of the following circumstances pertinent for the determination of imputability to the State of the guarantees in question: (i) the sole director of the company providing the guarantees acted beyond his authority and thus improperly; (ii) the sole director deliberately kept the provision of those guarantees secret and disregarded the undertaking's statutes requiring the consent of the supervisory board; and (iii) the public authority would have opposed the provision of guarantees had it been informed.

Importantly, the Court of Justice concluded that circumstances (i) to (iii) considered together could, in themselves, exclude such imputability to the public authority only if it can be inferred that the guarantees were provided without the involvement of that same public authority, which is ultimately for the national court to determine.

General Court Judgments

***Telefónica de España and Telefónica Móviles España v. Commission* (Case T-151/11)**

On July 11, 2014, the General Court dismissed an appeal by Telefónica, a Spanish telecommunications company, against a Commission decision of July 20, 2010,[56] which concluded that a change in the financing system of the Spanish public broadcaster (RTVE) was compatible with the internal market pursuant to Article 106(2) TFEU.

The underlying dispute concerned a Spanish law of 2009 that regulated the funding of RTVE.[57] Prior to the enactment of that law, RTVE financed its activities chiefly through advertising income and a subsidy from the Spanish government. The 2009 law banned RTVE from advertising and established three new taxes to bridge the funding gap caused by the advertising ban. These new taxes would be levied on telecommunications operators, such as Telefónica, and on pay TV and free-to-air broadcasters.

The Commission accepted that this new financing system gave rise to state aid in favor of RTVE, but concluded that such state aid was compatible with the internal market pursuant to Article 106(2) TFEU. According to the Commission, the three fiscal measures enacted to finance the state aid granted to RTVE did not constitute a part of such state aid, *i.e.*, they could be dissociated from the aid itself. Consequently the fact that these fiscal measures may be incompatible with Directive 2002/20/EC[58] would not affect the compatibility of the state aid itself with the internal market.

Telefónica appealed the Commission's decision, arguing that the fiscal measures did constitute a part of the state aid granted in favor of RTVE. This would mean that, in examining the compatibility of such state aid with the internal market, the Commission should have also analyzed whether the three new taxes established to finance RTVE were compatible with EU law, in particular, with Directive 2002/20/EC. If they were not, the state aid

[54] *Id*., para. 32.

[55] *Id*.

[56] Commission Decision C (2010) 4925 of July 20, 2010 (State Aid C 38/2009 (ex NN 58/2009)), OJ 2011 L 1/9.

[57] *Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española*.

[58] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services.

could not be considered compatible with the internal market.

The General Court rejected this argument, stating that, for a fiscal measure created to finance a given state aid measure to be deemed a part of such state aid measure: (i) there must be a binding rule of national law requiring that the proceeds obtained through the fiscal measure be used to finance the state aid measure; and (ii) the proceeds obtained through the fiscal measure must directly affect the amount of the aid.

The General Court concluded that the second condition was not met in the case of the fiscal measures enacted to finance RTVE because the amounts obtained through the fiscal measures were not directly linked to the amount of aid granted to RTVE. First, the amount of the state aid for RTVE is established taking into account the net costs incurred by RTVE in fulfilling its public service obligation and therefore does not depend on the amounts obtained through the fiscal measures. Second, if the revenue of RTVE exceeds the net costs incurred in fulfilling its public service obligation, the difference is reassigned to other purposes. Third, there is an absolute yearly revenue limit for RTVE. Fourth, if RTVE's revenue does not cover the costs incurred in carrying out its public service obligation, the Spanish authorities make up the difference.

In light of the above, the General Court concluded that the tax measures were not a part of the state aid granted to RTVE because there was no direct link between the new tax measures and the amount of aid granted to RTVE. Thus, the fact that these fiscal measures may be incompatible with Directive 2002/20/EC would not affect the compatibility of the state aid itself with the internal market.

Westfälisch-Lippischer Sparkassen – und giroverband v. Commission (Case T-457/09)

On July 17, 2014, the General Court dismissed an appeal against a Commission decision that approved restructuring aid to the German bank WestLB in the form of a guarantee in the amount of €5 billion provided by its public shareholders, *i.e.*, the German regional authorities.[59]

The Commission assessed the restructuring aid in light of the Guidelines on state aid for rescuing and restructuring firms in difficulty[60] and subjected the authorization of the aid to a restructuring plan, which required the sale of some of the bank's shareholdings. One of WestLB's shareholders, Westfälisch-lippischer sparkassen und Giroverband ("Westfälisch"), appealed.

Westfälisch argued, *inter alia*, that the Commission's decision breached Article 345 TFEU, according to which "[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership",[61] because it subjected the authorization of the state aid measure to the obligation to sell certain shareholdings, thereby depriving the shareholders of the bank of their right to property. The General Court dismissed the plea, noting that Article 345 TFEU does not limit the Commission's powers under Article 107 TFEU and that, in any case, the appellant had failed to prove that the bank could benefit from the exemption contained in Article 106(2) TFEU.[62]

The General Court also rejected Westfälisch's argument that the contested decision breached the principle of equal treatment because it conditioned its authorization of the state aid on the sale of some of the bank's shareholdings. By contrast, other recent Commission decisions, such as the *Commerzbank* decision of May 7, 2009,[63] did not

[59] Commission Decision C (2009) 3900 of May 12, 2009 (State Aid C 43/2008 (ex N 390/2008)), OJ 2009 L 345/1.

[60] Communication from the Commission on Community guidelines on state aid for rescuing and restructuring firms in difficulty, OJ 2004 C 244/2.

[61] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, Article 345.

[62] According to the General Court, to limit the Commission's powers under Article 107 TFEU, Westfälisch should have demonstrated that it could benefit from the exemption contained in Article 106(2) TFEU, i.e., that the exercise of the Commission's powers would obstruct the provision by Westfälisch of a service of general economic interest.

[63] Commission Decision C (2009) 3708 of May 7, 2009 (State Aid N 244/2009), OJ 2009 C 147.

require changes in the ownership of the beneficiaries of the aid. Westfälisch argued that the contested decision was the only decision adopted in the context of the financial crisis that had subjected the authorization of a state aid measure to such a condition.

The General Court recalled that the effects of restructuring aid have to be assessed on a case by case basis, and determined that the appellant had not demonstrated that the situation of WestLB was comparable to that of the beneficiaries of the state aid measures assessed by the Commission in other cases. The General Court added that the Commission is free to set conditions for the compatibility of a state aid measure which are stricter than those set in previous cases when doing so is necessary in light of the evolution of the internal market and of the objective of undistorted competition.

Hellenic Republic v. Commission (Case T-425/11)

On September 11, 2014, the General Court annulled the Commission's 2011 decision that concluded that Greece had granted unlawful state aid to state-owned Greek casinos.

Pursuant to Greek tax law, private casinos were required to charge an entrance fee of approximately €15, while state-owned casinos were only required to charge approximately €6. All casinos were subject to a legal obligation to remit 80% of the admission ticket's face value to the Greek state. While both types of casinos could grant their customers a free entrance, they would still have to pay 80% of the ticket's regulated price to the Greek state.

Following a complaint from a Greek private casino, the Commission investigated the matter and concluded that the Greek system constituted fiscal discrimination in favor of state-owned casinos through the setting of two unequal regulated prices for admission tickets, which gave the beneficiary casinos an undue competitive advantage.[64] As a result, Greece was required to recover the incompatible aid granted. Greece brought an action before the General Court seeking the annulment of the Commission decision.

The General Court's assessment focused on determining whether the Greek tax system conferred a selective advantage within the meaning of Article 107(1) TFEU. For the reasons set out below, the General Court held that the Commission had failed to establish the existence of such a selective advantage.

Although state-owned casinos charging €6 are required to pay the Greek state €4.80, thus two and half times less per ticket than the €12 paid by private casinos that charge €15, both types of casinos are required to remit the same proportion (80%) of the ticket's price to the Greek state. Accordingly, the mere fact that state-owned casinos pay a lower amount is not enough to establish the existence of an advantage. The General Court also rejected the Commission's argument that the free entrance policy reinforced the advantageous effect because no advantage was established in the first place.

As a result, the General Court concluded that the Commission had not established the existence of state aid within the meaning of Article 107(1) TFEU and annulled Commission decision in its entirety.

Commission Developments

Commission Publishes New Rescue and Restructuring Aid Guidelines

On July 31, 2014, the Commission published new Guidelines on Rescue and Restructuring Aid (the "R&R Aid Guidelines"), to replace and expand on those published in 2004.[65] The Guidelines' principal reforms concern: (i) the definition of "undertaking in difficulty"; (ii) better targeting of rescue and restructuring aid; (iii) the introduction of temporary restructuring support for small and medium enterprises ("SMEs"); and (iv) burden-sharing with company investors. The R&R Aid Guidelines do not apply

[64] Commission Decision C (2011) 3504 of May 24, 2011 (State Aid C 16/2010 (ex NN 22/2010, ex CP 318/09)), OJ 2011 L 285/25.

[65] Communication from the Commission on guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249/1.

to companies in the coal or steel sectors, or those covered by the specific provisions for financial services.

Undertaking in Difficulty

R&R aid may only be granted to companies that are "in difficulty."[66] The new R&R Aid Guidelines expand this definition to add more objective elements, including the proposed recipient company's credit rating and debt-to-equity ratio.

Better Targeting of R&R Aid

The R&R Aid Guidelines include 'filters' which aim to confirm that the aid is in the common interest and that the aid aims to prevent social hardship or address a market failure, including:

- Particularly high levels of unemployment in the region;
- Disruption of an important service which is hard to replicate;
- Exit of an undertaking with an important systemic role in a region or sector; and
- Irremediable loss of important technical knowledge or expertise.

In addition, the R&R Aid Guidelines underline that the R&R aid must also be capable of making a difference to the hardship or market failure; Member States must provide comparisons with credible alternative scenarios. Such assessments should consider whether the firm's viability could be ensured through means other than the R&R aid, *e.g.*, through debt reorganisation, asset disposal, raising private capital, or breaking up the undertaking.

Temporary Restructuring Support

To supplement the existing categories of short-term rescue aid and longer-term restructuring aid, the R&R Aid Guidelines introduce the concept of temporary restructuring support ("TRS"). TRS provides longer-term liquidity assistance to SMEs or smaller state-owned undertakings, and is available for up to 18 months.

Burden Sharing

Drawing on burden-sharing concepts developed during the financial crisis, the R&R Aid Guidelines require that investors in firms receiving R&R aid bear a fair share of the costs and risks related to the restructuring. The R&R Aid Guidelines provide that the granting of R&R aid should be conditional on existing investors (and, where necessary, subordinated creditors) fully accounting for losses accumulated by the firm, except where such a requirement would lead to disproportionate results. The R&R Aid Guidelines also state that R&R aid should be granted in a manner that gives the State a reasonable share of future gains in the event of a successful restructuring.

The R&R Aid Guidelines apply to aid schemes notified to the Commission from August 1, 2014. Member States have until February 1, 2015 to bring existing aid schemes into line with the new Guidelines.

POLICY AND PROCEDURE

General Court Judgments

MasterCard v. Commission (T-516/11)

On September 9, 2014, the General Court annulled the Commission decision that refused to grant MasterCard access to documents drawn up by a third party relating to a study of the costs and benefits to merchants of accepting different payment methods.[67]

In December 2010, MasterCard requested from the Commission, under Regulation 1049/2001,[68] which sets out the modalities for a right of public access to documents of the EU institutions, access to various documents supplied by EIM Business and Policy Research ("EIM") in advance to the final report on a study of the costs and benefits to merchants of accepting different payment methods,

[66] Section 2.2 of the R&R Aid Guidelines sets out when an undertaking will be considered "in difficulty."

[67] *MasterCard v. Commission* (T-516/11) EU:T:2014:759.

[68] Regulation (EC) No 1049/2001 of May 30, 2001, regarding public access to European Parliament, Council and Commission documents.

submitted in response to the Commission's invitation to tender. This study was being conducted in the context of the Commission's work on current and possible future competition enforcement relating to multilateral interchange fees.[69] The Commission refused access, explaining that it was entitled to do so under Regulation 1049/2001, because disclosure would undermine both its decision-making process[70] and the protection of EIM's commercial interests.[71]

The General Court clarified that these exceptions could apply only when access to the document "could specifically and actually undermine the protected interest,"[72] and that refusals must be based on evidence of a risk that is reasonably foreseeable, not purely hypothetical.

The General Court found that it was not clear either from the Commission's call for tender for the study or from the contested decision that the EIM documents formed part of a file relating to ongoing antitrust proceedings. Their disclosure therefore could not undermine the Commission's decision-making process. Similarly, the preliminary nature of the documents, and the fact that they were still being commented on and discussed by the Commission, does not establish that the decision-making process is seriously undermined.

The Commission also argued that the disclosure of the requested documents may give rise to comments from MasterCard. These comments may delay, disrupt and influence the Commission's work and thus amount to an external pressure on the decision-making process in this case. Although the General Court confirmed that targeted external pressure may constitute a legitimate ground for restricting access to documents, it underlined that the institution must provide proof that there is a "reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure."[73] The Commission, however, referred to the risk of an attempt to influence the decision-making process "only in a vague and general manner."[74] Moreover, the Commission organized the consultation with the expectation of observations from stakeholders and merchants, which would also have an impact on the Commission's work.

Finally, the General Court agreed that the commercial interests of EIM could include the protection against detriment to its reputation (through disclosure of incomplete work product) or against disclosure of its know-how in relation to study methods and processes. However, it found that the Commission had not provided evidence that such risks were reasonably foreseeable, and the interim nature of documents alone was insufficient proof.

Commission Developments

Commission Opinion: Disclosure of Documents in Follow-on Damages Litigation

On May 5, 2014, the Commission gave an opinion to the English High Court, under Article 15(1) of Regulation 1/2003,[75] about the disclosure of documents created in the framework of a Commission's investigation.[76]

On December 19, 2007, the Commission adopted a decision finding that MasterCard's EEA MIF breached

[69] *See* Horizontal Agreements Section.

[70] Regulation 1049/2001, Article 4(3). According to this article "*access to a document, (…) received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*"

[71] Regulation 1049/2001, Article 4(2). According to this article, access to a document can be refused "*where it would undermine the protection of the commercial interests of a natural or legal person (…), court proceedings and legal advice, [or] the purpose of inspections, investigations, and audits, unless there is an overriding public interest in disclosure*."

[72] *MasterCard v. Commission* (T-516/11) EU:T:2014:759.

[73] *Id*, para. 71.

[74] *Id*, para. 72.

[75] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition law laid down in Article 81 and 82 of the Treaty, OJ 2003 L1/1.

[76] *Interchange fee litigation before the Judiciary of England and Wales: Wm. Morrison Supermarkets plc and Others v. MasterCard Incorporated and Others (Claim Nos. 2012/699; 2012/1305-1311)*, C(2014) 3066 final, Commission Opinion of May 5, 2014,

Article 101 TFEU.[77] In May 2012, Wm Morrison Supermarkets plc ("WMS") brought a follow-on damages claim against MasterCard. In the framework of these proceedings, the English High Court questioned whether documents created in the course of the Commission's investigation could be disclosed to WMS, including the confidential version of the Commission decision, materials provided in the context of the notification of an agreement under the notification regime in force prior to Regulation 1/2003, or any material voluntary provided to the Commission (such as replies to a statement of objections). The English High Court asked for the Commission's view on this issue pursuant to Article 15(1) of Regulation 1/2003.[78]

Article 15(1) of Regulation 1/2003 provides that, in proceedings for the application of Article 101 or 102 TFEU, national courts may ask the Commission to give its opinion on questions concerning the application of the European competition rules. Such opinions are non-binding upon the national courts.

The Commission's opinion first summarizes the case law relating to the disclosure of documents created in the framework of a Commission's investigation. In *Donau Chemie*,[79] the Court of Justice stated that national courts must weigh the interests justifying the disclosure of information against those justifying the protection of that information on a case-by-case basis. As part of this process, national courts must consider both the interest of the claimant in obtaining access to the relevant documents and the actual harmful consequences to the legitimate interest of other parties or public interests (such as the need to preserve the effectiveness of anti-infringement policies) that may result from such access.

The Commission concluded that disclosure of materials provided in the context of the notification of an agreement under the notification regime in force prior to Regulation 1/2003 would not negatively impact the effectiveness of competition policy because the notification regime is no longer in force. Disclosure of replies to a Statement of Objection would not be problematic either. Specifically, it would not deter undertakings from cooperating with the competition authorities, because it is in their own interest to defend themselves comprehensively.

When ordering the disclosure of such documents, the national court should, however, provide appropriate protection of business secrets or other confidential information, including for information provided by third parties.

Finally, the Commission had no objection to the disclosure of the confidential version of the decision, provided that adequate protection is given to business secrets and other confidential information, for example through a confidentiality ring or further redactions.

Decision of the Ombudsman on Access to the Commission's file in an antitrust investigation

On July 22, 2014, the European Ombudsman dismissed a complaint about a Commission's refusal to grant access to its file relating to the investigation leading the elevators and escalators cartel decision.[80]

On February 21, 2007, the Commission fined several companies for a breach of Article 101 TFEU in the elevators and escalators markets.[81] On August 5, 2011, the complainant made a request, under Regulation 1049/2001,[82] for access to the Commission's file relating to

[77] *MasterCard* (COMP/34.579), *EuroCommerce* (COMP/36.518), and *Commercial Cards* (COMP/38.580), Commission Decisions of December 19, 2007.

[78] Article 15(1) of Regulation 1/2003 provides that, in proceedings for the application of Article 101 or 102 TFEU, national courts may ask the Commission to give its opinion on questions concerning the application of the European competition rules. Under Article 15(1), such opinions are non-binding on the national courts.

[79] *Donau Chemie* (Case C-536/11) EU:C:2013:366.

[80] Complaint No. 2343/2011/KM, Ombudsman decision of July 22, 2014.

[81] *Elevators and Escalators* (Case COMP/E-1/38.8233), Commission decision of February 21, 2007.

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

the investigation. The Commission refused to grant access on the basis that these documents were covered by the exceptions to disclosure in Article 4(2) of Regulation 1049/2001.[83] According to the Commission, companies have a legitimate expectation that the information they provide in the framework of a cartel investigation will remain confidential; the disclosure of this information would undermine mutual trust and thus competition law enforcement. The Commission also found that there was no overriding public interest in disclosure, because the private enforcement action served only private interests.

The Ombudsman first recalled the case law relating to access to the Commission's file in competition law proceedings. In *Netherlands v. Commission*,[84] which concerned the Commission's refusal to grant access to the confidential version of a cartel decision, the General Court noted that each of Regulation 1049/2001 and Regulation 1/2003 should be applied in a way that is compatible with the other, enabling a coherent application of both. In *Technische Glaswerke Ilmmenau*[85] and *Odile Jacob*,[86] which concerned access to documents in state aid and merger control proceedings respectively, the Court of Justice concluded that there is a general presumption that the disclosure of documents gathered by the Commission in the context of competition law proceedings jeopardizes the effectiveness of inspections, investigations, and audits of the Commission, as well as the commercial interests of the undertaking involved in such proceedings.

Based on this case law, the Ombudsman took the view that the Commission did not commit any instance of maladministration by relying on a general presumption that disclosure would undermine the protection of natural or legal persons' commercial interests or the purpose of its inspections and investigations.

The Ombudsman concluded that the Commission was correct in holding that the complainant's interest, based on the possibility of obtaining compensation, was not an overriding public interest but merely a private one. The Ombudsman, however, noted that, should the complainant decide to bring a claim for damages before a national court, he could request that the national court ask the Commission to disclose any evidence and other information concerning the relevant cartel. For the sake of completeness, the Ombudsman also noted that the above-mentioned case law is to be codified in the directive on antitrust damages.[87] The draft of this directive provides that, to ensure the effectiveness of the tools used by competition authorities, documents produced and statements made under a leniency program or a settlement procedure will be exempted from disclosure to third parties.

The Commission adopts a revised De Minimis Notice

On June 25, 2014, the Commission adopted a revised notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (the "Revised Notice").[88]

The Revised Notice sets out rules for assessing when minor agreements between companies below certain market share thresholds are not caught by the general prohibition of anticompetitive practices under Article 101 TFEU. In particular, it provides "safe harbors": for agreements between competitors whose combined market shares do not exceed 10% and for agreements between non-competitors whose individual market shares do not

[83] *See supra* n.71 for a discussion of Article 4.(2).

[84] *Netherlands v. Commission* (Case T-380/08) EU:T:2013:480.

[85] *Commission v. Technische Glaswerke Ilmenau GmbH* (Case C-139/07) EU:C:2010:376, Rec. I-5885.

[86] *Commission v. Éditions Odile Jacob SAS* (Case C-404/10) EU:C:2010:376.

[87] Commission's proposal for a directive approved on April 17, 2014 by the European Parliament *see* Commission Press Release IP/14/455, Antitrust: Commission welcomes Parliament vote to facilitate damages claims by victims of antitrust violations, available at http://europa.eu/rapid/press-release_IP-14-455_en.htm.

[88] Communication from the Commission – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, OJ 2014 C291/1.

exceed 15%. These thresholds are the same as those contained in the previous notice.[89]

The main changes result from the General Court's judgment in *Expedia*[90] where the Court of Justice concluded that national competition authorities can apply Article 101 to an agreement between undertakings that may affect trade between Member States but does not reach the thresholds specified in the Revised Notice, provided that the agreements constitutes an appreciable restriction of competition within the meaning of Article 101 TFEU. The Court of Justice held that an agreement that has an anti-competitive object (so-called restrictions "by object") must be deemed to constitute an appreciable restriction of competition.

The Revised Notice clarifies that any restriction by objects falls outside of its scope and therefore cannot benefit from the safe harbor. This departs slightly from the approach taken in the previous notice, which lists hardcore restrictions to which the Revised Notice would not apply.

Agreements containing restrictions by object may only fall outside the scope of Article 101 TFEU if they do not appreciably affect trade between Member States. For an explanation of "effect on trade," the Revised Notice refers to the Commission's new Notice on this issue,[91] which states that agreements between parties with an aggregate market share equal to or below 5% and aggregate annual turnover equal or below €40 million are excluded from the scope of EU competition law because they are considered to have no effect on trade.

[89] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, OJ 2001 C368/13.

[90] *Expedia Inc. v. Autorité de la concurrence and others* (C-226/11) EU:C:2012:795.

[91] Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ 2004 C101/81.

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099