FINING POLICY

ECJ Judgments

***InnoLux Corp. v. Commission* (Case C-231/14P)**

On July 9, 2015, the Court of Justice dismissed an appeal by InnoLux Corp. ("InnoLux") and upheld the €288 million fine imposed on InnoLux for participating in a worldwide cartel for liquid crystal displays ("LCD") panels. The Court of Justice confirmed that the Commission had correctly included the value of sales of end products, which constitute a separate market from the market concerned by the cartel, when calculating the fine.

In 2010, the Commission fined six LCD panel manufacturers, including InnoLux, a total of €649 million for restricting competition by object by coordinating prices and exchanging information on future production planning, capacity utilization, and other commercial conditions concerning LCD panels between October 2001 and February 2006.[1] LCD panels are the main part of flat screens used in various consumer end products, including computers, notebooks, and television sets.

On appeal in 2014, the General Court largely upheld the Commission's decision, but held that the Commission had miscalculated the fine against InnoLux. The General Court noted that InnoLux had provided incorrect data for the value of relevant sales necessary to determine the fine and reduced the fine by 4%, from €300 million to €288 million,[2] by excluding the proportion of the fine based on the incorrect data. InnoLux appealed to the Court of Justice.

InnoLux argued that the General Court had erred in law by including sales which do not relate to the infringement in its calculations. InnoLux argued that the fine should have been determined based solely on the revenue derived from sales of the cartelized product within the EEA.

The Court of Justice noted that the Commission's fining guidelines provide that a fine should be based on the annual turnover generated from the sale of products directly or indirectly affected by the infringement in the relevant geographic area within the EEA. In addition, it is settled case law that the amount taken into account for the purpose of determining the fine should reflect the real economic situation of the defendant during the period in which the infringement was committed and the economic significance of the infringement.

The Court of Justice noted the findings of the General Court that InnoLux employed three sales avenues for the cartelized products: (i) direct EEA sales (sales of cartelized LCD panels to independent third parties within the EEA); (ii) direct EEA sales of end products (sales of cartelized LCD panels incorporated by a vertically integrated company into end products); and (iii) indirect sales (sales of cartelized EEA panels to independent third parties outside of the EEA for resale within the EEA). For the purpose of setting the fine, the General Court included sales from both direct sales avenues.

The Court of Justice held that the General Court had not erred in law by reflecting the direct EEA sales of end products in the fine. While the market for end products is separate from that of LCD panels, the markets are closely related. The vertically integrated companies, which integrated the cartelized products into end products for sale within the EEA, can pass on the price increase of the LCD panels into the price of the end product leading to higher revenue, or benefit from lower production costs in relation to competitors which obtains the LCD panels for the cartelized price. The Court of Justice concluded that these sales must be taken into account in the fine calculation to accurately reflect the economic significance of the infringement and the relative weight of InnoLux in the cartel.

[1] *Liquid Crystal Displays* (Case COMP/39.309), Commission decision of December 8, 2010.

[2] *InnoLux Corp., formerly Chimei InnoLux Corp v. Commission* (Case T-91/11) EU:T:2014:92.

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InnoLux also contested the territorial jurisdiction of the Commission, arguing that the Commission did not have jurisdiction to impose a fine based on non-EEA sales of LCD panels.

The Court of Justice disagreed, holding that the Commission has jurisdiction to apply Article 101 TFEU in this matter based on the fact that InnoLux implemented the worldwide cartel by selling LCD panels directly to independent parties in the EEA. The Court of Justice noted that the jurisdictional question is separate from the issue of what sales should be taken into account for the purposes of determining the fine. The Commission thus may reflect in the fine sales of the cartelized products made outside the EEA for resale incorporated into end products into the EEA.

Having also rejected a breach of the *non bis in idem* principle, which provides that no legal action can be instituted twice for the same cause of action, and InnoLux's other ground of appeal alleging a breach of the principle of non-discrimination, the Court of Justice dismissed InnoLux's appeal in its entirety.

ECJ Advocate General Opinions

***Eturas UAB and Others v. Lietuvos Respublikos Konkurencijos Taryba* (Case C-74/14), Opinion of AG Szpunar**

On July 16, 2015, Advocate General ("AG") Szpunar gave his opinion in a preliminary ruling from a Lithuanian court on whether restricting discounts through a travel agent's common online booking system constituted a concerted practice under Article 101 of the TFEU.[3]

The travel agencies participated in a common booking system, in which the system's administrator, Eturas, posted a notice informing them that the discounts applicable to their clients would be restricted to a uniform maximum rate. The notice was followed by a technical restriction on the choice of a discount rate.

The referring court asked whether it could be presumed that (i) the travel agencies were aware of the notice, and (ii) they tacitly approved the price discount restriction by not opposing it, thereby engaging in a concerted practice under Article 101 TFEU.

AG Szpunar first examined the legal requirements for a finding of tacit coordination He emphasized that tacit approval may be inferred from the context of the communication. Where, as here, the sender of the information is not a competitor, but a facilitator, the interaction may give rise to collusion between competitors only if the individual competitors (*i.e.*, the travel agencies) are deemed to understand that the information transmitted by the facilitator came from a competitor or that it was at least communicated to a competitor, *i.e.*, that the facilitator acts as a conduit for the information, and is thus the center of a hub-and-spoke type arrangement.

AG Szpunar suggested that the referring court should assess whether it is highly probable, taking account of the characteristics of the booking system and the duration of the infringement, that a reasonably attentive and prudent economic operator would have become aware of the system notice and of the related restriction. In such case, the national court might also conclude that the high probability of that inference justifies applying a rebuttable presumption that the travel agencies concerned were aware of the illicit initiative.

AG Szpunar also noted that the mode of communication may be significant in assessing the context of the interaction. In this case, the travel agencies that became aware of the system notice must have appreciated that, absent their prompt reaction, the initiative would be automatically and immediately implemented with respect to all users of the system.

[3] *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba* (Case C-74/14) EU:C:2015:493.

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AG Szpunar concluded that undertakings using a common booking system that became aware of the illicit initiative, as announced in the system notice, but continued to use the system without publicly distancing themselves from the illicit initiative, must be considered to have subscribed to that initiative and therefore engaged in concerted action.

AG Szpunar pointed out that, even if the system operator acted on its own initiative, this would not exclude the finding of a concerted practice between the travel agencies, as Eturas's actions would have been motivated by the interests of the travel agencies deemed to have tacitly approved the initiative.

AG Szpunar also found that, to distance themselves from the concerted practices, travel agencies should have not only shown their opposition, but also adopted an independent course of conduct on the market.

Finally, as regards the burden of proof, AG Szpunar clarified that national competition authorities or courts can infer that travel agencies that became aware of the notice and continued to use the Eturas system tacitly subscribed to the illicit initiative. It is for the travel agencies to present evidence that they showed their opposition to that initiative or to prove that the concertation did not have the potential to affect their market conduct. By drawing such an inference, the administrative authority or the national court does not reverse the burden of proof, contrary to the rights of the defense, or set aside the presumption of innocence.

General Court Judgments

***SLM and Ori Martin v. Commission* (Joined cases T-389/10 and T-419/10)**

On July 15, 2015, the General Court partially upheld an appeal by Siderurgica Latina Martin SpA ("SLM") and its parent company, Ori Martin SA ("Ori Martin") against the Commission's decision of June 30, 2010,[4] in the European prestressing steel market cartel.

In 2010, the Commission fined SLM, Ori Martin, and 33 other companies for their involvement in a pan-European and national cartel between the 1980s and 2002. The cartel consisted in fixing quotas and prices, sharing customers, and exchanging sensitive information related to prestressing steel, a material used for building bridges, balconies, foundation piles and pipes. The Commission's decision was based on leniency applications submitted by several participants in the cartel, and on information obtained by the German competition authority. Twenty-eight actions for annulment of the Commission's decision were brought by the undertakings involved. Twelve cases were decided on July 15 by the General Court, resulting in a reduction of the fine imposed on SLM, Ori Martin, and two other companies. All the other fines were left unchanged.

SLM challenged the Commission's finding that the company had been aware of the Italian cartel since December 1995. In support of this finding, the Commission referenced documents drafted during a cartel meeting, in which SLM was referred to as a possible addressee of commercially sensitive information. Moreover, SLM was mentioned in other meeting notes and included in a table allocating clients among cartelists, although its column in the table was left blank. Finally, other documents submitted by a leniency applicant showed that SLM's sales were discussed during a cartel conference, although those sales did not clearly appear to be part of the collusive agreement and, in any case, SLM was not represented at the meeting. The General Court upheld SLM's plea, considering that none of these elements, considered separately or as a whole, were sufficient to prove its participation in the cartel before April 1997.

[4] *Prestressing Steel* (Case COMP/38344), Commission decision of June 30, 2010.

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SLM also contended that the Commission erred in taking into account SLM's sales in Austria, Germany, and France when calculating the fine imposed on the company for its participation in the Italian branch of the cartel before 2000. The General Court agreed with SLM, noting that the Commission was indeed unable to prove that the regional cartel established in Italy before 2000 also extended to sales made on the Austrian market. Moreover, even though this regional cartel actually targeted, on some occasions, the German and French markets, the General Court acknowledged that SLM was not active in those countries before 2000. Therefore, SLM's fine for the reference period should have been determined based exclusively on Italian sales.

Finally, the General Court held that the Commission failed to take due consideration of the specific circumstances of SLM's position when determining the basic amount of the fine. In particular, the sanction appeared to be disproportionate in light of the belated and limited involvement of SLM in the agreement.

For these reasons, the General Court reduced the fine imposed on SLM and Ori Martin from €19.8 and €14 million to €19 and €13.3 million respectively. All other pleas, concerning the prescription of the infringement, the application *ratione temporis* of the Commission's guidelines on the method of setting fines, the length of the administrative procedure, and the liability of the parent company, were dismissed.

Akzo Nobel NV and Others v. Commission **(Case T-47/10)**

On July 15, 2015, the General Court ruled on the applications of Akzo Nobel Chemicals GmbH ("Akzo GmbH"), Akzo Nobel Chemicals BV ("Akzo BV"), Akzo Nobel NV ("Akzo NV"), and Akcros Chemicals Ltd ("Akcros") to annul the Commission's decision in the heat stabilizers cartel,[5] which found that the undertakings had infringed Article 101 TFEU[6] and Article 53 EEA[7] by participating in two sets of anticompetitive agreements and concerted practices covering the EEA.

The General Court annulled the parts of the Commission's decision relating to the fines imposed on Akzo GmbH and Akzo BV for the first of the three infringement periods identified by the Commission, spanning from 1987 to 2000. It accepted the applicants' claim that the Commission was time-barred from taking action against them as of June 28, 1998. Indeed, under Article 25(1)(b) of Regulation No 1/2003, the Commission can no longer impose penalties for infringements of Article 101 TFEU after five years from the moment the infringement ceases, which was June 28, 1993 for the first infringement period. However, the Commission's first actions in respect of the infringements were only taken in the beginning of 2003. Thus, unlike their parent company, Akzo NV, Akzo GmbH and Akzo BV, although full members of the Akzo group, could legitimately claim that the limitation period had expired in respect of their infringement. The General Court referred to precedents recognizing that the mere fact that a subsidiary benefits from the expiry of the limitation period does not result in the parent company's liability being called into question.

The General Court also accepted Akzo NV and Akcros's argument that the Commission's refusal to grant them the 1% fine reduction given to all the other undertakings involved due to the lengthy administrative procedure constituted unjustified unequal treatment. The Commission had sought to justify this difference by noting that, unlike the other undertakings, Akzo NV and Akcros were responsible for instigating the judicial proceedings. The General Court

5 *Heat Stabilizers* (Case COMP/38589), Commission decision of November 11, 2009.

6 Treaty on the Functioning of the European Union, OJ 2012 C326.

7 Agreement on the European Economic Area, OJ 1994 L1.

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rejected this justification as incompatible with the principle of effective judicial protection and constituting unjustified unequal treatment. Accordingly, the General Court ordered that the amount of fines on Akzo NV and Akcros be reduced by 1%. However, it dismissed the action as to the remainder of the pleas.

GEA Group AG v. Commission **(Case T-45/10)**

On July 15, 2015, the General Court rejected the appeal of GEA Group AG (the "GEA Group") against the Commission's 2009 heat stabilizers cartel decision.[8] The Commission previously found that the GEA Group, formed through the merger of Metallgesellschaft AG ("MG") and GEA AG, was liable under Articles 101 TFEU and 53 EEA for taking part in two sets of agreements and concerted practices covering the EEA.

On appeal, the GEA Group argued that: (i) there was a mistake in the legal position regarding the imputation of the infringement; (ii) the Commission's ability to impose fines was time-barred; and (iii) its right of defense had been violated.

The General Court rejected the first ground, reaffirming past case law on the imputation of infringements, including the presumption that a parent company exercises decisive influence over its wholly-owned subsidiary.[9] At that time, MG, the legal predecessor of the GEA Group, held 100% of the shares of its subsidiaries during the relevant periods of infringement and the General Court held that the Commission had successfully demonstrated that MG exercised decisive influence over its subsidiaries.

The General Court also rejected the second ground of appeal, concluding that the Commission had successfully demonstrated the existence of an infringement between 1996 and 2000. Finally, the General Court rejected the GEA Group's arguments regarding alleged violations of its right of defense as a result of various defects in the procedure and its length. Accordingly, the General Court upheld the Commission's decision.

GEA Group AG v. Commission **(Case T-189/10)**

On July 15, 2015, the General Court upheld an appeal by the GEA Group pertaining to the Commission's 2010 decision, which amended its 2009 heat stabilizers cartel decision.[10] On appeal, the GEA Group argued that the Commission had infringed its right of defense because it was not appropriately heard before the adoption of the decision, and because the Commission failed to give the GEA Group access to the documents on which it based its investigation.

The General Court accepted that the appellant did not have access to the Commission's file, in violation of Article 27(1) of Regulation 1/2003,[11] and that it had not been appropriately heard. These violations of the right of defense were sufficient to annul the Commission's decision.

The General Court further held that, where liability was based solely on an imputation of infringement, the parent company should not be liable to pay a greater fine than its subsidiary, and should benefit from a reduction of fine granted to the subsidiary.[12] For those reasons, the General Court annulled the Commission's 2010 decision.

Panasonic Corp. and MT Picture Display, Toshiba Corp., LG Electronics Inc. Koninklijke, Philips Electronics NV, and Samsung SDI, Co. and Others v. Commission **(Cases T-82/13, T-104/13, T-91/13, T-84/13, and T-92/13)**

On September 9, 2015, the General Court issued five separate judgments addressing the appeals of the cathode ray tube cartel members. The Commission, in its 2012

8 *Heat Stabilizers* (Case COMP/38589), Commission decision of November 11, 2009.

9 *Akzo Nobel and Others v. Commission* (Case C-97/08 P) EU:C:2009:536, para. 58.

10 *GEA Group v. Commission* (Case T-189/10) EU:T:2015:504, para. 72.

11 *Ibid.*, para.71.

12 *Ibid.*, paras. 82, 86.

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decision,[13] found that eight cathode ray tube manufacturers violated Article 101(1) TFEU by agreeing to fix prices, share markets, allocate customers, co-ordinate output, and exchange information in the markets for color display tubes for computer monitors ("CDT's") and color picture tubes for television sets ("CPT's").

The five appellants (Panasonic Corp and MT Picture Display, Toshiba Corp, LG Electronics, Philips, and Samsung SDI) sought to have the fine imposed on each of them annulled or reduced. The General Court dismissed the appeals of Samsung SDI,[14] LG Electronics,[15] and Philips,[16] in their entirety.

The General Court rejected Samsung SDI's claims that the Commission should not have taken into account sales to Samsung Electronics Co, which were contracted for in South Korea. The Commission held that the place of delivery of the goods determined the level of sales made by Samsung SDI within the EEA. Additionally, the General Court confirmed the Commission's finding of a single and continuous infringement, despite collusive contacts between the cartel members occurring in Asia, as those arrangements were interconnected with the European activities. Lastly, despite providing valuable information to the Commission during its investigation, Samsung SDI received a 40% fine reduction under the 2006 leniency notice[17] instead of 50% because it had falsely downplayed its involvement and the nature of the cartel.

[13] *TV and computer monitor tubes* (Case AT.39437), Commission decision of December 5, 2012.

[14] *Samsung SDI v. Commission* (Case T-84/13) EU:T:2015:611, not yet published.

[15] *LG Electronics v. Commission* (Case T-91/13) EU:T:2015:609, not yet published.

[16] *Philips v. Commission* (Case T-92/13) EU:T:2015:605, not yet published.

[17] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298.

LG Electronics and Philips formed the LPD Group as a joint venture combining their global cathode ray tubes operations. Each company had a 50% interest in the joint venture. The General Court held that the Commission had not erred in concluding that the parent companies had decisive influence over the LPD Group, forming a single economic unit, and were jointly and severally liable for its activities in the infringement. Furthermore, the General Court found the Commission was correct in finding that, when a vertically integrated undertaking uses the cartelized market goods for the completion of a subsequent product outside the EEA, then sells that completed product within the EEA to independent third parties, this affects competition in the finished product market, even though it is a market separate from the original cartelized market.

The General Court accepted certain claims made by Panasonic and MT Picture Display,[18] and Toshiba Corp.[19] Panasonic and Toshiba were held liable not only for their own actions, but also as parent companies of their joint venture, MT Picture Display, created during the infringement period.

The General Court reduced the fine imposed on MT Picture Display, concluding that the Commission had incorrectly calculated the fine by failing to use the most accurate data in relation to the value of sales made. As this was an unjustified departure from the 2006 guidelines,[20] the General Court saw it fit to recalculate MT Picture Display's fines based on the most accurate information available.

The General Court accepted Toshiba's claim that the Commission had not established its involvement in single and continuous infringement before the establishment of the

[18] *Panasonic Corp and MT Picture Display v. Commission* (Case T-82/13) EU:T:2015:612, not yet published.

[19] *Toshiba Corp v. Commission* (Case T-104/13) EU:T:2015:610.

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

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MT Picture Display joint venture with Panasonic. It held that the Commission had not proven that Toshiba had intended to contribute by its own conduct to the common objectives of the cartel, or even that Toshiba was aware of the existence of the cartel. Moreover, it was insufficient to infer Toshiba's awareness of the cartel because it had initially maintained limited contacts with certain cartel members and attended only four meetings. Accordingly, the General Court annulled the fine imposed on Toshiba for its alleged infringement prior to the creation of MT Picture Display.

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HORIZONTAL AGREEMENTS

Commission's Decisions

***Perindopril (Servier)* (Case AT. 39612)**

On July 14, 2015, the Commission published a provisional version of its decision of July 9, 2014 in Servier (Perindopril), in which it found patent settlement agreements that delayed market entry of competing generic drugs to violate Article 101 TFEU. The Commission imposed a total of over €427 million in fines on the Servier Group ("Servier") and on five generic manufactures.

The Commission found that Servier's molecule patents on the perindopril compound, used to treat high blood pressure, would expire in most Member States between 2003 and 2005. In anticipation of the patent's expiry, several generic manufacturers began gearing up to launch generic versions of Servier's drug. According to the Commission, Servier engaged in a strategy to prevent this lower-priced generics from entering the perindopril market and assure its market position and set the price of perindopril.

Part of Servier's strategy was to rely on its process patents, which covered specific methods for manufacturing perindopril, and file new patents for the same drug which were broader than the patents that were about to expire. As a result, several disputes arose between Servier and the generic manufacturers concerning potential infringements of some of these process patents. Between 2005 and 2007, Servier and the generic manufacturers concluded five patent settlement agreements in which the generic companies received payment or other benefits if they refrained from challenging Servier's patents or entering the market for a number of years.

The Commission emphasized that there is "*no presumption that patent settlement agreements between competitors are antitrust infringements*."[21] However, the Commission also noted that such agreements do not benefit from a presumption of validity. Where the generic undertakings commit to limit their independent efforts to enter one or more EU markets, or where the generic undertakings are discouraged from entering one or more EU markets, such agreements may fall within Article 101 TFEU.

The Commission found that Servier and the generic manufacturers were at least potential competitors. With reference to *Hitachi*,[22] the Commission underlined that, if the generic manufacturers and Servier "*perceive*" one another as "*a source of competitive pressure*" that is sufficient for them to be considered at least potential competitors.[23] The Commission then applied the same test as it did in *Lundbeck* to find that the agreements were restrictions by object.[24]

According to the Commission, four out of the five agreements at issue involved payments amounting to rent sharing between Servier and the generic manufacturers. In return for payments, the generic undertakings agreed not to enter the market. The fifth generic undertaking received a license from Servier covering seven Member States as a 'reward' for renouncing to enter other markets, thereby sharing the market between the generic undertaking and Servier. The Commission concluded that all agreements granted Servier more than it could have obtained in successful court litigation.

The Commission rejected the parties' arguments that the agreements should be permitted under Article 101(3) TFEU. The Commission made it clear that none of the proposed efficiency claims met the level of detail sufficient to

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[21] *Perindopril (Servier)* (Case AT.39612), Commission decision of July 7, 2014, para. 1102.

[22] *Hitachi v. Commission* (Case T-112/07) EU:T:2011:342.

[23] *Perindopril (Servier)* (Case AT.39612), Commission decision of July 7, 2014, para. 1183.

[24] *Lundbeck* (Case AT.39226), Commission decision of June 19, 2013.

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substantiate any efficiency gain. For instance, the Commission rejected the claim that the settlement agreements helped avoid litigation costs. The Commission observed that, unless the undertakings could prove otherwise, avoiding litigation costs would merely increase the profits of the undertakings without producing any procompetitive effect.

Servier and the generic manufacturers appealed to the General Court, seeking the annulment of the Commission's decision.

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INTELLECTUAL PROPERTY AND LICENSING

ECJ Judgments

***Huawei Technologies CO. LTD, v. ZTE Corp. and ZTE Deutschland GMBH* (Case C-170/13)**

On July 16, 2015, the Court of Justice delivered its judgment in Huawei v. ZTE,[25] setting out the circumstances under which seeking an injunction for an infringement of a standard-essential patent ("SEP") constitutes abuse of dominance. The Court of Justice held that an SEP holder can seek an injunction without abusing its dominant position after it has specified the patents being infringed and offered a fair, reasonable, and non-discriminatory ("FRAND") license, and the SEP user, if it continues to use the SEP, has not diligently responded to the offer. The Court of Justice specified that an SEP user who has not accepted the SEP owner's offer may only assert that an injunction is abusive when it has made a FRAND counter-offer.

Huawei holds a European patent declared as essential to the Long Term Evolution ("LTE") mobile telecommunications 4G standard developed by the European Telecommunications Standards Institute ("ETSI"), a standard setting organization ("SSO"). Huawei made a commitment to ETSI to grant licenses for SEPs for LTE to third parties on FRAND terms.

ZTE, also a Chinese telecommunications company, markets base stations with LTE software that incorporates technology covered by Huawei's patent. After ZTE and Huawei failed to conclude a licensing agreement, Huawei sued ZTE for patent infringement in the Düsseldorf court seeking, among other remedies, an injunction prohibiting ZTE from continuing the infringement. ZTE claimed that Huawei's action for an injunction was abusive given ZTE's willingness to take a license to Huawei's patent in Germany on FRAND terms.

The Düsseldorf court was asked to decide the case against a background of seemingly inconsistent precedents at a national and European level. On the one hand, German courts approached these types of cases following the principles set out in the German Federal Court's *Orange-Book-Standard* judgment of May 6, 2009.[26] The Federal Court there held that a claimant seeking an injunction on de facto essential patents only abuses its dominant position if (i) the defendant (the would-be licensee) unconditionally offers to enter into a license agreement with the plaintiff at a rate that is so high that the plaintiff cannot reasonably refuse or at a rate to be determined by the plaintiff but being subject to court review and adjustment, and (ii) the defendant behaves as if it were an actual licensee, in particular by paying royalties into an escrow account and rendering accounts in the meantime. The Orange-Book-Standard case, however, was not precisely on point because it concerned a patent essential for a de facto standard (*i.e.*, a standard that had developed in the marketplace), rather than a patent that had become essential through a standardization process, and the Federal Court's conclusion was not based on the patent owner's (express or implied) promise to license on FRAND terms.

A few years after the Orange-Book-Standard judgment, the Commission issued a press release in the Samsung[27] case which advanced a broader application of Article 102 TFEU to injunctions brought by SEP holders. This press release suggested that seeking an injunction is an abuse of a dominant position where (i) the patent holder had committed to a standardization body to grant licenses on FRAND terms, and (ii) the infringer was willing to negotiate such a license

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[25] *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH* (Case C-170/13) EU:C:2015:477.

[26] *See* the Federal Court's judgment of May 6, 2009, case KZR 39/06.

[27] *Samsung Electronics and Others* (Case COMP/C-3/39.939), Commission decision of September 27, 2013.

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(although the press release did not explain the circumstances in which an infringer may be regarded as being willing to negotiate).

The Düsseldorf court found that, applying the Orange-Book-Standard to the Huawei-ZTE case would lead it to issue the requested injunction, while applying the principles set out in the Samsung press release might lead it to dismiss Huawei's action for injunction as an abuse. The outcome depended on what was considered sufficient to show a willingness to license. The court therefore stayed the proceedings and, on April 5, 2013, referred five questions to the Court of Justice, asking whether—and, if so, in what circumstances—an action for infringement brought by an SEP holder that has given a commitment to grant licenses on FRAND terms constitutes an abuse of a dominant position.

The Court of Justice noted that, to prevent an action for a prohibitory injunction from being regarded as abusive, an SEP holder must comply with conditions which seek to ensure "a fair balance between the interests concerned."[28] An SEP holder, therefore, is entitled to commence injunction proceedings, but only after it has complied with the specific requirements set out by the Court of Justice, and only provided that the SEP user has not complied with the following requirements.

The SEP holder must notify the SEP user of the infringement.[29] There is some tension in the judgment regarding the obligations of an SEP user to obtain a license prior to use. On the one hand, the Court of Justice states that "*in principle, the user of those rights, if he is not the proprietor, is required to obtain a license prior to any use.*"[30] On the other, the Court of Justice finds that an SEP holder cannot bring an action for an injunction "*without notice or prior consultation with the alleged infringer, even if the SEP has already been used by the alleged infringer.*"[31] It seems that the SEP holder's obligation to notify the SEP user trumps the SEP user's obligation to obtain a license prior to any use. That is, the SEP holder must notify the SEP user, even if the user has failed to obtain a license. Nonetheless, it is arguable that an SEP user may have to pay above-FRAND damages for prior use until it has at least expressed a willingness to take a FRAND license.

The SEP user must indicate its willingness to take a license on FRAND terms.[32] In practice, this should be a minor hurdle for SEP users to satisfy, and it is unlikely to make a material difference, including because the SEP user can reserve the right to challenge validity, essentiality, and infringement despite expressing its willingness to license (see below).

The SEP holder must then present a detailed written offer for a license on FRAND terms that includes the amount of royalty and the way in which that royalty is to be calculated.[33] The Court of Justice concluded that the SEP holder is better placed to make a non-discriminatory offer than the SEP user, particularly given that licensing agreements with third parties are confidential (*i.e.*, though some information may, from time to time, become publicly available, generally, only the SEP holder and its other licensees would know the royalty rates and other terms, against which the non-discriminatory nature of the current offer is to be measured).

The Court of Justice did not explain how to determine whether an SEP holder's offer is FRAND, or address the implications of the offer failing to qualify as FRAND. Both issues will need to be assessed by the court in which the

[28] *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH* (Case C-170/13) EU:C:2015:477, para. 55.

[29] *Ibid.*, para. 60 and 61.

[30] *Ibid.*, para. 58.

[31] *Ibid.*, para. 60.

[32] *Ibid.*, para. 62.

[33] *Ibid.*, para. 63.

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infringement action is brought. If the SEP holder's offer does not qualify as FRAND, the court should reject the injunction (but see below the SEP user's potential obligation to make a counter-offer in any event). Another issue not addressed in the judgment is whether a possible willingness of the SEP holder to have the FRAND terms of the license set by a court or arbitration tribunal renders the offer *per se* FRAND, although the judgment acknowledges this as an option, and courts will likely agree that such an offer would qualify as FRAND.

The SEP user must respond promptly, diligently, and in good faith, without engaging in delaying tactics. In particular, if the SEP user does not accept the offer, it must submit, promptly and in writing, a specific FRAND counter-offer.[34] If the parties do not reach an agreement, and the SEP holder seeks an injunction, it would seem that the infringement court would have to determine whether the SEP user's counter-offer qualifies as FRAND.

It is unclear whether the SEP user's willingness to have the terms set in arbitration or by a court would renders its counter-offer *per se* FRAND, however, as noted above, courts are likely to support that conclusion. It is also unclear what courts should do in circumstances where the SEP holder's and the SEP user's offers both qualify as FRAND (the Judgment's references to FRAND offer and counter-offer seem to imply that there is not just one unique set of terms that is FRAND, but rather a range or a band of possible FRAND terms), but where the parties are unable to agree. It is likely that, in such a case, where both parties have agreed to license but dispute the "price" (the rate and related conditions), the SEP owner is entitled to damages, but not to an injunction.

If no agreement is reached, an SEP user that is already using the technology must provide security (*e.g.*, by providing a bank guarantee or placing amounts necessary on deposit) by reference to the number of past acts of use, and must be able to render accounts.[35] This requirement seems to mean that the SEP user "must" pay an appropriate amount (taking into account, among other things, the number of past acts of use of the SEP) in escrow[36] from the point at which its counter-offer was rejected,[37] and render an account if requested by the SEP holder. If so, this requirement could prove to be onerous, particularly for companies in the telecommunications industry, where products and end customer devices (*e.g.*, mobile phones) are distributed to a multitude of customers in numerous individual transactions.

Where no agreement is reached, the amount of the royalty may, by common agreement, be determined by an independent third party.[38] The judgment makes no provision for what should happen if both parties claim to have made FRAND offers and one party refuses to have the matter decided by an independent third party (including a court or arbitration tribunal). In those circumstances, it seems the infringement court would have to assess, first, whether the SEP holder's offer was FRAND (and dismiss the suit if it is not). Second, if the SEP holder's offer is FRAND, whether the SEP user's counter-offer was also FRAND. If so, and if the SEP user had complied with its other obligations under the judgment (provision of security, accounting), the court would presumably have to dismiss the suit, leaving the SEP holder with the option to pursue damage claims. The court would only grant an injunction if

[34] *Ibid.*, para. 66.

[35] *Ibid.*, para. 67.

[36] In Landgericht Düsseldorf, Judgments of November 3, 2015, Joined Cases 4a O 93/14 and 4a O 144/14 *Sisvel v. Haier* (section IV)1)b)cc)2)aa) (discussed in further detail below) the Düsseldorf court implemented these principles and stated that the appropriate amount of the security would include, among other things, the number of uses of the SEP.

[37] *Ibid.*, (sections IV)1)b)cc and IV)1)b)cc)2)aa).

[38] *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH* (Case C-170/13) EU:C:2015:477, para. 68.

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the SEP holder's offer is FRAND, but the SEP user's counter-offer is not. This approach is not certain, however. The SEP owner would argue that an injunction is appropriate where it has complied with its FRAND promise, but the user has refused the offer.

SEP users can challenge the validity and essentiality of an SEP in parallel to licensing negotiations and after conclusion of a license.[39] The Court of Justice's choice of language seems to suggest that SEP holders can no longer make their licenses conditional on users' agreeing not to bring such challenges, contrary to common practice under the *Orange-Book-Standard* case law. In this respect, the Judgment is consistent with the Commission's decisions in *Motorola*[40] and *Samsung*.[41]

In sum, the judgment attempts to balance the interests of SEP holders, on the one hand, and concerns of implementers and consumers, on the other. The judgment clarifies that SEP holders who have committed to grant licenses on FRAND terms retain the right to seek and enforce injunctions against potential infringers, but that this right is limited in various important respects. In particular, the SEP holder must alert any user of the infringement and make a prior license offer on FRAND terms.

While the judgment seems to accept that SEPs can be used prior to the conclusion of a license, it also imposes important obligations on SEP users, notably, to make a counter-offer on FRAND terms and to provide appropriate security for the prior use of the SEP. The judgment does not expressly afford SEP users a "safe harbor" against injunctions by agreeing to have disputed FRAND terms determined by an independent third party, as had been suggested in prior Commission decisions and declarations. Instead, national courts will have a more important role in deciding whether each party's license offer is FRAND and whether the parties are acting in good faith, taking into account all the circumstances of the case. This represents a slight shift back toward protecting intellectual property rights compared to the recent Commission decisions in *Motorola*[42] and *Samsung*,[43] but at the same time it confirms that rights to injunctions are curtailed where the patentee has created legitimate expectations that it will license on FRAND terms.

Unfortunately, the judgment also leaves many questions unanswered. For example, the Court of Justice did not address the issue of dominance. It therefore remains an open question whether an SEP holder is (*per se*) dominant by virtue of having a patent that is essential to a standard. The judgment provides no guidance on what amounts to "FRAND" terms, whether the license has to be country-wide, EEA-wide or worldwide, whether a portfolio license can be required including SEPs on the same standard or other standards or even non-SEPs, whether a cross-license can be requested and if so, on what terms, etc. While this is not addressed in the judgment, it may be possible to argue—perhaps as a fallback in cases where an offer is not considered FRAND—that willingness to have the terms of the license determined by an independent third party should, in itself, be considered FRAND. Nonetheless, the judgment seems to require injunction courts to assess whether the offers made by the parties are objectively FRAND. If the parties fail to agree on having the terms of the license determined by a third party, it is not entirely clear what the implications will be for injunction proceedings.

39 *Ibid.*, para. 69.

40 *Motorola - Enforcement Of GPRS Standard Essential Patents* (Case AT.39985), Commission decision of April 29, 2014.

41 *Samsung Electronics and Others* (Case COMP/C-3/39.939), Commission decision of September 27, 2013.

42 *Motorola - Enforcement Of GPRS Standard Essential Patents* (Case AT.39985), Commission decision of April 29, 2014.

43 *Samsung Electronics and Others* (Case COMP/C-3/39.939), Commission decision of September 27, 2013.

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On November 3, 2015, the Düsseldorf court applied these principles in *Sisvel v. Haier*.[44] The Düsseldorf court left open the question of whether Sisvel's portfolio worldwide offer qualified as FRAND, because the user failed to provide security and therefore was not considered a willing licensee. The court also noted that it does not need to answer the question of whether there would have been room for a counter-offer by the SEP user if the SEP holder's offer had actually been FRAND (the SEP holder having thus fulfilled its licensing duty). Finally, the court stated that the security provided by the SEP user must be in accordance with its counter-offer. This ruling suggests that the Düsseldorf court remains inclined to be SEP-holder friendly.

[44] Landgericht Düsseldorf, Judgments of November 3, 2015, Joined Cases 4a O 93/14 and 4a O 144/14 *Sisvel v. Haier.*

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MERGERS AND ACQUISITIONS

Commission Decisions

Phase I Decisions With Undertakings

Mylan/Abbott EPD-DM **(Case COMP/M.7379)**

On January 28, 2015, the Commission approved the acquisition of Swiss-based Abbott EPD-DM ("Abbott") by US-headquartered Mylan, Inc. ("Mylan").[45] Mylan develops, licenses, manufactures, markets, and distributes generic, branded generic, and specialty pharmaceuticals. Abbott is Abbott Laboratories' non-U.S. developed markets specialty and branded generics business that mainly focuses on distributing branded ex-originator products in different therapeutic areas. The Commission found that the transaction would combine a producer of branded ex-originator drugs (Abbott) and a producer of generics (Mylan), with each focusing on different distribution channels: Abbott principally aims its sales efforts at prescribers, while Mylan focuses mainly on pharmacies and wholesalers.

In line with its previous decisions, the Commission confirmed that the generic and originator versions of medicinal products belong to the same relevant product market. The Commission also found that the transaction related mostly to prescription drugs and that, in this case, there was no reason to subdivide the market into prescription and over-the-counter (OTC) segments for those drugs that are available on both prescription and OTC basis. The Commission concluded that the relevant product market should be defined at a molecule (*i.e.*, ATC4 class) level[46] and identified 305 overlaps between the parties in the following therapeutic areas in the production of finished dose pharmaceuticals: (i) cardio-metabolic; (ii) gastro; (iii) anti-infective/respiratory; (iv) CNS/pain; and (v) women's and men's health.

The Commission identified competitive concerns in the following five markets: mebeverine in Germany and the United Kingdom; betahistine in Ireland; pygeum africanum in France; and delorazepam in Italy.

- Mebeverine belongs to the ATC3 class A3A, which includes all plain synthetic and natural antispasmodics and anticholinergics that are part of functional gastro-intestinal disorder drugs used to relieve cramps or spasms of the stomach, intestines, and bladder. In mebeverine in the United Kingdom, the parties would have had a combined share of 60-70%. The only other competitor would have been Teva, which in 2013 had experienced shortages of supply lasting for almost a year; during this period, the price of mebeverine increased substantially. In Germany, the parties would have had a combined share of 60-70%. The combined company would face competition only from parallel importers, which did not control the product availability and therefore could not commit to a long-term supply.
- Betahistine belongs to the ATC3 class N7C, which includes antivertigo products, stimulates the H1-receptors in the inner ear by reducing the asymmetrical functioning of sensory vestibular organs and by increasing vestibulocochlear blood flow, which decreases symptoms of vertigo and balance disorders. The Commission concluded that in Ireland the parties would have a combined share of 80-90%, with only two small competitors at a molecule level. It noted that only one company held a dormant marketing authorization to sell betahistine-based products. Also, the betahistine market in Ireland is small (valued at around €1.5 million) and consumers have a strong preference for branded products. As a result, entrants seeking to challenge the established brands (sold by the parties) would face high entry barriers. Furthermore, while one company already had a dormant authorization that could be reactivated

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[45] *Mylan/Abbott EPD-DM* (Case COMP/M.7379), Commission decision of January 28, 2015.

[46] Anatomical Therapeutic Classification (ATC), devised by the European Pharmaceutical Marketing Research Association (EphMRA) and maintained by EphMRA and Intercontinental Medical Statistics.

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within a short period of time, any other potential entrant would need to update betahistine's marketing dossier through a lengthy and costly procedure.

- Pygeum africanum, a product of herbal origin derived from the bark of the eponymous tree, belongs to the ATC3 class G4C, which includes benign prostatic hypertrophy ("BPH") products that treat the growth of individual prostatic stromal and epithelial cells. In France, the parties' pygeum africanum-based products fell under ATC4 class G4C9. Although the increment resulting from the transaction would have been limited (0-5%), the combined company would account for nearly all the sales in this category, with a market share of 90%-100%.
- Delorazepam belongs to the ATC3 class N5C, which includes tranquilizers. It is a popular drug for treating anxiety disorders in Italy. In delorazepam in Italy, the parties' combined share amounted to 80-90% and no other competitor held a marketing authorization or was active in the market. The parties' only sizeable competitor was Teva, which over the preceding years had been having a largely stable market share of 5-10%, as opposed to the steadily growing share of Mylan.

To address the Commission's concerns, the parties offered to divest Mylan's local businesses in the five markets concerned (including the relevant marketing authorizations, customer information, and supply contracts). The Commission concluded that the commitments were sufficient.

Merck/Sigma-Aldrich (Case Comp/M.7435)

On June 15, 2015, the Commission cleared, subject to commitments, the acquisition by the German-based pharmaceutical and chemical company Merck KGaA ("Merck") of the U.S. company Sigma-Aldrich Corporation ("Sigma"). Both companies develop, produce, and sell tools and products for the life sciences industry.

The parties activities overlapped mainly in the market for laboratory chemicals. The Commission analyzed these products for the first time and found competitive concerns primarily in two laboratory chemicals: (i) solvents, which are used to dissolve a target substance for the analysis or synthesis of a given material; and (ii) inorganics, which are reagents added to a system in order to bring about a chemical reaction. The analysis was limited to catalogue sales (*i.e.*, sales of product units up to 10 kilos), which—due to different purchasing patterns, customer categories, supply channels, and pricing—are distinguished from bulk sales.

The Commission's investigation revealed several concerns:

Strong market position. The parties were the two leading suppliers of solvents and inorganics in the EEA. The merged entity would be by far the largest competitor in the relevant markets (representing 30-50% of the total sales at the EEA level in most of the Member States, and in most subsegments), with all other competitors lagging significantly behind.

Breadth of product portfolios. Laboratory chemicals are subject to high quality standards and exhibit strong brand recognition. The Commission found that the parties were leading suppliers in the EEA, with distinctively high product quality and well-known brands. Additionally, the parties had the two broadest product portfolios in the EEA comprising the whole spectrum of laboratory chemicals that are offered to all customer segments. The Commission's market test indicated that other suppliers were not able to offer a comparable portfolio, which is essential to competing in a market composed of hundreds of different variants of solvents and inorganics.

Efficiency of distribution channels. The Commission determined that an efficient distribution channel is a critical competitive advantage because laboratory chemicals are often sold as a combination of several products in small quantities to a wide number of customers and must be delivered swiftly due to their hazardous and temperature-sensitive nature. The merged entity would control two of the

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most efficient distribution channels: Sigma's e-commerce platform for direct sales and Merck's indirect channel via its long-standing relationship with one of the main distributors in the sector, VWR.

Entry barriers. The Commission identified significant barriers to entry, preventing competition from bulk producers of solvents and inorganics: (i) brand loyalty to Merck and Sigma, especially among pharmaceutical customers, which prioritize risk mitigation and are thus less price-sensitive; (ii) economies of scale and scope, particularly the need to build a sufficiently broad portfolio across the spectrum of solvents and inorganics; and (iii) know-how and IP rights, in particular Sigma's long patent protection on first and second generation Karl Fisher titration solutions.

To address the Commission's concerns, the parties committed to divest Sigma's manufacturing facilities for most of the solvents and inorganics sold in the EEA, eliminating the entirety of the overlap between the companies. The Commission required an upfront buyer (*i.e.*, the parties had to identify the buyer before the Commission approved the main transaction). The remedy package also included divestment of certain brands, trademarks, and customer base worldwide, access to Sigma's e-commerce platform for a transitional period, a temporary license to the Sigma-Aldrich brand in the EEA, and transitional support to the purchaser for creating an e-commerce platform and for transferring customer information. Additionally, the final commitments extended the re-branding and black-out periods.[47]

[47] The Parties committed to grant an exclusive, time-limited license for Sigma-Aldrich brand to allow the purchaser to re-brand the products. This re-branding period would be followed by a second phase, the so-called "black-out period," during which the licensor is prohibited from selling products under the relevant brand; this is intended to help the buyer transfer the customers from the licensed brand to its own brand. (Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, para. 39).

Altice / PT Portugal **(Case Comp/M.7499)**

On April 20, 2015, the Commission conditionally cleared the acquisition by Altice S.A. ("Altice") of sole control over PT Portugal SGPS, S.A. ("PT Portugal"). Altice, a telecommunications company present in France, Belgium, Luxembourg, Switzerland, and Israel, is active in Portugal via its two subsidiaries: (i) Cabovisão provides pay-TV, broadband internet, and fixed telephony services to residential customers, and (ii) ONI provides business-to-business ("B2B") telecommunications and IT services. PT Portugal is the former telecommunications incumbent with activities extending across all telecommunications segments in Portugal.

The Portuguese competition authority had requested that the Commission refer the review of the transaction to it. The Commission rejected this request on the grounds that it was better placed to assess the merger both because of its extensive experience in the sector and the need to ensure consistency in the application of the merger control rules in the telecommunications sector within the EEA.

The Commission's analysis focused on horizontal overlaps in the retail segments for: (i) the supply of fixed voice services, (ii) the supply of fixed internet access services, (iii) the supply of pay-TV services, (iv) the supply of multiple play offers, (v) the provision of B2B telecommunications services and the wholesale segments for: (vi) the supply of leased lines, (vii) the provision of call origination services at a fixed location in Portugal, and (viii) the provision of call transit services at a fixed location in Portugal.

The Commission was concerned that the transaction would significantly lessen effective competition in most of the overlap markets, except for the wholesale market for call origination services at a fixed location in Portugal. The Commission concluded that concerns did not arise in this market because of the regulatory obligations imposed by ANACOM, the Portuguese regulator of the communications sector. In the remaining markets, the Commission's concerns primarily arose from the high (above 50%)

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combined market shares, in particular in multiple play offers where each party held a market share of 30-40%. The Commission found that PT Portugal was already dominant in the market for the supply of fixed voice services, and the transaction would eliminate its close competitor Altice. The Commission also noted that the telecommunications industry has high entry barriers that would further strengthen PT Portugal's dominant position post-transaction.

To address the Commission's concerns, the parties proposed to divest Altice's subsidiaries Cabovisão and Oni, thereby removing all overlaps. These commitments were submitted together with the notification of the transaction, allowing the Commission to clear the merger in Phase I.

Altice/PT Portugal confirms the consolidation trend in the telecommunications industry. The Commission's concerns about competition in this sector are evidenced by three Phase II decisions adopted in the past two years: *Orange/Jazztel* (a merger between the third and fourth largest telecommunications suppliers in Spain), *Liberty Global/Ziggo* (combining the first and second largest cable TV networks in the Netherlands), and *Telefónica Deutschland/E-Plus* (bringing together the third and fourth largest mobile network operators in Germany).[48] All three investigations ended with conditional approvals, imposing a mix of behavioral and structural remedies, which alleviated competition concerns, but ultimately allowed the parties to retain at least some of the acquired activities in the relevant markets. By contrast, *Altice/PT Portugal* (combining the incumbent (market leader) and the fourth-largest player in Portugal) did not result in a Phase II investigation because the parties committed to divest all of the overlapping activities, eliminating any plausible concerns.

IAG /Aer Lingus (Case Comp/M.7541)

On July 14, 2015, the Commission conditionally cleared the proposed acquisition of sole control of Aer Lingus by International Airlines Group ("IAG"). IAG is the holding company of British Airways Plc ("BA"), Iberia Lineas Aéreas de España, S.A. ("Iberia"), and Vueling Airlines S.A. ("Vueling"). IAG operates commercial carrier flights to around 200 destinations worldwide with another 200 destinations served under partnership agreements. Aer Lingus, in which 29.8% of shares were owned by the competing carrier Ryanair [49] and 25% by the Irish government, is a commercial airline based in Dublin serving more than 75 destinations primarily in the EEA and North America.

The Commission held that the transaction could raise competition concerns only in the markets for passenger air transport services.

The Commission defined markets based on its traditional "point of origin/point of destination" ("O&D") approach, viewing each city-pairing as a separate product market. These included to and from flights between London, Amsterdam, Barcelona, Belfast, Chicago, Dublin, Manchester, New York, and Shannon. The different airports of each city were deemed substitutable, except for London, where the Commission found a varying degree of substitution between the airports, in particular between the connecting hubs Heathrow and Gatwick airports. Given the emergence of new demand patterns in times of slow economic growth, where all passengers have become increasingly price-sensitive as even corporate customers

48 *Orange/Jazztel* (Case COMP/M.7421), Commission decision of May 19, 2015; *Liberty Global/Ziggo* (Case COMP/M.7000), Commission decision of October 10, 2014; *Telefónica Deutschland/E-Plus* (Case COMP/M.7018), Commission decision of July 2, 2014. Further, in *Telenor/TeliaSonera/JV* (Case COMP/M.7419), Commission decision of September 24, 2015, the parties abandoned the merger between the second and third largest operators on the Danish market, reportedly due to the Commission's objections.

49 It must be noted that in August 2013, the UK Competion and Markets Authority (CMA) issued a report requiring Ryanair to sell down its stake in Aer Lingus from 29.8% to 5% because in the CMA's view Ryanair's stake deterred other airlines from acquiring, or combining with, Aer Lingus.

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apply lowest fare policies, the Commission accepted the parties' view that the relevant market comprises all passengers with no need to distinguish between time-sensitive ("TS") and non-time-sensitive ("NTS") passengers.

The Commission held that the transaction raised serious concerns in relation to the London-Dublin and London-Belfast routes, on which Aer Lingus and IAG were closest competitors and controlled all relevant airport slots. Additionally, the Commission also highlighted the risk of the merged entity refusing to connect competing airlines' passengers on long-haul flights involving the London-Dublin or London-Belfast routes.

In response to these concerns, the parties undertook to make the relevant slots available at London Gatwick to prospective entrants so that five new daily flights could be operated on the London-Dublin and London-Belfast routes. The prospective entrant will be deemed to have grandfathering rights for the slots and IAG will enter into fare combinability and frequent flyer agreements. The parties also committed that Aer Lingus would enter into special prorate agreements ("SPAs") with competing airlines that operate long haul flights departing from, or arriving to, Heathrow, Gatwick, Manchester, Amsterdam, Shannon, and/or Dublin. That means that Aer Lingus would receive a fare proportionate to the time that a passenger spends on Aer Lingus's flight relative to the connecting flights' total journey time. The Commission concluded that these commitments were sufficient to address the concerns and authorized the transaction.

***Pfizer/Hospira* (Case COMP/M.7559)**

On August 4, 2015, the Commission conditionally cleared the acquisition of Hospira Inc. ("Hospira") by Pfizer Inc. ("Pfizer"), both US-based companies. Pfizer is a biomedical and pharmaceutical company that is active in discovering, developing, manufacturing, marketing, and selling innovative medicines for humans. Hospira is a global provider of injectable drugs and infusion technologies, active in generic, branded, and biosimilar medicines for humans.

The transaction gave rise to horizontally affected markets in biosimilars and sterile injectables.

Biosimilars. These products are a relatively new segment of pharmaceuticals and represent the most expensive therapies available. Biosimilars have active substances derived from living organisms and target the same therapeutic effect as originator drugs, although, unlike generics, biosimilars are not exact copies of originator drugs. Thus, in line with its previous practice, the Commission identified separate markets for biosimilars and generics.

The parties' activities in biosimilars overlapped in three molecules: (i) infliximab, (ii) rituximab, and (iii) trastuzumab. As regards rituximab and trastuzumab, the Commission left the market definition open because there were no competition concerns. The relevant product market for infliximab, an anti-tumor necrosis factor agent used to treat autoimmune diseases, was defined at a molecule (i.e., ATC4) level, covering both the originator and infliximab biosimilars. Additionally, the Commission defined the geographic market at the EEA level because all the overlaps were related to pipeline products.

In the infliximab market, Hospira markets the only approved biosimilar co-exclusively with Celltrion (the developer of the product), whereas Pfizer is one of only two companies that have biosimilars in phase III clical trials (the other company is Samsung Bioepis). The Commission raised two types of concerns. First, if following the launch of Pfizer's infliximab product, the merged entity were to market Pfizer's product instead of Hospira's, it could eliminate the existing price competition between Hospira and Celltrion, which produce biologically identical products. Second, the transaction could affect the future competition between differentiated biosimilars of Hospira/Celltrion, Samsung Bioepis, and Pfizer. The merged entity could focus on Hospira's marketed product and create a risk of delay or discontinuation of R&D of Pfizer's biosimilar drug, which is one of only two infliximab biosimilars in phase III clinical

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trials. Hence, the transaction could prevent or delay Pfizer's entry into infliximab market.

Sterile injectables. The Commission defined the market for sterile injectables at a molecule level and left open the issue of whether it would be appropriate to define an even narrower market based on galenic form. The competitive analysis in this segment focused on so-called Group 1 products (*i.e.*, where the parties' combined market share exceeds 35% and the increment is above 1%) in the national markets for finished dose products and in the EEA market for pipeline products. The Commission identified horizontal overlaps and competitive concerns in the following markets: (i) carboplatin in Belgium; (ii) cytarabine in Belgium, Italy, Portugal, and Sweden; (iii) epirubicin in Austria, Belgium, Italy, the Netherlands, and Spain; (iv) irinotecan in Belgium, the Czech Republic, and Italy; (v) vancomycin in Ireland; and (vi) voriconazole in the EEA as a whole.

In these markets, the combined market shares of the parties were in a range of 40-80%, with an increment of between 5-30%. In the market for cytarabine in Portugal, the combined market share would have been 90-100%, with a 5-10% increment. Additionally, the Commission found that, post-transaction, there would not be a sufficient number of credible competitors, or these competitors would face capacity constraints. In the market for vancomycin in Ireland, Hospira's share had been steadily increasing up to 50-60%, and the transaction would strengthen its leading position. Finally, in the market for voriconazole in the EEA, Pfizer was the originator whose patent would expire in the first half of 2016, and Hospira was the only supplier of a competing generic product.

To address the competitive concerns in infliximab, the parties committed to divest Pfizer's development, manufacturing, and marketing rights of its biosimilar product. The marketing rights outside the EEA remained with the merged entity. Concerning sterile injectables, the parties committed to divest Pfizer's marketing authorizations and associated rights in all the markets in which the Commission raised concerns.

Nokia/Alcatel-Lucent **(Case Comp/M.7632)**

On July 24, 2015, the Commission unconditionally approved the acquisition of sole control over Alcatel-Lucent S.A. ("Alcatel") by Nokia Corporation ("Nokia"). Nokia is a global provider of mobile network equipment and network service platforms, also active in the provision of professional services to telecommunications network operators and service providers. Alcatel is active in the provision of fixed and mobile network equipment, as well as in related services provided to telecommunications network operators.

The Commission assessed the effects of the transaction mainly in the markets for: (i) radio access network ("RAN") equipment, which provides the radio functions of the mobile network by transmitting signals between users' mobile handset and the core portion of the mobile network; and (ii) core network system ("CNS") solutions, which manage information flows within the mobile network and provide call control and security functions. These two markets were considered to be at least EEA-wide and possibly global.

RAN equipment. With respect to unilateral effects, the Commission noted that a number of strong competitors will remain active in the market, including the market leaders Ericsson and Huawei, and other smaller but steadily growing players, such as ZTE and Samsung. The Commission was of the view that the merging companies were not close competitors, because Nokia is mainly active in the European and Asian markets, while Alcatel is focused on North America.

Concerning coordinated effect, the Commission concluded that the transaction would not facilitate collusion with other competitors. Price levels for RAN equipment typically are not transparent, and orders are allocated in a few large and high-value tenders, which makes it difficult for firms to coordinate their behavior and encourages deviations. Also, the sector was found to be driven by technological

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innovation, which could have disruptive effects on the established market structure.

CNS solutions. The Commission concluded that the competitive dynamics in the CNS solutions segment were similar to those of the RAN equipment segment. The parties do not compete closely—Alcatel concentrates on wireline products, while Nokia's key strength lies in wireless solutions. Moreover, there are several well established competitors, such as Ericsson and Huawei, as well as smaller emerging players, including Cisco.

Finally, the Commission found that the aggregation of Nokia's and Altel's standard-essential patents ("SEP") would not raise significant competitive concerns. The merged entity's SEP portfolio would be of similar size to those of its main competitors, and the transaction would not affect the parties' commitments to license their SEP to any third party on fair, reasonable, and non-discriminatory terms.

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STATE AID

ECJ Judgment

***BVVG* (Case C-39/14)**

On July 16, 2015, the Court of Justice held that a national law[50] prohibiting the sale of public agricultural land for a "grossly disproportionate" price may not constitute state aid under Article 107(1) TFEU; the highest bid in a public tender does not necessarily correspond to market price.[51]

The dispute arose from the sale of agricultural land to two non-farmers by Bodenverwertungs- und -verwaltungs GmbH ("BVVG") through an open tender procedure.[52] The relevant local authority refused to authorize the sale due to a national law prohibiting the sale of agricultural land where the price agreed is "grossly disproportionate" to the land's value, that is, where the sale price exceeds the market value by 50%, with the market price assessed against similar transactions (the "proportionality rule"). The first instance and appeals courts agreed with the authority, dismissing challenges on the grounds that the agreed price was 50% greater than expert valuations. The German Federal Court of Justice stayed the proceedings, referring to the Court of Justice the question on whether the proportionality rule constituted aid under Article 107(1) TFEU.

The Court of Justice's analysis focused solely on whether the proportionality rule conferred a selective advantage. It recalled that the sale of land for a below-market price may constitute a selective advantage—the lower price is an advantage conferred through a reduction in the state budget. The Court of Justice also identified that methods for ascertaining market price include expert valuation and the highest offer obtained following open, transparent, and unconditional bidding procedures.

The assessment of market price under the proportionality rule could take into account the purpose of the transaction, including sale to non-farmers for the continued use as farmland. The Court of Justice began by highlighting that this consideration could result in selective advantage because assessing price by reference to the transaction's purpose could lead to the rejection of the highest bid "even though it may be presumed to correspond to the market price of the land at issue."[53] Yet, the Court of Justice proceeded to state that the market price may not always correspond to the highest bid in an open tender, and that "taking into consideration factors other than the price may be justified,"[54] for example, where the highest bid is much greater than other prices offered due to speculation. Accordingly, the Court of Justice held that a national rule may permit public bodies to dispose of land for a price lower than the highest bid "provided that the application of that rule results in a price which is [. . .] as close as possible to the market value of the land at issue"—which, the Court of Justice found, was a question for the referring court.[55] However, the Court of Justice rejected the justification put forth by the German Government that the proportionality rule aimed to protect professional farmers from high costs of new land; the Court of Justice emphasized that the effect of the measure, not its aim, determines state aid classification.

[50] Paragraph 9(1)(3) Grdst CG.

[51] *BVVG Bodenverwertungs- und -verwaltungs GmbH* (Case C-39/14) EU:C:2015:470.

[52] BVVG is a publicly-owned entity governed by private law, with the statutory purpose of privatizing agricultural and forestry land and buildings.

[53] *Ibid.*, para. 36.

[54] *Ibid.*, para. 39.

[55] *Ibid.*, para. 42.

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General Court Judgments

France v. Commission **(Joined Cases T-425/04 RENV and T-444/04 RENV)**

On July 2, 2015, the General Court annulled a Commission decision[56] concluding that France had granted illegal state aid to France Télécom ("FT") through public statements and the offer of a shareholder loan when the company was having financial difficulties.

In 2002, the French state held 56% of the share capital of FT. Following a significant share price drop and a downgrade of FT's credit rating, the French Minister of Economy made a statement in July 2002, assuring that the French state would provide financial support to FT. In September 2002, the French authorities confirmed that they would adopt the necessary measures to solve FT's financial difficulties. In December 2002, in the context of a fund-raising operation by FT, the French authorities offered to grant FT a €9 billion shareholder loan. However, the shareholder loan was never granted.

In August 2004, the Commission concluded that this offer of a shareholder loan, in the context of France's previous public statements, gave rise to incompatible state aid. The Commission found that these measures constituted a commitment by the French government to grant FT state resources, and conferred an economic advantage on FT by restoring market confidence in FT and enabling FT to maintain its credit rating. According to the Commission, such measures did not meet the "private investor" test, because it was highly unlikely that a prudent private investor would have committed to support a company in FT's financial situation, let alone to offer it a shareholder loan. However, the Commission did not order the recovery of the aid because the aid was difficult to quantify and because, given the novelty of the case, recovery would have been contrary to FT's legitimate expectations.

The French state, FT, and Bouygues appealed the Commission decision to the General Court. On appeal, the French state and FT argued, notably, that the measures did not constitute state aid. In May 2010, the General Court annulled the Commission's decision.[57] The General Court held that, instead of basing its finding of the existence of state aid on an overall examination of the statements of July 2002 and the shareholder loan offer, the Commission should have individually examined whether each measure conferred an economic advantage on FT through state resources.

Bouygues and the Commission appealed the judgment of the General Court to the Court of Justice, which quashed the judgment in March 2013.[58] It determined that the General Court had erred in law by excluding that the different measures could be analysed as a single state aid measure and in its examination of the existence of a transfer of state resources. The Court of Justice remanded the case to the General Court.

In July 2015, the General Court issued a new judgment confirming the annulment of the Commission's decision. The General Court established that the Commission had erred in its application of the private investor test. It found that in applying the test, the Commission should have considered only the December 2002 loan offer, rather than in conjunction with the public statements of July 2002. According to the General Court, it was wrong to apply the test to the public statements of July 2002 because the Commission did not have sufficient information to determine whether such statements were capable of committing state resources and thus constituting state aid.

[56] Commission Decision C (2004) 3060 of August 2, 2004, (State Aid SA.12594 (ex NN 47/2002)), OJ 2006 L257/11.

[57] *France and Others (FT) v. Commission* (Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04) EU:T:2010:216.

[58] *Bouygues and Bouygues Télécom v. Commission and Others* (Joined Cases C-399/10 P and C-401/10 P) EU:C:2013:175.

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TV2 and Viasat v. Commission **(Cases T-674/11 and T-125/12)**

On September 24, 2015, the General Court, partially annulled the Commission's 2011 decision[59] establishing that Denmark's initial financing and subsequent recapitalization measures in favor of public service broadcaster TV2 were compatible state aid.[60]

TV2 is the successor of the autonomous state undertaking, TV2/Danmark, which was established with the help of an interest-bearing state loan, and the activities of which were to be funded with the help of revenue from a license fee paid by all Danish television viewers and from advertising revenue. In its first decision regarding this initial financing of the broadcaster, the Commission found that the aid received by TV2/Danmark was compatible, but ordered recovery of an amount exceeding costs (€84.4 million) from successor TV2 ("TV2 I decision").[61] This recovery rendered TV2 insolvent. Denmark subsequently notified the Commission of recapitalization plans of TV2, which the Commission considered as compatible aid (the "recapitalization decision").[62] On appeal, the General Court annulled the TV2 I decision, thereby abrogating pending appeals against the recapitalization decision.[63] In its April 20, 2011 decision, the Commission re-examined the measures concerned; it considered the recapitalization as part of its assessment ("TV2 II decision"). Again, it concluded that the measures in question constituted state aid, but in this instance found that the former overcompensation was an appropriate capital buffer for TV2.

Both the recipient TV2 and competitor Viasat challenged the TV2 II decision on the grounds of the alleged erroneous application of the second and fourth *Altmark* criteria,[64] albeit for different reasons. According to the second *Altmark* criterion, the parameters on the basis of which the compensation is calculated must be established in advance, and in an objective and transparent manner. According to the fourth *Altmark* criterion, if the beneficiary is not chosen in a public tender, the level of compensation must be determined by comparison with the costs that a typical well-run undertaking adequately equipped with the means to provide the public service in the sector concerned would incur.

TV2 submitted that the Commission had erred in its application of the second and forth *Altmark* criteria, *i.e.*, TV2 argued that they were fulfilled, and therefore the measures in question did not constitute state aid. The General Court agreed that the second *Altmark* criterion was indeed met and that the Commission had erred in applying it by imposing an additional condition requiring that the parameters for calculating the compensation also ensure effective management of the public service. However, because the *Altmark* conditions are cumulative – and if all four conditions are met, a given measure does not constitute state aid—the General Court proceeded to the examination of the fourth criterion. The General Court found that the Commission had correctly concluded that the financial and audit checks on TV2 carried out by the National Audit Office did not provide sufficient proof that TV2's costs were those of a typical well-run undertaking. The General Court did, however, partially annul the contested decision because it held that the 1995-96 advertising revenue that TV2 received stemmed from

[59] Commission Decision C (2011) 2612 of April 20, 2011, (State Aid C 2/03), OJ 2011 L340/1.

[60] *TV2/Danmark v. Commission* (Case T-674/11) EU:T:2015:684, and *Viasat Broadcasting UK v. Commission* (Case T-125/12) EU:T:2015:687.

[61] Commission Decision C(2004) 1814 of May 19, 2004, (State Aid 2005/217/EC), OJ 2006 L85/1.

[62] Commission Decision of March 16, 2004 (State Aid 2005/C 172/03), OJ 2005 D172/3.

[63] *TV 2/Danmark v. Commission* (Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04) EU:T:2008:457.

[64] *Altmark Trans and Regierungspräsidium Magdeburg* (Case C-280/00) EU:C:2003:415 (setting out the criteria for determining whether state aid exists).

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private and not state resources and could not be considered state aid.

Viasat agreed with the determination that the measures in question constituted state aid but challenged the Commission's finding of compatibility. Viasat argued that the Commission had erred in disregarding the second and fourth *Altmark* criterion in its analysis of compatibility. The General Court explained that, even if the conditions for classifying a measure as aid compatible with the internal market are somewhat similar to the *Altmark* conditions, the application of Article 106(2) TFEU entails responding to a "fundamentally different question," which already presupposes an affirmative answer to the question concerned by the *Altmark* judgment, which is "distinct and is upstream of the question of the compatibility of the aid at issue with the internal market." That is, the *Altmark* criteria seek to establish the existence of state aid, the question of compatibility is predicated on the finding of state aid. Accordingly, the General Court dismissed Viasat's appeal.

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POLICY AND PROCEDURE

ECJ Advocate General Opinions

DHL Express (Italy) and DHL Global Forwarding (Italy) **(Case C-428/14), Opinion of AG Wathelet**

On June 5, 2007, DHL Express and DHL Global Forwarding (together, "DHL") submitted an immunity application regarding their participation in an international freight forwarding cartel in the sea, air, and road transport sectors. The Commission granted DHL full immunity for the entire freight forwarding sector but decided to prosecute the infringement concerning freight forwarding by air. On July 12, 2007, DHL submitted a summary application for immunity to the Italian Competition Authority (the "ICA") in relation to the same cartel. In November 2007, Deutsche Bahn AG (acting for itself and on behalf of its subsidiary, Schenker) submitted a leniency application to the Commission, with Schenker filing a summary application to the ICA in December 2007. The ICA determined the existence of a cartel concerning international freight forwarding on the road to and from Italy. However, it held that DHL's initial summary application did not include information concerning freight forwarding on the road; such information having only been provided in DHL's additional summary application dated June 23, 2008. Therefore, the ICA only awarded DHL a fine reduction, granting Schenker immunity because it was deemed to be the first to acknowledge that there was a freight forwarding cartel on the road.

To assess the ICA's approach, on September 18, 2014, the Italian Consiglio di Stato (the "Council of State") referred several questions to the Court of Justice concerning (1) whether the ECN model leniency program (the "program") is binding on National Competition Authorities ("NCAs"), and (2) whether a legal link exists between a leniency application filed with the Commission and a summary application submitted to an NCA concerning the same cartel. AG Wathelet delivered his opinion on these issues on September 10, 2015.[65]

As to the first issue, AG Wathelet focused on the fact that in *Pfleiderer*, the Court of Justice held that the program is not binding on national courts and tribunals.[66] AG Wathelet pointed out that a court may be an NCA,[67] and that it would be illogical to distinguish between competition authorities of a judicial versus administrative nature by holding that only the latter are bound by the program. AG Wathelet further stated that the ECN merely offers a forum for discussion and cooperation between the European competition authorities, that it is not a legislative body, and that its acts cannot be binding upon NCAs. He also underlined that the word "model" in the title of the program confirms its non-binding nature. As a result, AG Wathelet concluded that NCAs are not bound by the program.

AG Wathelet further disagreed with DHL's contention that its two applications had to be regarded as a single application due to the close legal link between them. AG Wathelet disagreed. He explained that, because the program is not binding on the NCAs, a system for summary applications set up by Member States does not have to mirror the system proposed in the program, provided that Member States comply with EU law. Furthermore, AG Wathelet emphasized that, independently of any EU application, a summary application must be sufficiently precise and capable of securing the position of a leniency applicant on a national level, in case the Commission decides not to act and an NCA launches an investigation. Finally, in view of its standalone nature, NCAs are not obliged to assess the

[65] *DHL Express (Italy) and DHL Global Forwarding (Italy)* (Case C-428/14), opinion of Advocate General Wathelet, EU:C:2015:587.

[66] *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09) EU:C:2011:389, para.

[67] Article 35(1) of Regulation 1/2003,Council Regulation (EC) No 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

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summary application in light of the application filed with the Commission.

General Court Judgments

***Axa Versicherung AG v. Commission* (Case T-677/13)**

On July 7, 2015, the General Court partially annulled the Commission's decision insofar as it rejected Axa Versicherung AG's ("Axa") request to access references to leniency documents included in the table of contents of the car glass cartel file.[68]

Axa had requested access to a significant number of documents,[69] including references to leniency documents in the index of the Commission's file. Axa deemed the documents potentially relevant for its damages action against the car glass cartel participants. On October 29, 2013, the Commission rejected Axa's request to access the documents.[70] Axa appealed the decision to the General Court, claiming, *inter alia*, that the Commission had failed to comply with Regulation 1049/2001 because it had not conducted a concrete and individual examination of each document requested and had adopted an overly broad interpretation of the exceptions to the right of access enshrined in Regulation 1049/2001.

The General Court found that the Commission did not err in refusing Axa access to the case file documents. It stated that, while the investigation is not deemed complete, the Commission can apply the general presumption of confidentiality. Thus, in this instance, the Commission was entitled to refuse access to case file documents without examining each of them individually, because disclosure of such documents would, in principle, undermine the protection of both the investigation's purposes and the commercial interests of the undertakings involved. The General Court recalled that this general presumption could be rebutted where an applicant shows the existence of a public interest in the disclosure of specific documents,[71] but found that in this case Axa had failed to do so.

The General Court went on to analyze the Commission's refusal to grant access to the references to leniency documents contained in the table of contents of the case file. It found that the Commission had erred in considering the table of contents a part of the case file that could be protected by the presumption of inaccessibility. The General Court found the Commission's assertion that disclosure of references to leniency documents in the table of contents would undermine the effectiveness of the leniency program insufficient to substantiate a refusal to grant access to this specific part of the index.

The General Court therefore annulled the part of the Commission's decision denying Axa access to references to leniency documents in the index of its car glass cartel file, but dismissed the rest of Axa's claims for access to other documents in the same file.

***Pilkington Group Ltd v. Commission* (Case T-462/12)**

On July 15, 2015, the General Court dismissed most of the arguments put forward by Pilkington Group Ltd ("Pilkington") and AGC Glass Europe ("AGC") in their respective appeals against the Hearing Officer's decisions to reject parts of their requests for confidential treatment of certain information contained in the non-confidential version of the Commission's decision.[72]

In preparing to publish a non-confidential version of the car glass decision, the Commission asked Pilkington and AGC

[68] *Axa Versicherung AG v. Commission* (Case T-677/13) EU:T:2015:473.

[69] Under 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 L 145, 31.5.2001 ("Regulation 1049/2001").

[70] Gestdem 2012/817 and 2012/3021, Commission Decision of October 29, 2013.

[71] Article 4 (2) of Regulation 1049/2001.

[72] *Pilkington Group Ltd v. Commission* (Case T-462/12) EU:T:2015:508.

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to identify information that they deemed confidential or that should be considered a business secret. When the Commission refused to accept all of their requests for confidential treatment, AGC and Pilkington referred the matter to the Commission's Hearing Officer. On August 6, 2012, the Hearing Officer partially rejected AGC's claim and entirely rejected Pilkington's request, prompting both companies' appeals to the General Court.

The General Court held that the Hearing Officer had erred in refusing Pilkington's request for confidentiality concerning a particular section of the car glass decision, because the Commission had already accepted that request. The General Court stated that the Hearing Officer's powers are limited to the requests referred to him, and that he cannot call into question decisions already taken by the Commission. Accordingly, it held that the Hearing Officer's decision should be partially annulled insofar as it related to this specific section of the decision. It dismissed the rest of Pilkington's claims, notably concerning historical information and information known from third parties or concerning the essence of the infringement. It also rejected the assertions that the decision had infringed Article 339 TFEU,[73] breached the principles of equal treatment, proportionality, the protection of legitimate expectations, and those governing the protection of identity of individuals and public access to the institutions' documents.

***AGC Glass Europe SA v. Commission* (Case T-465/12)**

On July 15, 2015, the General Court dismissed AGC's action in its entirety.[74] It found that the Hearing Officer had taken sufficient account of AGC's interest as a leniency applicant, and stated that the leniency notices do not create legitimate expectations of non-disclosure of the information provided in that context in the Commission's decision bringing the administrative procedure to an end. It rejected the claims of alleged breaches by the Hearing Officer of the principles of: (i) protection of legitimate expectations; (ii) equal treatment; (iii) the obligation to state reasons, (iv) good administration; and (v) the provisions relating to public access to the institutions' documents.

Commission Developments

Commission Amends Procedural Rules to Reflect Damages Directive

On August 3, 2015, the Commission announced amendments to its procedural rules and notices to reflect certain provisions in Directive 2014/104 (the "Damages Directive").[75]

Amendments to Regulation 773/2004[76] include: enshrining in hard law for the first time the main concepts of the Commission's leniency program (in particular, the rules on immunity from and reduction in fines); introducing new provisions on the timing and form of settlement submissions (*e.g.*, such submissions need not be made in writing); and providing that a party with whom the Commission has discontinued settlement discussions, and to whom it has issued a statement of objections, may receive access to the file, but that access to leniency statements and settlement submissions may only be granted at Commission premises.

Regulation 773/2004 has also been amended as concerns limitations on the use of information obtained in the course of Commission proceedings. For example, information prepared by other natural or legal persons specifically for Commission proceedings, as well as information prepared by the Commission and provided to the parties during the

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73 Which contains the obligation of professional secrecy.

74 *AGC Glass Europe SA v. Commission* (Case T-465/12) EU:T:2015:505.

75 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

76 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18–24.

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course of such proceedings, may only be used in national courts after the termination of the Commission proceedings.

The Commission also amended its Notices on: (i) access to the file [77] (reflecting, *inter alia*, relevant changes to Regulation 773/2004); (ii) immunity from fines and reduction of fines in cartel cases [78] (*e.g.*, specifying that failure to comply with the provisions in Regulation 773/2004 on the use of information obtained through access to the file may constitute a lack of cooperation, and give rise to penalties under national law); (iii) the conduct of settlement procedures[79] (including adding that the Commission will not transmit leniency statements to national courts for use in Article 101 or 102 TFEU damages claims, but that this does not alter the right of claimants to request that a national court examine evidence solely to determine whether it constitutes a leniency statement or settlement submission); and (iv) cooperation between the Commission and EU member state courts [80] (*e.g.*, providing that disclosure of information to national courts should not interfere with Commission investigations or the functioning of the leniency program or settlement procedures).

Explanatory Note on Commission Inspections Pursuant to Article 20(4) of Council Regulation No. 1/2003

On September 11, 2015, the Commission published a revised Explanatory Note on its powers to conduct dawn raids. [81] The main changes concern the IT and data protection aspects of dawn raids, and are explained below.

The Commission may, using its own Forensic IT tools, search the undertaking's IT-environment and all storage media (*e.g.*, CD-ROMs, external hard disks, and cloud services) on the premises. Importantly, this also includes any private devices and media used for professional reasons.

Evidence will be collected and listed in its "*technical entirety*," meaning that, even if only one email attachment is selected, the Commission will also collect the cover email and all its attachments. However, for the purposes of placing the evidence in its case file, the Commission may list separately each component part of the various items.

The handling of data and documents copied during an inspection is protected by, and may only be processed in compliance with, EU regulations. In particular, personal data may be collected throughout the course of the inspection (although undertakings, not staff, are the target of dawn raids), but may only be used for the purpose for which they were collected (*i.e.*, the enforcement of the competition rules). Further, they must be processed in accordance with EU rules on data protection.[82]

If the data search cannot be completed by the end of the on-site inspection, a copy of the remaining data may be sealed and inspected later at the Commission, where representatives of the undertaking can be present.

Finally, the relevant undertakings will be provided with a DVD containing the final data selected by the Commission for its file, along with a signed copy of the index of its contents.

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[77] OJ 2005 C325/7.

[78] OJ 20106 C298/17.

[79] OJ 2008 C167/1.

[80] OJ 2004 C101/54.

[81] Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2013.

[82] In particular, Council Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

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