FINING POLICY

ECJ Judgments

Industries Chimiques du Fluor v. Commission (Case C-467/13 P)

On October 9, 2014, the Court of Justice dismissed an appeal by Industries Chimiques du Fluor ("ICF") against the General Court's judgment of June 18, 2013,[1] upholding the European Commission's ("Commission") decision of June 25, 2008 in the aluminum fluoride cartel.[2]

In 2008, the Commission fined ICF and two other aluminum fluoride producers a total of €4.97 million for their involvement in a short-lived price-fixing cartel in late 2000. On appeal, the General Court confirmed the Commission's decision, and ICF appealed the General Court's judgment to the Court of Justice on three grounds.

ICF first argued that the General Court erred in holding that the Commission did not infringe its rights of defense. According to ICF, the Commission had committed a procedural error by failing to allow ICF to express its views on the reduction in the number of alleged infringers between the statement of objections and the infringement decision. Specifically, ICF claimed that it should have been entitled to express its views on this reduction, because it necessarily entailed a corresponding increase in the amount of the fine to be imposed on the remaining alleged cartelists.

The Court of Justice rejected this claim. The Court of Justice recalled that the statement of objections is a preparatory document that must clearly set out all essential facts on which the Commission relies at the relevant stage of the administrative procedure. The legal and factual assessments contained in the statement of objections are purely provisional. The Commission is therefore bound to reflect in its final decision the factors that may subsequently emerge from the administrative procedure and abandon objections revealed to have been unfounded. Further communication to the final addressees of the infringement decision is necessary only where the result of the investigation leads the Commission to take new facts into account or to materially alter the evidence of the relevant infringement. Where, on the other hand, the Commission merely abandons all objections against certain alleged infringers during the course of the administrative procedure, the final addressees of the Commission's decision need not be given an opportunity to submit their observations on this point.

ICF also claimed that the General Court had misinterpreted point 18 of the 2006 Fining Guidelines.[3] Where the relevant infringement's geographic scope extends beyond the territory of the EEA, that provision states that the Commission may set the basic amount of the fine by (i) assessing the total value of the "sales to which the infringement relates" in the relevant geographic area (broader than the EEA); (ii) determining the share of the sales of the relevant undertakings in this area; and (iii) applying such share to these undertakings' aggregate sales in the EEA.[4] ICF claimed that the General Court had erred in taking into account only the combined value of the sales of each alleged infringer for the purposes of assessing the total value of the "sales to which the infringement relates" under prong (i). According to ICF, the General Court should have, instead, considered the total value of the sales of *all* undertakings active in the market to which the infringement relates–*i.e.*, including undertakings not involved in the infringement.

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1 *Industries Chimiques du Fluor v. Commission* (Case T-406/08) EU:T:2013:322.

2 *Aluminium Fluoride* (Case COMP/39.180), Commission decision of June 25, 2008.

3 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 45/3. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.

4 *Id.*, point 18.

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The Court of Justice held that both the letter and the spirit of paragraph 18 of the 2006 Fining Guidelines supported the General Court's interpretation. It explained that, under the 2006 Fining Guidelines, the sales of undertakings that are not involved in the infringement do not qualify as "sales to which the infringement relates." The Court of Justice further rejected ICF's claim that this interpretation contradicted both the Commission's previous and subsequent decisional practice.

ICF also requested a reduction in the amount of the fine on account of the excessive length of the proceedings before the General Court. The Court of Justice rejected this claim. The Court of Justice remarked that the proper remedy for a failure by the General Court to adjudicate within a reasonable time is an action for damages. Such claim cannot be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself. Where the General Court's breach of its duty to adjudicate within a reasonable time is sufficiently serious, the Court of Justice may so find without it being necessary for the parties to adduce evidence in this regard. In this case, the proceedings before the General Court lasted almost four years and nine months, and three years elapsed between the end of the written proceedings and the hearing. Neither the complexity of the case nor a document request by the General Court one month before the hearing could explain the length of the proceedings.

Having rejected ICF's three grounds of appeal, the Court of Justice dismissed the appeal.

***Commission v. Parker Hannifin Manufacturing Srl and Parker-Hannifin Corp* (Case C-434/13 P)**

On December 18, 2014, the Court of Justice set aside the General Court's judgment of May 17, 2013, allowing the appeal by Parker Hannifin Manufacturing Srl, formerly Parker ITR Srl, and Parker-Hannifin Corp. against the Commission's decision of January 28, 2009 in the marine hose cartel.

In 2009, the Commission imposed over €131 million in fines on five marine hose manufacturers for participating in a cartel from 1986 to 2007.[5] The Commission held Parker ITR liable for the full period of the infringement and Parker-Hannifin jointly and severally liable from the date of its acquisition of Parker ITR in January 2002. The Commission did not fine Parker ITR's former parent company, Saiag SpA. On appeal, the General Court concluded that the Commission had erroneously attributed liability to Parker ITR for the period before January 1, 2002, and reduced the fine imposed on the company.[6]

The Commission appealed the General Court's judgment on two grounds.

The Commission argued that the General Court had erred in law by misapplying the case law on the transfer of liability between consecutive undertakings and intragroup economic succession. The Court of Justice agreed with the Commission.

The Court of Justice explained that, under the principle of economic continuity, liability may be attributed to the transferee that continues the activities of the transferor. A finding of economic continuity requires two elements. First, there must be a structural link between the transferor and the transferee at the time of the transfer. There is, however, no requirement for the structural link to continue for a minimum period. Second, there must be a real link between the transferor and the transferee. There is a rebuttable presumption of an actual link between a parent company and its wholly-owned subsidiary.

In this case, there were two distinct transfers of assets: (i) an intragroup transfer within the Saiag group, in which the ITR assets were transferred to a new entity called ITR Rubber (now Parker ITR) for the sole purpose of facilitating the subsequent acquisition of the ITR assets by Parker-Hannifin; and, later, (ii) an intergroup transfer in which Parker-Hannifin purchased ITR Rubber from Saiag. At the time of the intragroup transfer, there was a structural link

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

[6] *Parker ITR and Parker Hannifin v. Commission* (Case T‑146/09) EU:T:2013:258.

between Saiag and ITR Rubber, which the subsequent acquisition of ITR Rubber by Parker Hannifin did not break. The Court of Justice found that the General Court had failed to take into account the intragroup transfer of assets and therefore incorrectly inferred from the intergroup transfer that there was no structural link between Saiag and Parker Hannifin. As regards the existence of a real link, the General Court failed to examine the rebuttable presumption of an actual link between Saiag and its wholly owned subsidiary, ITR Rubber, because it had excluded the existence of economic continuity from the outset.

The Commission further argued that the General Court acted *ultra petita* (outside of its authority) by unlawfully reducing the fine on Parker-Hannifin by €100,000 due to its non-participation in the infringement from January 1, 2002 to January 31, 2002. The Court of Justice stated that the EU courts have unlimited jurisdiction under Regulation 1/2003. Therefore, the General Court did not act *ultra petita*. The Court of Justice, however, noted that the General Court is bound by certain requirements when exercising its unlimited jurisdiction, including the duty to state reasons and the principle of equal treatment. The Court of Justice found that the General Court had failed to state reasons when reducing the amount of the fine imposed on Parker-Hannifin. The Court of Justice therefore also upheld the Commission's second plea.

Having set aside the General Court's judgment, the Court of Justice referred the case back to the General Court for a ruling on the merits.

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

On November 12, 2014, the Court of Justice allowed an appeal by Guardian Industries Corp. and Guardian Europe Sàrl (together, "Guardian") against the General Court's judgment of September 27, 2012, upholding the Commission's decision of November 28, 2007 in the flat-glass cartel. The judgment is a rare instance of the Court of Justice reducing the amount of a fine upheld at first instance by the General Court.

In 2007, the Commission fined Guardian and two other undertakings a total of €489.6 million for participating in a cartel in the flat glass sector.[7] On appeal, the General Court upheld the Commission's decision,[8] and Guardian appealed to the Court of Justice.

Guardian claimed that the General Court had breached its rights of the defense and the principle of equality of arms by admitting into evidence a letter the Commission lodged with the General Court on the working day before the hearing. According to Guardian, this letter was lodged out of time without justification or prior court authorization and set out for the first time the Commission's position on the method for calculating the reduction in Guardian's fine.

The Court of Justice disagreed, explaining that the principle of respect for the rights of defense precludes the General Court from basing its decisions on facts and documents with which one or more parties to the proceedings have not been able to acquaint themselves. The principle of equality of arms aims to maintain a balance between the parties to the proceedings by ensuring that each has an opportunity to examine and challenge any document submitted by the other to the court. In this case, however, Guardian had three days to acquaint itself with the contents of the letter before the hearing. Given the nature and content of the letter, this period was not excessively short. Guardian thus had the opportunity to express its views on the letter at the hearing. Moreover, Guardian did not request a postponement of the hearing or an opportunity to comment on the letter in writing.

Guardian also argued that the General Court infringed the principle of equal treatment in refusing to accept that, for the purposes of calculating the fine, the Commission must take internal sales into account on the same basis as sales to third parties. The Court of Justice held that no distinction can be drawn between sales to third parties and internal

[7] *Flat glass cartel* (Case COMP/39165), Commission decision of November 28, 2007.

[8] *Guardian Industries and Guardian Europe v. European Commission* (Case T-82/08) EU:T:2012:494.

sales for the purpose of assessing the proportion of the overall turnover that derives from the sale of products that are the subject of the infringement. To disregard the value of internal sales would inevitably give an unjustified advantage to vertically integrated companies by allowing them to avoid fines proportionate to their actual importance on the product market to which the infringement relates. The Commission does not have discretion to simply disregard those internal sales, even if this were to lead to lower fines for most companies. If the Commission nonetheless choses to exclude these sales from the fine calculation, it must grant corresponding reductions to non-vertically integrated companies. In this case, the General Court departed from these principles. Therefore, the Court of Justice upheld Guardian's plea, and concluded that a 30% reduction in the amount of the fine imposed on Guardian was appropriate.

General Court Judgments

***Eni SpA v. European Commission* (Case T-558/08 P)**

On December 12, 2014, the General Court allowed an appeal by ENI SpA ("ENI") against the Commission's decision of October 1, 2008 in the paraffin wax cartel.[9]

In 2008, the Commission levied fines totaling €676 million on nine corporate groups for their involvement in a cartel in the paraffin wax sector between 1992 and 2005.[10] In particular, the €29.12 million fine imposed on ENI reflected a 60% increase in the basic amount of the fine on the grounds that ENI was a repeat offender. ENI appealed the Commission's decision to the General Court.

ENI challenged the Commission's findings that it had participated in an anticompetitive agreement or a concerted practice, which was based solely on the fact that it had attended one single technical meeting in Hamburg on October 30 and 31, 1997, under the auspices of the European Wax Federation ("EWF"). ENI explained that its representative attended this meeting because he was in Hamburg for legitimate business reasons and that he had distanced himself from the meeting's anticompetitive content. After that meeting, ENI did not attend any further technical meetings and withdrew its participation from the EWF. More generally, by attending a single meeting, ENI could not have participated in any "global plan" to distort competition.

The General Court disagreed, explaining that, when anticompetitive agreements are concluded at a meeting of competing undertakings, it is sufficient for the Commission to establish that the undertaking concerned participated in the relevant meeting to prove that it participated in the infringement. To rebut this conclusion, the undertaking concerned must produce evidence showing that it made its competitors aware that it was participating in the relevant meetings in a spirit different from theirs. The underlying rationale is that, if a participant fails publicly to distance itself from what is being discussed at a given meeting, then one can infer that the other participants will remain under the impression that it subscribes to, and will abide by, the anticompetitive agreement reached at that meeting.

According to the General Court, ENI's representative merely indicated to another participant's representative that he was uninterested. This fell short of the public distancing required by case law. Moreover, the evidence obtained from two other participants in the meeting showed that they believed that ENI's representative had subscribed to the agreement concluded at the meeting. The allegedly coincidental nature of his presence at this meeting was insufficient to call into question the Commission's finding that ENI had participated in the infringement.

ENI further challenged the Commission's calculation of the fine. In particular, ENI argued that the Commission had violated the principle of legal certainty by imposing a 60% increase over the basic amount of the fine on the grounds that ENI was a repeat offender. The Commission based its finding of recidivism on the fact that two of ENI's subsidiaries had been subject to fines in other cartel investigations prior to, or during, ENI's participation in the paraffin wax cartel: (i) Anic SpA ("Anic") in the

[9] *Candle Waxes* (Case COMP/C.3918), Commission decision of October 1, 2008.

[10] For certain undertaking, the cartel also involved market-sharing.

polypropylene cartel case and (ii) Enichem SpA ("Enichem") in the PVC II cartel case.

Following ENI's arguments, the General Court restated that the presumption that a parent company exercises decisive influence over its wholly-owned subsidiaries is rebuttable.[11] A parent company can produce evidence that, at the time of the infringement, it did not form a single economic entity with its wholly-owned subsidiary because such subsidiary acted independently. The General Court highlighted the relevance of examining such evidence. However, it is important to underline that the threshold for the rebuttal of the presumption is very high, especially in cases of wholly owned subsidiaries, because it is generally quite difficult to show that the parent did not in fact exercise decisive influence.

In this case, however, ENI was not the addressee of the statements of objections in those two proceedings. Nor was it mentioned in the related Commission infringement decisions. The Court of Justice therefore ruled that ENI did not have the opportunity to express its views as to its lack of influence over Anic or Enichem.

The fact that the Commission's statement of objections in the paraffin wax case referred to those prior infringements was insufficient to protect ENI's rights of defense. Indeed, this did not enable ENI *ex post* to rebut the presumption that it exercised decisive influence over its subsidiaries at the time the Commission investigated these infringements.

Therefore, the General Court removed the 60% increase for recidivism, which resulted in a 37.5% reduction in the original fine. The General Court dismissed ENI's three other pleas alleging errors in the calculation of the fine.

Pilkington Group Ltd and Others v. Commission
(Case T-72/09)

On December 17, 2014, the General Court dismissed an appeal by several Pilkington group companies ("Pilkington") against the Commission's decision of November 12, 2008, in the car glass cartel.[12]

The Commission imposed over €1.38 billion in fines on several car glass manufacturer groups for their involvement in a single and continuous infringement in the car glass sector between March 1998 and March 2003. The Commission found that Pilkington had participated in the infringement from March 1998 to September 2002, and imposed a €357 million fine on the UK-headquartered undertaking.

Pilkington argued in its appeal to the General Court that the Commission had failed to prove the existence of a single and continuous infringement. According to Pilkington, the meeting in which its representatives participated and at which they exchanged commercially sensitive information did not qualify as a 'fully-fledged' cartel, operating on the basis of a pre-determined plan designed to distort competition.

The General Court rejected this argument. The General Court first recalled that the disclosure of information to a competitor in preparation for an anticompetitive agreement suffices to prove the existence of a concerted practice within in the meaning of Article 101 Treaty of the Functioning of the European Union "TFEU." The General Court further noted that the Commission must adduce evidence capable of demonstrating, to the requisite legal standard, the existence of the circumstances constituting an infringement of this provision. Evidence of anticompetitive behavior is often fragmentary and sparse, which justifies the Commission reconstituting certain details through deduction.

The General Court reviewed the body of evidence relied on by the Commission and concluded that it was sufficient to support its finding of a single and continuous infringement. The fact that the meetings or contacts between the infringing undertakings sometimes took place several

[11] *See Akzo Nobel and Others v. Commission* (Case C-97/08 P) EU:C:2009:536.

[12] *Car glass cartel (*Case COMP/39.125), Commission decision of November 12, 2008.

weeks or months apart could not call this conclusion into question.

Pilkington also argued that the Commission had incorrectly assessed the duration of its involvement in the infringement by finding that it had participated in the infringement before January 15, 1999. The General Court noted that, in a single and continuous infringement, the Commission may impute liability to an undertaking for anticompetitive actions, provided that those actions form part of an overall plan with the same anticompetitive object and that the undertaking participated in the infringement. The General Court held that the Commission had correctly assessed the evidence showing that Pilkington had participated in the exchange of sensitive information as of March 1998. The anticompetitive conduct formed part of the overall plan to stabilize the market shares of the participants of the infringement. The General Court therefore found that that conduct was an integrated part of the single and continuous infringement that lasted from 1998 to 2003.

Finally, Pilkington argued that the Commission had erred in calculating the basic amount of the fine by (i) applying the same gravity and entry fee coefficients as for other participants, which yielded a fine representing a greater proportion of Pilkington's turnover than the fines imposed on the other infringers, (ii) departing from paragraph 13 of the 2006 Fining Guidelines,[13] whereby account is taken only of the sales made during the last full year of participation in the infringement, and, (iii) in calculating the total value of sales, considering the sales made during the infringement period based on contracts concluded before the beginning of the infringement period, and sales that were not shown to have been subject of collusion.

The General Court disagreed. First, the General Court noted that the Commission has broad discretion when setting the fine. The basic amount may be adjusted according to aggravating and mitigating circumstances specific to each of the undertakings concerned and thus need not be taken into account when determining the gravity or entry fee coefficients. Second, the General Court noted that the Commission may derogate from the 2006 Fining Guidelines where the circumstances of a case justify doing so. For the period of March 1998 to June 2000, the Commission used the value of sales to car manufacturers; the Commission had direct evidence that these sales had been the subject of collusive practices. For the period of July 2000 to September 2002, the Commission took into account all of Pilkington's sales in the EEA. The Commission then calculated the basic amount of the fine based on an annual weighted average by dividing the value of the sales by the number of months of Pilkington's participation in the infringement and multiplying the result by 12. The General Court held that this approach yielded a fine that more accurately reflected the characteristics of the cartel than calculating the fine based on a value of sales of the last full year of Pilkington's participation in the infringement. Third, the General Court held that paragraph 13 of the 2006 Fining Guidelines cannot be interpreted to apply only to the turnover resulting from the sales actually affected by that cartel. Instead, the applicable value of sales should reflect the economic significance of the infringement and the size of Pilkington's contribution to it. Therefore, the value of sales may extend to encompass sales made during the infringement period based on contracts concluded before the beginning of the infringement period, and sales that were not shown to have been subject of collusion.

The Commission's method was thus justified in view of the scope of the cartel, its mode of operation, and its overall objective of stabilizing market shares.

Having also rejected as unfounded Pilkington's other pleas concerning the application of the gravity coefficient and application of the exchange rate to Pilkington's turnover, the General Court dismissed the appeal.

[13] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2, para. 13.

Reinforcing Bars Cartel **(Cases T-472/09; T-55-56/10; T-489-90/09; T-69-70/10; T-83/10; T-85/10; and T-90-92/10)**
On December 9, 2014, the General Court issued nine separate judgments on appeals against the Commission's decision of September 30, 2009,[14] re-adopting its decision of December 17, 2002 in the Italian concrete reinforcing bars cartel.[15] The General Court dismissed six of the appeals, reduced the fines imposed on two applicants, and annulled the Commission's decision insofar as it held SP SpA ("SP") jointly and severally liable with its shareholder Lucchini SpA ("Lucchini").

In 2002, the Commission had fined 11 Italian steel manufacturers a total of €85.04 million for participating in a single, complex, and continuous infringement in the Italian concrete reinforcing bars sector between December 1989 and May 2000. The legal basis for the Commission's decision was Article 65 of the ECSC Treaty,[16] which prohibited anticompetitive agreements in the coal and steel sectors. All 11 undertakings appealed the Commission's decision to the General Court. On October 25, 2007, the General Court annulled the Commission's decision because Article 65 ECSC was no longer in force when the decision was adopted.[17]

In 2009, the Commission re-adopted its decision on the basis of Articles 7(1) and 23(2) of Regulation 1/2003.[18] On December 8, 2009, the Commission amended its decision to incorporate tables setting out price movements for reinforcing bars that had been referenced but not included in the re-adopted decision. The undertakings concerned all appealed the re-adopted decision, and three of them also challenged the amendment decision.

The applicants all argued that the Commission did not have the power to re-adopt the decision on the basis of Regulation 1/2003. The General Court rejected these arguments. It first noted that the legal basis for the Commission's decision must be in force at the time of adoption of the decision. In this case, the legal basis for the Commission's re-adopted decision was Regulation 1/2003, which was in force at the relevant time. The General Court further explained that the ECSC Treaty constituted a *lex specialis* (special law) derogating from the *lex generalis* (general law) of the EC Treaty. Following the expiry of the ECSC Treaty, the scope of the EC Treaty was extended to the sectors formerly subject to the ECSC Treaty, pursuant to the principle and objectives of the unity and continuity of the European Union ("EU") legal order. Therefore, the fact that the ECSC Treaty had expired did not mean that the Commission lost its power to impose penalties for infringements of Article 65 of this Treaty that had occurred prior to its expiry.

Several applicants also argued that the Commission had breached essential procedural requirements in adopting the September 2009 decision. In particular, they alleged that the decision was insufficiently reasoned because it referred to but did not actually include tables setting out price movements for concrete reinforcing bars during the infringement period. The General Court rejected these arguments, concluding that the appealed decision was clear, unequivocal, and sufficiently reasoned, enabling the applicants to understand the reasons for the decision.

Some of the applicants further maintained that the Commission had breached their rights of defense by failing to open new proceedings, to issue a new statement of objections to the undertakings concerned, or to hold a new hearing following the annulment of the 2002 decision. The General Court recognized that the statement of objections is an essential procedural safeguard that allows undertakings against which the Commission may levy fines to express their views on the allegations against them.

[14] *Reinforcing bars, re-adoption* (Case COMP/37.956), Commission decision of September 30, 2009.

[15] *Reinforcing bars* (Case COMP/37.956), Commission decision of December, 17, 2002.

[16] Treaty establishing the European Coal and Steel Community, Paris, April 18, 1951.

[17] *SP SpA and Others, Riva Acciaio SpA, Feralpi Siderurgica SpA, and Ferriere Nord SpA v. Commission* (Joined Cases T-27/03, T-46/03, T-58/03, T-79-80/03, T-97-98/03 EU:T:2007:317 and Cases T-45/03 EU:T:2007:318, T-77/03 EU:T:2007:319, and T-94/03 EU:T:2007:320).

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

However, the annulment of an act of an EU institution does not necessarily affect the legality of a preparatory act such as a statement of objections. Rather, the procedure for replacing an act which has been annulled must, in principle, be resumed at the point at which the illegality occurred.

Where the Commission chooses to remedy the illegalities found in an annulled decision and to adopt an identical decision untainted by these illegalities, that decision concerns the same allegations that have already been put to the undertakings. Thus, the statement of objections adopted by the Commission prior to the 2002 decision already had given the undertakings concerned the opportunity to respond to the Commission's allegations. The fact that the Commission re-adopted the decision on a different legal basis did not alter this conclusion.

SP also challenged the Commission's finding that it still formed part of the same economic entity as Lucchini at the time of the September 2009 decision. The General Court pointed out that Regulation 1/2003 precludes the Commission from imposing fines in excess of 10% of the turnover of the undertaking concerned in the previous fiscal year. Where several addressees of a decision form a single economic entity at the time of that decision, the 10% ceiling can be calculated on the basis of the single economic entity's overall turnover.

When the Commission re-adopted the decision, Lucchini owned only 16.7% of SP's shares. The Lucchini family owned the remaining 83.30% of SP's share capital. However, the Lucchini family owned only 20.18% of the shares in Lucchini, the remainder having been acquired by Russian steelmaker Severstal in 2007. The General Court therefore found that the Commission was not entitled to infer from the respective shares of Lucchini and the Lucchini family in SP that Lucchini and SP undertakings formed a single economic unit at the time of the decision. The fact that SP's registered office and the administrative headquarters of Lucchini shared the same premises was insufficient to prove the existence of a single undertaking. Therefore, the General Court annulled the decision insofar as it had failed to apply the 10% ceiling to SP individually. Moreover, SP had no turnover in 2007 and therefore could not be fined.

Ferriere Nord S.p.A. and Riva Fire S.p.A. further challenged the Commission's assessment of the duration of their participation in certain aspects of the infringement. The General Court concluded that the Commission had correctly found that Ferriere Nord and Riva Fire had not participated in the agreement relating to the limitation of output from its inception, but had failed to reflect this in the fine imposed on the two undertakings. The General Court thus upheld Ferriere Nord's and Riva Fire's pleas and reduced the basic amount of the fines imposed on them by 6% and 3%, respectively.

Having rejected the applicants' other pleas concerning alleged breaches of their rights of defense, the illegality of the amendment decision, and errors in the application of Article 65 ECSC in the calculation of the fine and the imputation of liability to the infringing undertakings' parent companies, the General Court dismissed all other appeals.

***Alstom v. Commission* (Case T-517/09) *& Alstom Grid SAS v. Commission* (Case T-521/09)**

On November 27, 2014, the General Court issued two separate judgments on appeals brought by Alstom and its subsidiary Alstom Grid against the Commission's decision of October 7, 2009 in the power transformers cartel.[19] The General Court annulled the Commission's decision insofar as it concerns Alstom, but dismissed Alstom Grid's appeal.

In 2009, the Commission imposed €67.64 million in fines on six power transformer manufacturers for participating in a cartel. The Commission fined Alstom €16.50 million, of which Areva T&D (now Alstom Grid) was found jointly and severally liable for €13.35 million. Alstom and Alstom Grid separately appealed the Commission's decision to the General Court.

[19] *Power Transformers* (Case COMP/39.129), Commission decision of October 7, 2009.

Alstom's Appeal

Alstom's appeal in case T-517/09 turned on two central claims, both of which questioned the Commission's attribution of liability to Alstom for the actions of its subsidiary Areva T&D. First, Alstom alleged that the Commission had misinterpreted the case law on joint and several liability and mistakenly found it jointly and severally liable for the actions of a subsidiary with which it did not form a single economic entity either during the infringement or at the time of the decision. The General Court disagreed. It explained that sole ownership is sufficient to trigger the presumption that a parent company has decisive influence over its wholly owned subsidiary and is, accordingly, liable for that subsidiary's infringements of competition law. The Commission need not adduce further evidence of control or separately establish the parent company's responsibility. Having established that Alstom owned 100% of Areva T&D's share capital at the time of the infringement, the Commission was entitled to presume that Alstom exercised decisive influence over Areva T&D, regardless of whether the two undertakings still formed a single economic entity at the time of the decision.

Second, Alstom argued that the Commission had failed to provide sufficient reasons for dismissing its arguments to rebut the presumption of effective control. The General Court noted that the statement of reasons must be such as to allow both the parent undertaking and the General Court to assess whether the Commission has erred in finding that the presumption was not rebutted. In particular, the mere fact that the parent undertaking's arguments may be insufficient to dispel this presumption does not relieve the Commission from its duty to state reasons.

Given that Alstom's arguments as to the lack of effective control were not manifestly out of context, the Commission was under a duty to state its reasons for rejecting them. The Commission, however, failed to do so. The General Court held that this called into question the legality of the decision itself and not just the quantum of the fine. The General Court therefore annulled the Commission's decision insofar as it concerns Alstom.

Alstom Grid's Appeal

In Case T-521/09, Alstom Grid argued that the Commission had departed from the 2002 Leniency Notice[20] and failed to state its reasoning. Under the 2002 Leniency Notice, immunity from fines is subject to two conditions. First, the immunity applicant must be the first to submit evidence which, in the Commission's view, may enable it to adopt a decision to carry out an investigation concerning an alleged cartel. Second, the immunity applicant cannot benefit from immunity where the Commission already had sufficient evidence to adopt such a decision at the time of the application.

According to Alstom Grid, the statements it made to the Commission met the requirements of the 2002 Leniency Notice and should have led to a fine reduction. In particular, Alstom Grid maintained that the information that the Commission claimed to have obtained prior to Alstom Grid's leniency application was insufficient to enable the Commission to undertake an investigation, and that Alstom Grid's information had enabled it to do so. The Commission's refusal to grant immunity, therefore, must have meant that it applied a further requirement in addition to those set out in the 2002 Leniency Notice.

The General Court disagreed, noting that documents found prior to Alstom Grid's leniency application during a dawn raid at another undertaking's premises in the context of another investigation had already revealed the existence of the power transformers cartel, enabling the Commission to carry out an investigation in this case. The General Court rejected Alstom Grid's argument that the Commission was not entitled to use the information so obtained for the purposes of its power transformers investigation. The General Court explained that information obtained during investigations must not be used for purposes other than those indicated in the order or decision under which the investigation is carried out. This does not, however, preclude the Commission from relying on its knowledge of such information to adopt a decision to carry out an

[20] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 45/03.

investigation in another case. Accordingly, the Commission was entitled to rely on its knowledge of the documents concerning the power transformers cartel to carry out an investigation in this case. Therefore, Alstom Grid did not meet the requirements of the 2002 Leniency Notice and its claim that the Commission departed from the 2002 Leniency Notice was meritless.

Having also rejected Alstom's argument alleging a violation of its legitimate expectations, the General Court dismissed the appeal.

INTELLECTUAL PROPERTY

ECJ Advocate General Opinions

***OPINION OF ADVOCATE GENERAL WATHELET – HUAWEI TECHNOLOGIES CO. LTD V. ZTE CORP., ZTE DEUTSCHLAND GMBH* (CASE C-170/13)**

On April 5, 2013, the Landgericht Düsseldorf (Düsseldorf Regional court, Germany) referred a series of questions to the Court of Justice concerning the application of Article 102 TFEU to an injunction brought by Huawei, the holder of a standard-essential patent ("SEPs"), against ZTE, the alleged infringer. On November 20, 2014, Advocate General ("AG") Wathelet delivered his opinion on the issues raised by the court.

Huawei, a Chinese telecommunications company, holds a European patent declared as essential to the Long Term Evolution ("LTE") standard developed by the European Telecommunications Standards Institute ("ETSI"), a standard setting organization ("SSO"). Huawei made a commitment to ETSI to grant licenses to third parties on fair, reasonable, and nondiscriminatory ("FRAND") terms.

ZTE, a group of Chinese companies, markets base stations with LTE software that makes use of Huawei's patent. After ZTE and Huawei failed to conclude a licensing agreement, Huawei brought an action for infringement against ZTE before the Düsseldorf court seeking, among other remedies, an injunction prohibiting the continuation of the infringement. ZTE claimed that—given its alleged willingness to license Huawei's patents—Huawei's action for an injunction was abusive.

The Düsseldorf court faced a dilemma. On the one hand, German courts have approached these types of cases in accordance with the principles laid down by the German Federal Court of Justice (Bundesgerichtshof, "FCJ") in its judgment of May 6, 2009 in Orange-Book-Standard.[21] In that decision, the court 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 for the patent 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 *de facto* essential patent (rather than an SEP) and the Supreme Court, in its holding, did not rely on a promise to license on FRAND terms.

On the other hand, the Commission had recently issued a press release in the *Samsung*[22] case suggesting a broader application of Article 102 TFEU to injunctions brought by SEP holders. In particular, the 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 (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 this case would lead it to uphold the action for infringement. Applying the principles set out in the Samsung press release, however, would lead it to dismiss Huawei's action for injunction as an abuse. The court therefore stayed the proceedings and asked the Court of Justice to determine 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.

AG Wathelet noted that the fact that an undertaking owns an SEP does not necessarily mean that it holds a dominant

[21] *See the FCJ's judgment of May 6, 2009*, case KZR 39/06.

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

position—it gives rise to a rebuttable presumption of dominance, but that is ultimately for the national court to determine on a case-by-case basis. This is less strict than the Commission's decision in the *Motorola Mobility* case[23] which considers that the mere holding of an SEP does not confer dominance, but suggests that an SEP owner will occupy a dominant position if the SEP reads on (*i.e.*, is essential to the implementation of) a standard that is widely accepted in the industry.

AG Wathelet then referred to the Court of Justice case law precedent on refusals to license intellectual property ("IP"), under which such a refusal by a dominant company can be deemed abusive, but only under "exceptional circumstances." He set out the "exceptional circumstances" in which bringing an action for an injunction can constitute an abuse of a dominant position. This analysis is relatively brief, and it fails to address the important debate that has been ongoing since the Commission's *Motorola* and *Samsung* decisions.

In *Motorola*, the Commission held that "seeking and enforcing" an injunction is an abuse in "exceptional circumstances." The Commission effectively deemed the standard-setting context and the SEP owner's commitment to license on FRAND terms to constitute such "exceptional circumstances."[24] In *Samsung*, the Commission suggested that merely applying for an injunction can be abusive, even if the injunction is not granted or enforced. This conclusion is difficult to reconcile with the established legal tests in *ITT Promedia*[25] and *Protege International*,[26] which held that the initiation of legal proceedings could constitute an abuse of a dominant position only when the legal action (i) is manifestly unfounded, and (ii) proves to be part of a plan to eliminate competition.

In his analysis of the "exceptional circumstances" test, AG Wathelet recognizes that injunctions are an essential means for patent holders to assert their IP rights,[27] that any restriction on the right to bring those actions can only be permitted in exceptional circumstances, and that the right of access to the courts is protected by Article 47 of the Charter. Although Article 52(1) of the Charter permits limitations on this right, the importance of the right of access to the courts means that bringing an action for an injunction should only be considered an abuse of a dominant position in exceptional circumstances.

AG Wathelet believes that these rights must be balanced against the freedom to conduct a business in accordance with Community law.[28] In this case, he found that Huawei's notification of its patent to an SSO and its commitment to license on FRAND terms created a relationship of technological and economic dependence between the SEP holder and the companies that produce products and services in accordance with that standard. He found that, consistent with *Volvo*,[29] in these circumstances, bringing an action for an injunction against a "willing licensee" can constitute recourse to a method different from those governing normal competition and an abuse of a dominant position, provided several additional requirements are met, relating partly to the behavior of the SEP holder and partly to that of the SEP user/would-be licensee.

The legal test employed by AG Wathelet appears to confuse the notions of abusive refusal to license with the abusive recourse to a court of law. The *Volvo* case concerned the circumstances under which it would be abusive for a dominant IP holder to refuse to grant licenses to willing licensees, namely, where it holds a dominant position and arbitrarily refuses to supply (or manufacture) spare parts for independent repairers, or charges excessive prices for those parts. It did not concern the circumstances in which bringing an injunction—and

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

[24] *Id.*

[25] *ITT Promedia (*Case T-111/96) EU:T:1998:183.

[26] *Protégé International* (Case T-119/09) EU:T:2012:421.

[27] As recognised by Article 17(2) of the Charter.

[28] Article 16 of the Charter.

[29] *AB Volvo v. Erik Veng* (UK) EU:C:1988:477.

therefore access to the courts—can be restricted. Unfortunately, AG Wathelet's opinion did not elaborate on that test, or reference the *ITT Promedia* or *Protege International* cases.

AG Wathelet set out specific steps a SEP holder should take before bringing an action for an injunction to avoid a charge of abuse. First, unless it is established that the infringer is fully aware of the infringement, the SEP holder must alert the infringer in writing, giving reasons and specifying the SEP concerned and the way in which it has been infringed. Second, the SEP holder must always present the infringer with an offer for a license on FRAND terms, including the precise amount of the royalty and how it is calculated.

Once those steps have been taken, the application for an injunction can still be abusive if the infringer responds in "a diligent and serious manner" to the offer made by the SEP holder.[30] Thus, if it does not accept that offer, it must promptly submit to the SEP holder, in writing, a reasonable counteroffer relating to the clauses with which it disagrees. An injunction action would not be abusive if the infringer's conduct is purely tactical or dilatory or not serious.

Importantly, even if negotiations fail, the patent user cannot be regarded as dilatory or not serious (in other words, "unwilling") if it asks for the terms of a license to be fixed by a court or arbitration tribunal. In those cases, the SEP holder may ask the court to require the patent user to provide a bank guarantee for the payment of royalties or to deposit a provisional sum at the court or arbitration tribunal in respect of its past and future use of the SEP. Likewise, a patent user will not be seen as unwilling to take a license because it reserves the right to challenge the validity or infringement of the SEP holder's patents.

As with the *Samsung* and *Motorola* decisions, the AG Wathelet's opinion provides patent users with a "safe harbor" for avoiding injunction proceedings, by agreeing to have the terms of a license determined by a court or arbitration tribunal. But the opinion leaves open whether patent holders enjoy a similar comfort if the user refuses an offer to have FRAND terms of a license determined by a court. It is thus unclear when a patent user will be regarded as "dilatory" or "not serious" which, in turn, makes it difficult for patent holders to know when, if ever, they can commence injunction proceedings. The only guidance given by AG Wathelet is that the timeframe for exchange of offers and counter-offers and the duration of negotiations must be assessed "in light of the commercial window of opportunity available to the SEP holder for securing a return on its patent in the sector in question."[31]

Although the opinion of AG Wathelet is not binding, the Court of Justice has tended to follow the conclusions of the AG in the majority of cases. The Court of Justice may, however, employ a different reasoning in its decision, or vary the conditions, even if it ultimately arrives at the same conclusions. In a case with such important implications, the reasoning employed by the Court of Justice will likely make a significant difference to the application of Article 102 by national courts. The Court of Justice's preliminary ruling is expected in the spring of 2015.

[30] *Huawei Technologies Co. Ltd* (Case C-170/13) EU:C:2014:2391, opinion of Advocate General Wathelet of November 201, 2014, para. 88.

[31] *Id.*, para. 89.

MERGERS AND ACQUISITIONS

Commission Decisions

Second-phase Decisions Without Undertakings

***Nynas/Shell/Harburg Refinery* (Case Comp/M.6360)**

On September 2, 2013, the Commission unconditionally cleared Nynas AB's ("Nynas") acquisition of certain refinery assets located in Hamburg/Harburg (Germany) from Shell Deutschland Oil GmbH ("Shell") following a Phase II investigation. The acquired assets consisted of a plant producing base oil from distillates and fuels, and a refinery producing distillates from crude oil. The Commission approved the acquisition primarily due to "failing firm" arguments.

Nynas, jointly controlled by Petróleos de Venezuela S.A. and Neste Oil Oyj of Finland, is active globally in the production of naphthenic base and process oils and transformer oils ("TFOs"), and maintains its core business in Sweden. Naphthenic base and process oils are intermediary products used in the production of numerous end applications, such as industrial greases, metalworking fluids, adhesives, inks, insoluble sulphur, industrial rubber, fertilizers, defoamers, and additives. Shell is a fully integrated global group of energy and petrochemical companies involved in upstream and downstream activities, from exploration to refining to distribution and retail sales.

The Commission focused on the market for the supply of naphthenic base and process oils, which was distinguished from paraffinic base and process oils, in particular due to differences in product characteristics, such as solvency and volatility, preventing customers from easily switching between the two types of base and process oils and requiring separate and unique production facilities for each type. In line with the Commission's previous decisions, the market for naphthenic base and process oils was considered to be EEA-wide because customer preferences and prices are different in North America and Europe, and transportation costs between the two continents are high.

The transaction combined the only two suppliers of naphthenic crude oil with production facilities in Europe, leaving the U.S.-based Ergon—with its import, distribution, and marketing operations in Europe—as the sole competitor to the combined entity in the EEA. The Commission determined that the combined entity's high market share of between 70% and 80%, including a 10% to 20% increment, would not accurately reflect the transaction's effects on competition because the Harburg refinery would be closed, absent the transaction. The Commission found that the lost capacity would not be replaced by Nynas' plant in Sweden, which suffered from capacity constraints, but would be filled by foreign imports, which would be more costly than local production in Europe. Consequently, prices of naphthenic base and process oils would increase. Thus the Commission concluded that the transaction would lead to preservation of capacity and lower prices in Europe compared to the counterfactual where the Commission prohibited the transaction leading to the assets' exit from the market.

To reach the conclusion that the transaction would be procompetitive, the Commission concluded that:

(i) Shell would indeed shut down the Harburg refinery, as confirmed by its internal documents, which showed that closing of the site was economically more beneficial than continuing to operate because the refinery had been loss-making for a few years and would likely remain such in the future; and

(ii) there would be no less anticompetitive alternative purchase of the Harburg refinery. The Commission discarded as implausible the potential sale of the refinery to Ergon because Ergon and Shell could not reach an agreement following negotiations in 2010 and 2011, and during the Commission's investigation Ergon declined Shell's invitation to confirm its interest in Harburg refinery because of the "unrealistic timeframe" proposed by Shell.

The Commission also concluded that Ergon would not have an incentive to take over the Harburg refinery if the notified transaction were prohibited, because Ergon had wanted to

purchase the refinery in order to prevent its acquisition by Nynas, which had sought to alleviate capacity constraints in its refinery in Sweden. However, prohibiting the transaction, and thereby preventing Nynas from acquiring the Harburg refinery, would undermine Ergon's incentive to purchase the refinery itself.

Finally, the Commission found that Nynas planned to increase the capacity of the Harburg refinery, which would likely lead to a significant reduction of costs for Nynas. Such cost reductions would be verifiable, merger-specific, and passed on to consumers. In particular, Nynas would be able to replace imports by cheaper EEA production. This would result in lower variable costs at the Harburg refinery relative to variable costs of imports, which, in line with the Commission's Horizontal Merger Guidelines,[32] are likely to be reflected in the final product price.

The Commission's analysis confirms that the Commission may accept an otherwise problematic transaction under the "failing firm" defense if the following three criteria are met: (i) unless acquired by another undertaking, the allegedly failing business would in the near future exit the market; (ii) there is no less anticompetitive alternative purchaser; and (iii) the effect on competition would be no worse if the transaction were approved because, in the absence of the merger, the assets of the failing firm would exit the market.[33] While not explicitly referring to the "failing firm" defense, *Nynas/Shell/Harburg Refinery* is the first EU merger decision where the Commission has cleared a transaction because the acquired business would cease to operate and its assets would exit the market in the absence of the transaction, thereby accepting the application of the "failing firm" defense to a separate business within the seller's company (a "failing division" defense).[34]

First-phase Decisions With Undertakings

***Rautaruukki/SSAB* (Case COMP/M.7155)**

On July 14, 2014, the Commission approved, subject to commitments, the acquisition of Rautaruukki Oyj ("Ruukki") by SSAB AB ("SSAB"). SSAB and Ruukki are steel manufacturers, active in the production and distribution of (mainly carbon) steel and the supply of steel products for the construction industry. The parties' European carbon steel production facilities are located in the Nordic countries, with SSAB based in Sweden and Ruukki in Finland.

The Commission's analysis focused on horizontal overlaps in the following segments: (i) the production and supply of carbon steel, particularly in the markets for hot-rolled, cold-rolled, organic (*i.e.*, painted) coated carbon steel, and in the potential submarkets for high strength steels, used for applications requiring high strength and low weight (such as cranes), and wear resistant steels, used in high-abrasion environments (such as in mining equipment); (ii) the distribution of carbon steel; and (iii) the production and supply of steel products for the construction industry.

The Commission concluded that the geographic market for hot-rolled, cold-rolled, and organic coated carbon steel could possibly be limited to the Nordic countries (*i.e.*, Finland, Sweden, and Norway), while the geographic market for the production and supply of high strength and wear resistant steel is at least EEA-wide. The Commission noted that the parties are strong head-to-head competitors and post-transaction would have a combined share of between 50% and 80% (with an increment of up to 40%) in the markets for the production and supply of hot-rolled, cold-rolled, and organic coated carbon steel in the Nordic countries. The parties have strong, vertically-integrated

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32 Commission's guidelines on horizontal mergers, OJ 2004 C 31/5, para. 80.

33 *Id.*, para. 90.

34 The Commission has declined to recognize the existence of a "failing division" defense in the following cases in the past: *NewsCorp/Telepiù* (Case COMP/M.2876), Commission decision of April 2, 2003, para. 211; *Rewe/Meinl* (Case IV/M.1221), Commission decision of February 3, 1999, paras. 66–69; *Bertelsmann/Kirch/Premiere* (Case IV/M.993), Commission decision of May 27, 1998, para. 71. In JCI/Fiamm (Case COMP/M.4381, Commission decision of May 10, 2007, para. 710), the Commission considered the "failing division" defense only in circumstances where the relevant business is so unprofitable as to endanger the financial viability of the entire seller company. The *Nynas/Shell/Harburg Refinery* decision, however, suggests that the Commission might relax this requirement going forward (in the light of Shell's otherwise sound financial position at a group level).

businesses, and their captive distribution channels limit the flow of imports from outside the Nordic countries. The Commission found that continental European steel producers, in spite of large overcapacity, have limited market presence in the Nordic countries and it is therefore unlikely they would be a significant competitive constraint on the parties. The Commission found no competition concerns in high strength and wear resistant steels, where the parties combined share of the EEA supply did not exceed 40%.

The Commission defined national geographic market for the distribution of steel products with each of Finland, Norway, and Sweden constituting a separate market. The Commission found that the combined entity would be a market leader with high market shares, and the transaction would give rise to competition concerns in the distribution of carbon steel flat products through steel service centers ("SSCs") in Sweden and Norway (combined shares of 50-80%), the distribution of carbon steel flat products through stockholding centers ("SCs")[35] in Norway (a combined share of 70%-80%), and the distribution of stainless steel products through SCs in Finland and Norway (combined shares of 50%-70%).

The Commission found that the transaction would likely give rise to competitive concerns in the production and supply of profiled steel construction sheets in Finland, where the parties' combined share would amount to 40-50%. However, the Commission did not reach a definitive conclusion because the proposed commitments removed the horizontal overlap.

To address the identified competition concerns, the parties proposed to divest major steel service centers in Finland and Sweden and SSAB's shares in two distribution joint ventures in Norway. The divestment also included further distribution assets in Finland as well as SSAB's construction business in Finland. The divestment remedy did not include production capacity because the Commission's key concerns were related to the parties' strong presence at the distribution level.

[35] Stockholding centers operate as wholesalers by buying steel products in bulk and reselling in smaller quantities.

INEOS/Solvay (Case COMP/M.6905)

On May 8, 2014 the Commission authorized, subject to commitments, a newly established joint venture between INEOS AG ("INEOS") and Solvay SA ("Solvay"). The joint venture ("JV"), owned equally by each party, will combine Solvay's and Ineos's plants producing polyvinyl chloride ("S-PVC"),emulsion PVC ("E-PVC"), integrated upstream chlorine and ethylene dichloride ("EDC") / vinyl chloride monomer ("VCM"), together with chlorine electrolysis, chloromethanes and epichlorhydrine plants, an interest in an ethylene cracker and salt/brine facilities, and chlorinated paraffins and chloromethanes plants.

The Commission's analysis focused on the transaction's effect on the production of commodity S-PVC, a coarse porous white powder mainly used for pipes and rigid profiles, and sodium hypochlorite, a by-product of chlorine production used for various applications particularly as a disinfectant and a bleaching agents in households and industry and for water treatment.

Concerning commodity S-PVC, the Commission concluded that the relevant product market includes the production and supply of commodity S-PVC, including all molecular weights (K-values) but excluding high-impact S-PVC ("HIS-PVC") and other co-polymers. The Commission concluded that specialty S-PVC, extender S-PVC, and HIS-SPVC are not part of the same market because of suppliers' limited economic incentives to switch from these products to commodity S-PVC. Nevertheless, the Commission's assessment of capacity market shares took into account the capacity used to manufacture specialty, including co-polymers, extender S-PVC, and HIS-PVC, to reflect the technical capability to redeploy capacity from these products to the commodity S-PVC. The parties submitted extensive data on prices, sales, and product flows to argue that the competitive assessment of the commodity S-PVC market should be carried out at the EEA level. The Commission rejected this argument and found that the geographic market for commodity S-PVC is limited to North

Western Europe, potentially also including Austria, Finland, Italy, and Switzerland. This conclusion was based on transport costs, the advantages of having plants close to customer production sites, the absence of effective price arbitrage between North Western Europe and the rest of Europe, and the limited impact of S-PVC producers located outside North Western Europe on prices within North Western Europe.

The Commission found that the parties are the two largest commodity S-PVC producers having a combined share, in terms of sales and capacity, exceeding 50% in North Western Europe. INEOS is the largest commodity S-PVC supplier, selling nearly more than twice the volume of Solvay, the second largest supplier. Solvay would contribute to the JV three S-PVC plants together with the associated upstream assets and, as a result, the parties would become the only companies with extensive operations in North Western Europe. According to the Commission, other suppliers do not have sufficient capacity and incentives to expand production because the market would be highly concentrated with the three largest firms accounting for more than an 80% of the market in the context of insignificant imports. The Commission concluded that these anticompetitive effects would also apply in a geographic including Austria, Finland, Italy, and Switzerland.

Concerning sodium hypochlorite, the Commission held that the geographic market is limited to the Benelux because sodium hypochlorite is typically sold within a 300 km area around manufacturing plants. The Commission found that the transaction would negatively affect competition because the parties are, respectively, the largest and second largest supplier of sodium hypochlorite in the Benelux, with a combined share of between 60% and 70%, facing only one significant competitor, Akzo, which would not impose sufficient competitive constraint on the combined entity because it would lack the incentive and ability to counter price increases from the JV.

To remove the identified competitive concerns in the market for S-PVC in North Western Europe and the market for sodium hypochlorite in Benelux, the Commission accepted the parties' commitment to divest to an upfront purchaser: (i) INEOS's vertically integrated PVC chain comprising production assets in Belgium, France and the Netherlands; and (ii) INEOS's vertically integrated PVC chain comprising EDC assets in the UK and VCM/S-PVC operations in Germany.

***Chiquita Brands International/Fyffes* (Case COMP/M.7220)**

On October 3, 2014, the Commission approved, subject to commitments, the merger between Chiquita Brands International, Inc. ("Chiquita") and Fyffes plc ("Fyffes"). Following the conditional clearance granted by the Commission, the planned merger was abandoned after Chiquita's shareholders rejected the merger on October 24, 2014.

The Commission analyzed horizontal overlaps in the following three markets: (i) the import and sale of bananas to retailers and wholesalers; (ii) banana ripening services; and (iii) the sourcing and sale of pineapples. The Commission concluded that the transaction would raise competition concerns with respect to the import and sale of bananas to retailers and wholesalers in Belgium, Denmark, Finland, Germany, Ireland, the Netherlands, Sweden, and the UK, and possibly in the Czech Republic, Poland, Italy, Latvia, and Lithuania. The parties' commitments would have eliminated these concerns.

According to the Commission, the import and sale of bananas form a distinct product market that does not include other fruit, largely because the demand for bananas is inelastic and, relative to other fruit, bananas are cheap and their supply is not subject to seasonality. The Commission did not define separate markets for yellow and green bananas because sufficient ripening capacity existed and independent ripeners were present in the market. The Commission also did not defined separate markets on the basis of origin countries or classes (based on appearance, length, and grade), but did not exclude the possibility that

fairtrade or organic bananas[36] are in a separate product market from conventional bananas (other bananas excluding fairtrade and organic bananas). The geographic scope of the market was found to be national because of differences in consumer preferences, price strategies, and types of customers across different EU Member States.

The Commission analyzed whether the transaction would increase the risk of coordination between competitors due to the concentration of distribution networks. Banana suppliers previously had been fined for cartels in 2009 and 2011[37]. This precedent notwithstanding, the Commission found no such concerns and concluded that the market today has become less prone to coordination because, following the abolition of the quota regime in 2006, several companies have entered the market and have started to source bananas directly from plantations and Aldi, the discount retail chain, stopped announcing its weekly banana prices in 2012.

As to non-coordinated effects, the Commission concluded that the parties' high combined market shares in certain countries, which reached up to 60% in Denmark, the Netherlands, and Sweden, 70% in Finland and Ireland, and 80% in Belgium, would not give rise to unilateral competition concerns because the combined company would continue to be sufficiently constrained by the possible entry and expansion of competitors. The Commission did find, however, that the transaction would raise competition concerns because the merged entity would increase its commercial negotiating power toward shipping companies at national and global levels. In particular, the Commission was concerned that the combined entity could impose exclusivity clauses in shipping agreements or foreclose competitors' access to shipping services in other ways, in particular to gateway ports in Belgium, Germany, the Netherlands, and the U.K. The Commission relied on the example of the Irish market, where Fyffes successfully negotiated an exclusivity clause with Maersk. This has forced competitors to ship bananas to neighboring countries such as Belgium, the Netherlands, and the U.K., significantly increasing their transport costs.

To address these concerns, the Commission accepted the parties' proposed commitments to release Maersk from the exclusivity shipping agreement in Ireland, and not to apply any exclusivity obligations to shipping services for ten years. Chiquita and Fyffes further committed to refrain from using other means to force any shipping company to refuse to provide banana shipping services to other importers on relevant routes for ten years.

First-phase Decisions Without Undertakings

***Facebook/WhatsApp* (Case COMP/M.7217)**

On October 3, 2014 the Commission unconditionally cleared Facebook, Inc.'s ("Facebook") acquisition of WhatsApp Inc. ("WhatsApp"). Facebook offers social networking consumer communications and photo/video sharing services via its website and applications for mobile devices. Facebook also offers advertising space on these platforms. WhatsApp provides consumer communications services through the mobile ("app") "WhatsApp."

The Commission determined that the transaction gave rise to horizontal overlaps in the following three markets: (i) the consumer communications services market; (ii) the social networking services market; and (iii) the online advertising services market.

The Commission's analysis focused primarily on the consumer communications services market. The Commission concluded that the concentration did not raise competition issues in the consumer communications services market because WhatsApp (market share between 20% and 30%) and Facebook (market share between 10% and 20%) are not close competitors. Even

[36] Fairtrade bananas include bananas that comply with ethical, social and environmental standards, as certified by the Fairtrade Foundation. Organic bananas are those that meet the criteria specified in the Council Regulation (EC) No 834/2007 of June 28, 2007 on organic production and labeling of organic products.

[37] *See* Commission Decision of 15 October 2008 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/39.188 — Bananas), OJ 2009 C 189/12.. *See also* Commission decision of 12 October 2011 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (Case COMP/39.482 — Exotic Fruit (Bananas)), OJ 2012 C 64/12.

though Facebook has a standalone consumer communications app "Facebook Messenger," the parties' products are different in terms of: (i) the identifiers used to access the apps; (ii) the source of the contacts; (iii) the level of user experience; (iv) the privacy policy of collecting user data; and (v) the intensity with which the apps are used. The features of Facebook Messenger and WhatsApp are also offered by other companies and consumers, can switch providers easily and rapidly because communications apps are offered for free or at a very low price and can coexist on the same handset. The Commission found that network effects in this market, which are associated with the increased utility that users derive from having more users of the same app, are unlikely to raise competition concerns in light of recent instances of market entry, the fast-growing nature of the market characterized by short innovation cycles, and the absence of user lock-in to a particular platform.

The Commission found no competition concerns in social networking services, the parties are not close competitors. Facebook provides a significantly richer user experience than WhatsApp and the parties' platforms have different functionalities and focus. The Commission also concluded that other social networking platforms, such as Google+, LinkedIn, Twitter, and MySpace would continue to constrain the combined company. The Commission rejected the concerns regarding potential integration of the parties' platforms because such integration would entail significant technical hurdles and may alienate users, Facebook has not discussed such plans in its internal documents, and WhatsApp's user base was largely overlapped with Facebook.

The Commission found no competitive concerns because WhatsApp does not collect data about its users or store messages. As a result, the transaction did not increase the amount of data potentially available to Facebook for advertising proposes. The Commission noted that WhatsApp has a "no ads" strategy, and if it were to introduce ads, users would have sufficient alternatives and may be prompted to leave WhatsApp's service.

Decision Imposing a Fine for Infringing Notification and Standstill Obligations

Marine Harvest v. Morpol **(Case COMP/M.7184)**

On July 23, 2014, the Commission issued a decision imposing a €20 million fine on Marine Harvest ASA ("Marine Harvest") for implementing a concentration, by way of acquisition of a controlling minority stake in Morpol ASA ("Morpol"), in breach of the notification requirement and standstill obligation in Articles 4(1) and 7(1) of the Merger Regulation.[38] Respectively, the parties are Norwegian seafood companies primarily active in the production and processing of salmon. The appeal of the Commission's decision is pending before the General Court.

On December 14, 2012, Marine Harvest signed a share purchase agreement (the "SPA") with two private limited liability companies controlled by the founder and former CEO of Morpol for the purchase of approximately 48.5% of Morpol's share capital. Because the SPA triggered a mandatory public tender for the remaining shares under the Norwegian public takeover rules, three days later on December 17, 2012, Marine Harvest announced a mandatory offer for the remaining shares. On the following day, Marine Harvest closed the SPA. On December 21, 2012, it informed the Commission of the closing and stated that it would refrain from exercising its voting rights in Morpol pending the outcome of the Commission's investigation. On January 15, 2013, Marine Harvest commenced a mandatory public offer for the remaining 51.5% of the shares in Morpol. Following a prenotification process, Marine Harvest submitted a formal notification on Form CO on August 9, 2013. As a result of the settlement and completion of the public offer on March 12, 2013, Marine Harvest owned 87.1% of the shares in Morpol. It completed its acquisition of Morpol's remaining shares on November 12, 2013. Pending the Commission's clearance, Marine Harvest refrained from exercising its voting rights, did not attend Morpol's shareholder meeting, and kept

[38] Commission Regulation No 139/2004 on the control of concentrations between undertakings, OJ L 024/1.

Morpol as a ring-fenced entity. The Commission authorized the concentration on September 30, 2013 following a Phase I investigation, subject to commitments.

The Commission imposed a fine of €20 million for closing the SPA before its notification and merger clearance by the Commission. The €20 million levied upon Marine Harvest consisted of a €10 million fine for closing the SPA before notifying the Commission, in violation of Article 4(1) of the Merger Regulation, and a €10 million fine for closing the SPA before securing the Commission's clearance, in breach of the standstill obligation under Article 7(1) of the Merger Regulation. The Commission took the view, first, that the closing the SPA transferred approximately 48.5% of Morpol shares to Marine Harvest, thereby conferring *de facto* sole control over Morpol. Although Marine Harvest had refrained from exercising its voting rights, the Commission concluded that the mere acquisition of a controlling minority stake conferred upon Marine Harvest the possibility to exercise decisive influence over Morpol, which in itself amounted to an implementation of the concentration. The SPA was closed on December 18, 2012, and in the Commission's view, the concentration was implemented prior to its formal notification on August 9, 2013, and before the clearance decision issued on September 30, 2013.

Second, the Commission rejected Marine Harvest's arguments that its acquisition of Morpol was covered by the exemption of Article 7(2) of the Merger Regulation, which allows implementation of a concentration before its notification and clearance if the concentration is implemented by way of a public bid provided that: (i) the concentration is notified to the Commission without delay; and (ii) the acquirer does not exercise the voting rights or does so only to maintain the full value of its investments in accordance with the Commission's derogation. The Commission rejected Marine Harvest's claim that the SPA and the ensuing public bids were interrelated, fulfilled the same economic purpose to acquire Morpol, and are to be considered as one single concentration. The Commission also noted that it is irrelevant that the SPA and the ensuing bids may have been viewed as part of the same transaction. According to the Commission, Article 7(2) is applicable only when control is acquired from various sellers, while the SPA provided for the acquisition of shares from a single controlling shareholder and therefore fell outside the ambit of Article 7(2). For these reasons, the Commission found it unnecessary to examine whether Marine Harvest had complied with the terms of Article 7(2).

The Commission further found the infringements to be serious by nature because the purpose of the EU merger control is to prevent undertakings from causing permanent and irreparable damage to competition by implementing reportable concentrations before the Commission's clearance. The Commission concluded that Marine Harvest was negligent in committing the infringements, because: (i) it is a large company having had experience in merger control filings at the EU and national levels and the acquisition of *de facto* control was obvious from the publicly available information on attendance rates in Morpol's shareholder meetings; (ii) Marine Harvest received legal advice on the application of Article 7(2) only on the date of closing the SPA; (iii) there was a previous Commission decision on the interpretation of Article 7(2); and (iv) Marine Harvest had been previously fined by the French competition authority for early implementation of a transaction. In determining the amount of the fine, the Commission also took into account the serious concerns as to the transaction's compatibility with the internal market (as an aggravating factor) and the fact that Marine Harvest promptly informed the Commission of the transaction (as a mitigating factor).

STATE AID

General Court Judgments

Alouminion v. Commission **(Case T-542/11)**

On October 8, 2014, the General Court annulled a Commission decision[39] determining that a preferential tariff granted by the Greek public power corporation Dimosia Epicheirisi Ilektrismou AE ("DEI") to aluminum producer Aluminium of Greece and its successor Aluminium SA (together, "AoG") constituted incompatible state aid.

The preferential tariff at issue resulted from a 1960 contract between AoG and DEI (the "rate contract"), concluded prior to the accession of Greece to the European Union. In 1992, the Commission decided that the preferential tariff did not constitute state aid.[40] The rate contract expired on March 31, 2006, and, as of April 1, 2006, DEI started charging AoG the standard rate applicable for large industrial customers. AoG challenged the Rate Contract's termination before the national court and, on January 5, 2007, obtained an interim order suspending the effect of the termination pending judgment on the merits. DEI successfully petitioned to have the first interim order overturned in March 2008, and resumed charging AoG the standard rate.

The contested decision concerned the 25-month period between the interim orders, during which DEI had granted AoG the preferential tariff. The Commission determined that the previously approved aid had ceased on March 31, 2006, and the granting of the preferential tariff following the expiration of the original contract constituted new aid that required notification. As a result, Greece had unlawfully granted AoG €17.4 million.

The General Court concluded that the Commission had erred in classifying the measure at issue as new aid which rendered its decision unlawful in its entirety. The General Court recalled that the modification of existing aid results in new aid where it affects the substance of the original aid scheme. However, the first interim order did not do so; it merely suspended the effects of the rate contract's termination, but neither altered any contractual or statutory provisions related to the preferential tariff, nor changed the tariff's limits or terms. Accordingly, the first interim order could not be regarded as the granting or alteration of aid under Article 108(3) TFEU. In addition, unlike in previous Court of Justice's decisions finding an extension to have given rise to new aid, the extension at hand was not brought about by legislative intervention, and did not alter the legal framework approved by the Commission. The Commission's appeal to the Court of Justice is pending.[41]

Alcoa Trasformazioni v. Commission **(Case T-177/10)*****, Portovesme v. Commission*** **(Case T-291/11)** ***and Eurallumina v. Commission*** **(Case T-308/11)**

On October 16, 2014, the General Court upheld two Commission decisions[42] concluding that the preferential electricity tariffs granted to three Italian metal producers constituted state aid incompatible with the common market.

ENEL, then an Italian state-owned electricity monopoly, granted a preferential electricity tariff to two primary aluminum smelters of Alcoa Trasformazioni Srl. ("Alcoa") at a fixed rate for a 10-year period ending on December 31, 2005. In 1996, the Commission concluded that the tariff in question did not constitute state aid because it covered ENEL's marginal costs and a portion of its fixed costs, consistent with what would be required by a private operator under standard market conditions.[43]

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[39] Commission Decision C (2011) 4916 of July 13, 2011 (State Aid C 2/10 (ex NN 62/09)), OJ 2012 L 166/ 83.

[40] Commission Decision SG (92) D/867 of January 23, 1992 (State Aid NN 83/91).

[41] *DEI v. Alouminion and Commission* (Pending Case C-590/14 P), appeal lodged on December 18, 2014.

[42] Commission Decision C (2009) 8112 of November 19, 2009 (State Aid C 38/A/04 (ex NN 58/04) and C 36/B/06 (ex NN 38/06)), OJ 2010 L 227/62, regarding State aid measures implemented by Italy for Alcoa Trasformazioni Srl, and Commission Decision C (2011) 956 of February 23, 2011 (State Aid C 38/B/04 (ex NN 58/04) and C 13/06 (ex N 587/05)), OJ 2011 L 309/1, regarding State aid granted by Italy to Portovesme Srl, Eurallumina SpA and others.

[43] Commission Decision (State Aid C 38/92), OJ 1996 C 288/4.

The tariff was extended until June 31, 2007 and subsequently until December 31, 2010, while its financing mechanism was modified to an *ex-post* compensation scheme[44] financed by a parafiscal charge imposed on all Italian electricity consumers. None of these modifications was notified to the Commission.

On November 19, 2009, the Commission found that the existing preferential tariff in favor of Alcoa had been prolonged without due regard to the evolution of the electricity market, and constituted a subsidized tariff and thus incompatible operating aid.[45] The present appeals followed.

The General Court agreed that the market conditions and the regulatory framework pertinent to the 1996 tariff had changed considerably: the administration of the financing scheme was handed over to a public body and the electricity market had undergone a major liberalization. Unlike in 1996, the prices were no longer set by a State-owned monopoly but freely negotiated on the market. Accordingly, none of the beneficiaries in question would have obtained such a favorable electricity price (in light of the *ex-post* compensation received) under prevailing market conditions. Interestingly, the General Court rejected the parties' effort to invoke the principle of legitimate expectations. It explained that, in the absence of a prior notification to the Commission, the aid's recipient cannot legitimately expect the measure to be lawful, particularly where, as here, the circumstances have changed substantially after the Commission's last decision on that matter.

Accordingly, aid recipients ought to be vigilant and should not assume the lawfulness of a measure approved in the past without regard to its subsequent modifications and relevant market developments.

In December 2014, Alcoa and Portovesme appealed to the Court of Justice; this appeal is pending.[46]

Autogrill España v. Commission (Case T-219/10) *and Banco Santander and Santusa v. Commission* (Case T-399/11)

On November 7, 2014, the General Court annulled two Commission decisions[47] concluding that the Spanish tax rules that enabled Spanish companies to deduct the acquisition of shareholdings in foreign companies constituted state aid incompatible with the common market.

Under Article 12(5) of the Spanish corporate tax code,[48] any company subject to taxation in Spain can deduct from its taxable base any acquisition of at least 5% of the shares of a foreign company that it had held without interruption for at least one year.[49] The Commission concluded that this system constituted state aid because it granted a selective advantage to Spanish companies that acquired shares in foreign companies (as compared to Spanish companies that acquired shares in other Spanish companies). Autogrill España S.A., Banco Santander, S.A., and Santusa Holding, S.L., appealed to the General Court, arguing that the Commission had failed to establish the existence of a selective advantage within the meaning of Article 107(1) TFEU.

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44 The financing mechanism was first modified in 2000 when ENEL started to charge a nominal full price, but granted Alcoa a direct discount. In 2004, Alcoa continued to pay the full price to ENEL, but received an ex-post compensation equal to the previously provided discount from the Equalization Fund (a public body).

45 The preferential tariff was also extended to benefit other companies, including the metal producers Portovesme, and Eurallumina, and similarly found incompatible operating aid by a Commission decision of February 23, 2011.

46 *Alcoa Trasformazioni v. Commission* (Pending Case C-604/14 P), appeal lodged on December 27, 2014; and *Portovesme v. Commission* (Pending Case C-606/14 P), appeal lodged on December 23, 2014.

47 Commission Decision C (2009) 8107 of October 28, 2009 (State Aid C 45/07 (ex NN 51/07, ex CP 9/07)), OJ 2011 L 7/48; and Commission Decision C (2010) 9566 of January 12, 2011 (State Aid C 45/07 (ex NN 51/07, ex CP 9/07)), OJ 2011 L 135/1. The first decision focused on the acquisition of shareholdings in companies established within the EU, while the second focused on the acquisition of shareholdings in companies established outside the EU.

48 Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 of March 5, approving the revised text of the Corporate Tax Code). This law is no longer in force.

49 In particular, Article 12(5) of the Spanish corporate tax code enabled companies to amortize the financial goodwill arising from acquisitions of foreign companies.

The General Court noted that, in assessing fiscal measures under the EU state aid rules, one must identify the general system of reference, *i.e.*, the general tax regime. Subsequently, one must analyze whether the tax measure at issue constitutes an exception to the general system and grants a selective advantage to certain undertakings or to the production of certain goods within the meaning of Article 107(1) TFEU.

The General Court concluded that the Commission had failed to establish the existence of a selective advantage. First, even if Article 12(5) could be deemed an exception to the general system of corporate taxation in Spain, which is uncertain, this would not in itself be sufficient to establish that this measure favored certain undertakings or the production of certain goods. Indeed, the exception provided in Article 12(5) was in principle available to any company, regardless of the type of activity it carried out. Thus, Article 12(5) was not aimed at a particular category of undertakings or at the production of a particular type of goods, but at a specific category of economic transactions, *i.e.*, acquisitions of at least 5% of the shares of a foreign company. Second, the General Court explained that Article 12(5) was not a "*de facto*" selective measure, because it was not limited to companies with a significant amount of financial resources. The minimum 5% threshold applied regardless of the size of the target and of the economic value of the acquisition.

Finally, the General Court established that the selectivity of a measure must be determined by reference to comparable companies located in the same member state as those benefitting from the measure. Thus, the fact that Article 12(5) encouraged Spanish companies to acquire shareholdings in foreign companies, benefitting Spanish companies as opposed to foreign companies, is irrelevant for the selectivity analysis.

Commission Decisions

Luxembourg – Alleged aid to Amazon by way of a tax ruling (SA.38944 (2014/C))

On October 7, 2014, the Commission initiated a formal investigation into Amazon's transfer pricing arrangements in Luxembourg, approved by way of a tax ruling.[50]

Tax rulings are comfort letters issued by the tax authorities to an individual company, including to confirm transfer pricing arrangements—prices charged in intragroup commercial transactions. Multinational companies have a financial incentive to inflate the price of goods sold or services provided by a subsidiary in a low-tax jurisdiction to a subsidiary of the same corporate group in a high-tax jurisdiction, because this approach results in the latter declaring higher costs and, in turn, lower taxable profits. Accordingly, it is imperative that the transfer prices be "comparable to that which would have been arrived at between independent operators"[51] (*i.e.*, the arm's length principle) to simulate standard conditions of competition. Otherwise, a company would obtain a selective advantage by artificially decreasing its tax liability compared to other companies whose profits are allocated under standard market conditions.

The Commission is investigating a tax ruling that approved a methodology for calculating tax deductible royalty fees in connection with the licensing of Amazon's intellectual property rights between Amazon's two subsidiaries incorporated in Luxembourg.[52] The Commission has expressed serious doubts that the methodology in question

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[50] Commission Decision C(2014) 7156 of October 7, 2014 (State Aid SA.38944 (2014/C) (2014/NN)), OJ 2015 C 44/13. The Commission is conducting several similar investigations in the Netherlands (*Starbucks*), Ireland (*Apple*), Luxembourg (*Fiat Finance*), and Belgium, publicly pronounced a priority by the former Competition Commissioner Almunia, as well as his successor Commissioner Vestager (*see* commentary of the European Commission: "Statement by Vice President Almunia on opening of three investigations on transfer pricing arrangements on corporate taxation of Apple (Ireland), Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)", June 11, 2014; and Margrethe Vestager, Speech to High Level Forum of Member States, Brussels, December 18, 2014).

[51] Commission Decision C(2014) 7156 of October 7, 2014 (State Aid SA.38944 (2014/C) (2014/NN)), OJ 2015 C 44/13, para. 59.

[52] The licensor is a "tax transparent entity"–not subject to corporate taxation in Luxembourg–and thus has an incentive to demand excessive royalties to increase profits. The licensee is taxed in Luxembourg and thus has an incentive to pay excessive royalties to increase costs and decrease profits.

conforms to the arm's length principle. First, Luxembourg failed to provide a transfer pricing report that would allow the Commission to verify the compatibility of the proposed methodology with the arm's length principle. Second, Amazon's pricing methodology does not correspond to any of the methods recommended in the OECD Guidelines.[53] Third, the royalty is incompatible with the OECD Guidelines because it is not directly linked to output, sales, or profits. Further, the royalty is in any event subject to a floor and cap that seeks a predictable level of taxable profits without appropriate link to the arm's length reasoning. Finally, the ruling was granted more than a decade ago and was not subject to any revision reflecting developments in the economic environment.

Accordingly, the Commission has taken a preliminary view that the Luxembourg authorities have conferred on Amazon a selective advantage, and in turn an operating aid incompatible with the EU internal market.[54]

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[53] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2010).

[54] Establishing the remaining conditions for a finding of a state aid within the meaning of the Article 107(1) TFEU is relatively straightforward.

POLICY AND PROCEDURE

ECJ Advocate General Opinions

***Advocate General Jääskinen's opinion on questions referred from A German court regarding anchor defendants* (December 11, 2014)**

On December 11, 2014, AG Jääskinen delivered an opinion[55] following a preliminary reference from a German court regarding the application of the Brussels I Regulation ("Brussels I")[56] in a damages action following a decision by the Commission on a cartel matter.[57] The Court of Justice has not previously been asked to rule on the interaction between rules of EU private international law and EU competition law.

The case arose in Germany from a complaint by the Cartel Damage Claims Hydrogen Peroxide, a company aimed at upholding rights to damages suffered from cartels. The complaint was lodged against six companies fined by the Commission, only one of which was based in Germany. The cartel consisted of several companies from different Member States and resulted in damage to many persons scattered across the EU.

The German court submitted three questions concerning different provisions of Brussels I. First, Article 5(3), a rule for extra-contractual matters, gives jurisdiction to the courts of the place where the harmful event occurred or may occur. The German court asked whether, in the present case, the places of the harmful events would correspond to the different Member States where the cartel agreements were concluded and implemented. Second, Article 6(1) allows several defendants from different Member States to be judged before the courts of one single Member State, provided the claims against the defendants are closely connected and there is a need to avoid irreconcilable judgments. The German court questioned whether it was expedient to hear all the damage claims at stake together, so as to avoid such irreconcilability. Third, the German court asked whether the effective enforcement of Article 101 TFEU allowed it to take into account jurisdiction clauses, under Article 23, and arbitration clauses agreed by the parties, which would exclude the jurisdiction given either under Article 5(3) or 6(1).[58]

AG Jääskinen first noted that Brussels I is not the most adequate mechanism to ensure private enforcement of EU competition law. In his opinion, future developments in EU legislation should include a rule of jurisdiction more apt for such cases. It should be in line with the conflict of laws provision of the Rome II Regulation for obligations deriving from acts that restrict competition.[59]

AG Jääskinen's starting point was that, although Brussels I is not directed at giving effect to competition rules, it should nevertheless be interpreted so as to ensure the full effectiveness of provisions of EU competition law. Its interpretation should ensure that the jurisdictional rules of Brussels I do not make it impossible or excessively difficult to give effect to a right to damages in the context of a cross-border cartel.

AG Jääskinen concluded that Article 5(3) did not apply in this case. Article 5(3) is an exceptional provision based on the assumption that its criteria points to the court which has a particularly close link to the dispute and is hence best placed to judge it. AG Jääskinen found that the established case law on how to determine the place where the harmful event occurred does not apply to an EU-wide cartel with a great geographical dispersion of both cartel participants and damaged persons. Therefore, it was not possible to establish a close link, and the AG Jääskinen advised that the finding of multiple jurisdictions should not be accepted.

[55] CDC (Case C-352/13) EU:C:2014:2443, opinion of Advocate General Jääskinen of December 11, 2014.

[56] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

[57] *Hydrogen Peroxide and Perborate* (Case COMP/F/38.620), Commission decision of May 3, 2006.

[58] Only jurisdictional clauses fall under the scope of Brussels I, in Article 23. National law determines the validity of arbitration clauses.

[59] Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

In AG Jääskinen's view, Article 6(1) should be applied. This provision applies only where there is a risk of irreconcilable judgments—*i.e.*, divergent outcomes in the context of the same situation of fact and law. Even though defendants participated in the cartel in different ways, places and times, AG Jääskinen concluded that all these occurrences formed part of the same factual event. The situation in law was also the same, because the different types of conduct led to one single infringement of competition law. This joining of cases would permit a uniform ruling of claims submitted by one single applicant, which is desirable. This was because AG Jääskinen took into account, on the one hand, that the persons that suffered damages should not be forced individually to sue each of the parties responsible for the same infringement; and on the other hand, that companies held responsible should not face the risk of paying different amounts of damages due to having been sued in different courts.

Finally, the question to be addressed was whether Article 101 TFEU could influence the application of jurisdictional and arbitration clauses. Both are based on party autonomy and have the common effect of derogating from Brussels I. They are not, in themselves, an obstacle to the effectiveness of competition rules. A problem would only arise if such clauses had been agreed upon before the injured person was aware of the existence of a cartel. In this scenario, the injured party would not have given its consent validly, and the application of the clause should be rejected.

General Court Judgments

***Si.mobil telekomunikacijske storitve d.d. v. Commission* (Case T-201/11)**

On December 17, 2014, the General Court[60] dismissed the appeal brought by Si.mobil telekomunikacijske storitve d.d. ("Si.mobil") against a Commission decision of January 24, 2011, rejecting Si.mobil's complaint that Mobitel, d.d. ("Mobitel"), the incumbent Slovenian mobile operator, had abused its dominant position.[61] Si.mobil claimed that Mobitel had imposed a margin squeeze at the retail level, and had refused to provide access and call origination services to rivals at the wholesale level. The Commission refused to investigate Si.mobil's complaint because the Slovenian Competition Authority ("SCA") had already initiated an investigation of the alleged margin squeeze at the national level and the EU interest at stake was insufficient to justify an investigation into the alleged refusal to supply. Si.mobil appealed to the General Court.

The General Court rejected Si.mobil's claim that Article 13(1) of Regulation 1/2003[62] requires that the Commission apply a balancing test to ascertain whether there is sufficient EU interest in investigating a case. It held that Article 13(1) provides that if a National Competition Authority ("NCA") is already dealing with "the same practice" as that alleged in a complaint, this alone constitutes "sufficient grounds" for other competition authorities to reject such a complaint.[63] The Commission has broad discretion when invoking Article 13(1). Moreover, any judicial review is limited to verifying compliance with procedural rules and with the requirement to state reasons and accurately report the facts, as well as ensuring that the Commission did not manifestly err in its assessment or misuse its powers.

In particular, neither Regulation 1/2003, nor the Commission Notice on cooperation within the Network of Competition Authorities,[64] imposes a specific rule of case allocation among the European competition authorities or creates individual rights for companies to have their case addressed by a particular authority. Consequently, both

[60] *Si.mobil telekomunikacijske storitve d.d. v. Commission* (Case T-201/11) EU:T:2014:1096.

[61] *Si.mobil/Mobitel* (Case COMP/39.707), Commission decision of January 24, 2011.

[62] Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003 ("Regulation 1/2003").

[64] *Si.mobil telekomunikacijske storitve d.d.*, *supra* n 60, para 5.

[64] Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43.

the Commission and NCAs are largely free to allocate cases among themselves.

The Commission is not required to verify whether a particular competition authority has the institutional, financial, and technical means to properly investigate a given case. Instead, the Commission's rejection decision must show that a particular NCA is "dealing with" the alleged infringement and that the investigation's scope covers the same practice as the complaint.[65] The General Court emphasized that the NCA must be "actively" investigating the case. While the Commission does not need to assess the merits of the national approach, it does have an obligation to gather evidence on the investigatory steps taken by the NCA. Regarding the second condition, the General Court was satisfied that the undertakings, the behavior's starting period and duration, the markets concerned, and the type of alleged infringement were identical in the SCA investigation and in Si.mobil's complaint to the Commission.

Consistent with established case law, the General Court confirmed that the Commission needs to balance the significance of an alleged infringement against the probability of establishing its existence and the investigative measures necessary to achieve compliance with Article 102 TFEU. The Commission must consider each element of fact and law with due care.

It may, however, reject the existence of an EU interest by giving priority to a single criterion, such as the absence of a significant effect on the functioning of the internal market or the low probability of establishing the infringement. Finally, the fact that the Slovenian authority was dealing with one aspect of the alleged infringement weighed against the EU interest in investigating other aspects of the conduct. The Commission concluded, and the General Court agreed, that the effect of the alleged abuse on the wholesale market would be further limited if the national authority sanctioned Mobitel's behavior on the retail market.

66 *Si.mobil telekomunikacijske storitve d.d.*, *supra* n 60, para 5.

Schenker AG v. Commission **(Case T-534/11)**

On October 7, 2014, the General Court partially upheld an appeal by Schenker AG ("Schenker") against a Commission decision[66] refusing it access to documents in the Airfreight cartel case.[67, 68] The General Court found that, at the very least, the Commission should have provided Schenker with the part of the nonconfidential version of the decision that was not, or was no longer, subject to confidentiality claims.

On November 9, 2010, the Commission adopted a decision finding that several companies had infringed Article 101 TFEU by participating in a worldwide cartel concerning airfreight services within the European Economic Area.[69] On April 21, 2011, Schenker, a customer of some of the undertakings involved in the cartel, requested access to the entire administrative file of the case or, in the alternative, to the confidential version of the Commission's decision or, as a further alternative, to the nonconfidential version of this decision, under Regulation 1049/2001.[70] The Commission dismissed this request and also rejected Schenker's subsequent application for reconsideration.[71] On October 10, 2011, Schenker appealed the Commission's second refusal to the General Court.

Regulation 1049/2001 establishes a right of public access to documents held by the institutions of the EU, but also includes many exceptions. For example, EU institutions will deny access to documents where disclosure would

66 Commission letter dated August 3, 2011, dismissing the confirmatory application made by Schenker pursuant to Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

67 *Airfreight* (Case COMP/39.258), Commission decision of November 9, 2010.

68 *Schenker AG v. Commission* (Case T-534/11) EU:T:2014:854.

69 *Airfreight* (Case COMP/39.258), Commission decision of November 9, 2010.

70 Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43 ("Regulation 1049/2001").

71 Confirmatory application made pursuant to Article 7(2) of Regulation 1049/2001.

undermine the interests in protecting the purpose of investigations or the commercial interests of undertakings, unless there is an overriding public interest in the disclosure.[72]

The General Court noted the general presumption that the Commission's disclosure of documents collected in the course of Article 101 proceedings undermines both interests mentioned above. The General Court therefore rejected Schenker's argument that the Commission had to examine separately and individually each document in the case file. It also confirmed that Schenker did not show an overriding public interest justifying the disclosure of either the case file documents or the confidential version of the Commission's decision.

However, the General Court did partially annul the contested Commission decision, insofar as the Commission also denied Schenker access to a nonconfidential version of its final decision. The General Court found that, although all confidentiality claims had not yet been settled, the Commission ought to have provided Schenker with the portion of the draft nonconfidential version of the decision that was not, or was no longer, subject to such a claim. According to the General Court, there was no indication that such a redacted nonconfidential version of the decision would be unintelligible, and nothing prevented the Commission from communicating it to Schenker. The General Court also underlined that, were the Commission allowed to wait for all confidentiality requests to be definitively settled before granting access to the parts of decisions that are not subject to such requests, the undertakings concerned would have an incentive to raise and maintain objections, not only to protect their legitimate confidentiality requests, but also to delay the publication of decisions to impede damages actions before national courts.

***Energetický a průmyslový holding a.s. and EP Investment Advisors s.r.o. v. European Commission* (Case T-272/12)**

On November 26, 2014, the General Court dismissed an appeal brought by Energetický a průmyslový holding a.s. and its wholly owned subsidiary, EP Investment Advisors s.r.o. against a Commission fine for obstructing the Commission's inspection under Regulation 1/2003.[73, 74]

On November 24, 2009, the Commission commenced an inspection of the applicants' premises under Article 20 of Regulation 1/2003. An inspector notified the inspection decision and explanatory note to a senior employee. The inspector asked this employee to contact the person responsible for the IT department and ordered that the email accounts of four key individuals be blocked and that new passwords known only to the Commission inspectors be issued. This was needed to ensure that the inspectors would have exclusive access to those accounts during the inspection. The IT department blocked and set new passwords for the relevant email accounts. However, the password of one of the four key individuals was later changed to grant the individual access to his account. The Commission learned this on an inspector's unsuccessful attempts to access this account. The following day, the Commission also learned that the applicants had prevented emails addressed to one of the key individuals from arriving in his inbox; instead, these emails remained on the IT department's server.

The General Court upheld the Commission's decision. The General Court agreed that the applicants had refused to submit to the inspection because, despite its request, the Commission had not been granted exclusive access to the relevant email accounts. This was further compounded by the fact that the applicants had intentionally diverted emails from a key employee's inbox to a server. The General Court further held that the inspectors should have been able to obtain the emails "where such evidence is normally

[72] Article 4 of Regulation 1049/2001.

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

[74] *Energetický a průmyslový holding a.s. and EP Investment Advisors s.r.o. v. European Commission* (Case T-272/12) EU:T:2014:995.

to be found,"[75] without the applicants' intervention. The General Court confirmed that, because the emails were relevant to the subject matter of the investigation, the applicants were under a duty to make them available to the inspectors. Consequently, it was irrelevant that the emails missing from the inbox of the individual in question could have been found on the server.

The General Court also rejected the applicants' arguments that the inspectors should have informed the IT department's representative of his obligations and the penalties for noncompliance. The General Court held that the Commission's ability to carry out inspections under Article 20 of Regulation 1/2003 would be impeded were it obliged to inform each person of their individual duties, particularly given the limited time available to conduct inspections. According to the General Court, once the inspection decision had been notified to the authorized persons, it became the applicants' duty to take all necessary steps to implement the inspectors' instructions and to ensure that such implementation was not hindered in any way. Consequently, the General Court also found that the Commission had respected the applicants' rights of defense.

Finally, the General Court upheld the fine imposed by the Commission, concluding that its amount was justified.

Commission Developments

Policy Brief and White Paper on the acquisition of minority shareholdings

On October 15, 2014, the Commission published a policy brief, explaining its previously published White Paper[76] on the proposed extension of the EC Merger Regulation[77] to cover acquisitions of noncontrolling minority shareholdings.[78] Analyzing the current situation at the EU and national levels, and the types of anticompetitive harm that may arise if the existing merger control regime is not expanded, the Commission concluded that there was a need to regulate these cases. It proposed to do so through a "targeted transparency system."[79]

The Commission explained that, under the current legislative framework, there is an "enforcement gap." The EU Merger Regulation does not empower the Commission to review standalone acquisitions of noncontrolling minority shareholdings (which often raise issues similar to those raised by concentrations[80]). Furthermore, antitrust rules are insufficient to cover all problematic cases. This is because Articles 101 and 102 TFEU target only past anticompetitive conduct and have high enforcement thresholds, which many acquisitions of noncontrolling minority shareholders would not meet. Thus, under the current enforcement regime, there is a group of potentially problematic cases that the Commission cannot reach—acquisitions of noncontrolling minority shareholdings come within the Commission's jurisdiction only when they precede a reportable concentration.

By contrast, at the national level, some authorities have competence to review these acquisitions. For example, within the EU, the Austrian, German, and the United Kingdom ("UK") regulators have jurisdiction to review acquisitions of noncontrolling minority holdings.[81] Such national intervention is not, however, a substitute for control at the EU level. This was made clear in the *Ryanair/Aer*

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[75] *Energetický a průmyslový holding a.s. and EP Investment Advisors s.r.o. v. European Commission* (Case T-272/12) EU:T:2014:995, para. 41.

[76] White Paper, Towards more effective EU merger control, COM(2014) 449 final of July 9, 2014.

[77] Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ 2004 L 24 ("EUMR").

[78] Competition Policy Brief, "Minority Power – EU Merger Control and the acquisition of Minority Shareholdings," issue 15, October 2014.

[79] *Supra*, n.76, para. 49.

[80] Acquisitions of noncontrolling minority shareholdings can have harmful effects similar to those of traditional concentrations. The Commission explained the potential for horizontal unilateral effects, coordinated effects, and vertical foreclosure. These types of effects may occur regardless of whether the acquiring firm has a "silent stake," or is able to exert "material influence" on the target company due to corporate rights, *supra*, n.78, p.3.

[81] Similarly, outside the EU, the regulators in Canada, the United States, and Japan can do so as well.

Lingus case.[82] While the Commission did not have the power to order Ryanair to divest its minority shareholding in Aer Lingus, the UK authorities could do so, but had no jurisdiction to assess the transaction's effects in other States. Moreover, the proposal establishes a one-stop shop for noncontrolling minority shareholding cases throughout the EU.

In the proposal, the Commission took into consideration the fact that the number of potentially problematic cases will be limited. Therefore, the targeted transparency system only applies to transactions with a "competitively significant link."[83] The test is based on two cumulative criteria: (i) acquisitions of a minority shareholding in a competitor or vertically related company, and (ii) where the acquired shareholding is around 20%, or above 5% when accompanied by additional elements (*e.g.*, rights giving a *de facto* blocking minority, a seat on the board of directors, and access to commercially sensitive information). This system will target mainly industry investors, and not private equity investors or banks.

Under the proposed regime, a company planning to acquire a noncontrolling minority stake that creates such a "competitively significant link" would submit a short "information notice" to the Commission. Based on this notice, the Commission will decide whether the transaction is worth investigating further, and Member States may also ask that the matter be referred to them. If there is a decision to investigate, a full notification will be required. If no investigation has been started after a waiting period of 15 working days, the transaction may be completed. Within a period of four to six months after the information notice, the Commission may still initiate an investigation. In the latter situation, interim measures may be applied to ensure the effectiveness of a final decision.

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[82] *Ryanair/Aer Lingus* (Case COMP/M.4439), Commission decision of June 27, 2007, and *Ryanair/Aer Lingus III* (Case COMP/M.6663), Commission decision of February 27, 2013.

[83] *Supra*, n.76, para. 46.

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