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MERGERS & ACQUISITIONS

Second-phase decisions with Undertakings

Case COMP/M.5540 *Lufthansa/Austrian Airlines*

On August 28, 2009, the European Commission cleared the merger between Lufthansa and Austrian Airlines, subject to commitments. This transaction is the continuation of the recent trend of consolidation in the aviation industry.

As in other cases, the Commission used the "point of origin/point of destination" city-pair approach, whereby every combination of a city of origin and a city of destination constitutes a separate product market. In this case, the Commission found that the proposed concentration raised serious doubts as to its compatibility with the common market with respects to the following routes: (1) Vienna-Stuttgart, (2) Vienna-Cologne, (3) Vienna-Frankfurt, (4) Vienna-Brussels, and (5) Vienna-Munich (the "*Identified City Pairs*"). The Commission also confirmed its practice that indirect flights do not constitute a competitive alternative to direct flights for short-haul routes (up to three hours).

In order to address these concerns, Lufthansa offered the Commission a commitment package. This package included slots, that is, a permission given to an aircraft to use infrastructure at a given airport on a specific date and time for the purposes of landing and take off. On the Identified City Pairs where the Parties' combined market share was between 50-100%, they were required to offer 40-50% of their slots. These slots are to be allocated to a new air service provider, namely any airline that provides a new or additional competitive air service on the Identified City Pairs. In the allocation of the divested slots, the Commission will favour the new entrant that decides to operate the greatest number of routes. The Parties are also obliged to sign the slot lease agreement for the duration equal to, with respect to most of the Identified City Pairs, two IATA seasons, but the new entrant will have the right to terminate the agreement at the end of each IATA season without penalty.[1] If a Star Alliance member, to which the Parties belong, obtains slots under the commitment package, specific conditions can be imposed by the Commission to guarantee the independence of this applicant from the Parties. New entrants, except for Star Alliance members, will obtain grandfathering rights[2] over the slots once they have operated on the relevant Identified City Pairs for a specific number of full consecutive IATA seasons (in most cases two seasons). By contrast, if the new entrant ceases to operate the slots transferred in the Identified City Pairs before the end of the utilization period, these slots will be first transferred to Lufthansa and then made available to another new entrant.

Moreover, on two of the Identified City Pairs, a competing airline, Niki, will be able to exchange its current slots for slots offered under the conditions pursuant to the Parties' commitment package. Niki's frequencies will be deducted from the total number of slots made available pursuant to the commitments. Niki will also be entitled to acquire grandfathering rights for the slots it currently leases from Lufthansa in Frankfurt.

The commitments also envisage the possibility for new entrants to conclude special prorate and code-sharing agreements allowing it to place its codes on flights with an origin or destination in either Austria, Germany and/or Belgium, provided that part of the journey involves the Identified City Pairs. It also provides the new entrants for the possibility to conclude frequent flyer programme access agreements with the Parties and intermodal agreements with a railway or other surface transport company.

According to the Commission, slot congestion is the main entry barrier and the commitment package was designed to remove it. The Commission does not provide for what happens if no one takes the slots offered, but suggest that it only accepts commitments if they "make the entry of new competitors timely and likely." This determination is made based on the interests expressed by the competitors in taking advantage of the commitments package during the market tests.

1 IATA Season starts on the 4th Sunday in March and ends on the 4th Saturday in March of the following year.

2 Grandfathering rights mean that the prospective new entrant will be entitled to use the slots transferred from the parties at both ends of any Identified City Pair for a different intra-European city pair than the Identified City Pairs.

Second-phase decisions without Undertakings

Case COMP/M.5529 *Oracle/Sun Microsystems*

On January 21, 2010, the European Commission unconditionally cleared Oracle's acquisition of Sun. The Commission's decision is significant, as it appears to give companies the scope to submit non-traditional remedies to address antitrust concerns identified by the Commission during its review of a merger.

Both companies are active in the IT sector, in particular in the software sector. The focal point of the Commission's analysis related to the transaction's competitive effects on the database market. In particular, the Commission focused on whether Oracle would, post-transaction, have the ability and incentive to downgrade Sun's open-source database product, MySQL. The Commission found that MySQL played an important competitive constraint on Oracle's own database offering, and therefore concluded that any post-transaction downgrade of MySQL would be to the detriment of consumers.

The Commission's market investigation found that, in terms of sales revenue, MySQL only accounted for 0-5% of the worldwide database market. (Oracle's market share was of 40-50%.) However, the Commission concluded that the calculation of market shares on the basis of revenues did not accurately reflect MySQL's market power, because MySQL, in its capacity as an open source product, is predominately distributed under a free-of-charge General Public License ("*GPL*") license.[3] In other words, MySQL databases are mostly distributed for free, and therefore do not create any revenue.

The Commission found that, pre-transaction, MySQL was an important competitive constraint on Oracle in the database market, in particular in the segments of databases for small and medium enterprises and embedded databases. Some customers expressed the concern that, post-transaction, Oracle would neutralize the competition between its database products and MySQL in a harmful way, namely by no longer offering MySQL under a GPL license or by downgrading the GPL version of MySQL.

Ultimately, the Commission found that such concerns were not well-founded. The Commission primarily based this conclusion on the public pledges announced by Oracle on December 10, 2009. In short, Oracle pledged to continue enhancing MySQL post-transaction and to make updates to MySQL available under a GPL license. In addition, Oracle made further pledges regarding the continued enhancement and availability of particular aspects of the MySQL architecture, as well as a more general commitment to a continued investment in MySQL. It is important to note that these pledges are not formal commitments that would typically be submitted to the Commission in the context of a traditional merger procedure.

Nevertheless, the Commission pointed to a number of aspects that it believed demonstrated the sufficiency of Oracle's pledges. First, Oracle provided the Commission with evidence demonstrating that it had already implemented three of its pledges. Second, for the remaining pledges (that the Commission found not to be legally binding), the Commission gave emphasis to the particular circumstances of the open source software market in general, as well as the "vibrant ecosystem" that surrounded MySQL in particular. The Commission considered that, post-transaction, Oracle would require the support of the open source community for a number of its products (including MySQL) in order to continue the development and dissemination of such products. This community would ensure that Oracle complied with its public announcement. Reputation and trust are important factors for the sponsor of open source projects (such as Oracle), and therefore Oracle would have the incentive to keep to its pledges.

From a legal standpoint, while the public pledges do not constitute formal commitments, the Commission retained the right to revoke its clearance decision should Oracle fail to comply with its pledges. The legal basis for the Commission's position is that Oracle's public announcement constituted a relevant fact upon which the Commission's cleared the transaction.

First-phase decisions with Undertakings

Case COMP/M.5597 *Towers Perrin/Watson Wyatt*

On December 3, 2009 the European Commission cleared the merger between Towers Perrin and Watson Wyatt, subject to certain divestitures. The decision is interesting because it is a case of the Commission raising serious doubts in respect of an overlap the parties may not have identified to the Commission in their Form CO, and parties successfully modifying the nature of their commitments in response to Commission criticisms in order to preserve and secure Phase I clearance.

Towers Perrin and Watson Wyatt each operate various consultancy businesses that specialize in a number of overlapping areas, including, (1) retirement benefits consulting, (2) pensions

3 The term "open source" refers to the development and distribution of certain types of software. A distribution of open source software contains at least the source code of the distributed software. For a piece of software to be categorized as "open source," a license review process exists to determine whether a given software license complies with the notion of open source software. A GPL license requires that modified versions of software licensed under the GPL also be governed by the GPL. This means that software that has once been made available under the GPL cannot later be offered for a fee.

administration, (3) financial valuation and capital adequacy consulting for insurance companies, (4) general insurance consulting (life and non-life), (5) actuarial software for life insurance, (6) investment consulting, and (7) human capital consulting. The Commission's investigation did not identify any serious concerns arising out of the merger except in one of these consultancy areas, actuarial software for life insurance.

The parties had originally submitted to the Commission that one affected market was the market for "insurance and financial consulting". The Commission rejected this product market definition as overly broad, and instead focused on narrower markets, one of which was actuarial software for life insurance. It appears from the Commission's decision that the parties may not have initially advised the Commission about the existence of their competing actuarial software for life insurance offerings (para. 72: "*The fact of the Parties' overlap in actuarial software for life insurance came to light during the market investigation when several respondents raised concerns…*"). The parties submitted that the actuarial software for life insurance market was worldwide in scope, but the Commission rejected that definition, distinguishing the national and European specific nature of the software at issue. The Commission also noted the absence of a significant US competitor in the European market. The Commission ultimately adopted an EEA-wide geographic market definition.

Pre-merger, there were only three companies successfully selling actuarial software for life insurance in the EEA. A fourth US competitor had failed to establish itself in the EEA in this product area though it had offered other consultancy services in the EEA for a number of years. The Commission found the US competitor's failure to enter to be evidence of the significance of the barriers to entry that characterized the European market. With combined market shares above 50% and customers unable to switch inexpensively between software providers, the Commission indicated that it had serious doubts regarding the compatibility of transaction with the internal market.

As a result of the Commission's concerns, the parties submitted a package of remedies, in essence offering to divest either of Towers Perrin or Watson Wyatt's actuarial software for life insurance businesses, but reserving for themselves the right to use know-how from the divested business and to enter into an agency agreement to sell the products of the divested business. The Commission market tested these commitments, but market participants were critical of their likely effectiveness. As a result of this feedback, the parties modified their offer of commitments to address the Commission's concerns. Instead, the parties committed to sell Watson Wyatt's actuarial software for life insurance product, a remedy that appears to have received broader market support. The parties also agreed to a number of other modifications, including specifications upon their ability to use know-how from the divested business and to ensure that any agency agreement with the divested business is on a non-exclusive basis.

Case COMP/M.5644 *Kraft Foods/Cadbury*

On January 6, 2010, the European Commission conditionally cleared Kraft's acquisition of Cadbury. This decision confirms the national scope of the geographic markets for certain confectionary products, as well as the existence of distinct product markets for different types of chocolate.

The Commission found that, for the purposes of market definition, a distinction existed between chocolate tablets, countlines (*e.g.* Mars bars), and pralines. This distinction was based on a number of factors: (1) different consumers and consumption patterns for each product (*e.g.,* tablets are shared between family members and countlines are mostly consumed instantly by teenagers and young adults); (2) differences in price; (3) frequency of purchases (countlines are more often purchased than tablets); and (4) differences in seasonal purchasing patterns (pralines are mostly bought for gifting).

The Commission's market investigation confirmed prior practice regarding the national scope of these markets. The existence of important national brands, national pricing differences, and divergence of market shares of manufacturers led the Commission to conclude that geographic markets are national.

The Commission identified four markets that raised potential post-transaction antitrust issues. First, the Commission analyzed the impact of the transaction on the UK and Irish markets for tablets. Post-transaction, the merging parties benefited from a 50-70% market share. Despite the significant market power these figures suggested, the Commission ruled that no harm to competition resulted from the transaction. The basis for this conclusion was the fact that the parties' products that led to these large market shares were not close competitors. Cadbury's products were classified as "British heritage chocolate"[4] that competed more closely with Mars and Nestlé than with Kraft's products (which were deemed to be "continental" types of chocolate).

4 British heritage chocolate has a lower content of cocoa butter and a higher content of milk fat than typical continental European chocolate (*e.g.* Lindt).

However, in the Polish market for tablets and pralines, the Commission found that the transaction would lead to market power on the part of the merged entity. This merged entity would benefit from large post-transaction market shares (60-70% in the tablets market and 30-40% in the pralines market). In addition, in the tablets market, the merging parties would have a market shares ten times larger than the next largest competitor, and in the pralines market the parties would have a combined position that was twice that of its closest competitor. As a result, the Commission required the parties to divest the leading Polish brand for confectionary (the "Wedel" brand) owned by Cadbury, as well as a number of associated assets of the brand (in particular, the manufacturing facility used to produce Wedel confectionary products).

In the Romanian market for tablets, the merging parties had a post-transaction market share of 60-70%. As in the Polish markets, the merging parties would have a substantially larger market share than the merging parties, and there were no mitigating factors, such as countervailing market power, that suggested a restraint on the merged entity's post-transaction market power. Therefore, the Commission required the parties to divest all of Cadbury's Romanian confectionary business, which included several confectionary brands and manufacturing facilities.

First-phase decisions without Undertakings

Case COMP/M.5736 *TPG/IMS Health*

On February 2, 2010, the European Commission cleared the acquisition by two of the TPG Group's investment funds of IMS Health Incorporated ("*IMS Health*"). The decision suggests narrower market definitions for market research services and offers insight into how the Commission might view the competitive effect of a vertical merger of a marketing service that is not a direct input for the production of a downstream product.

The Commission's previous examination of market research services left open the relevant market definition. In particular, the Commission declined to opine on whether segmentation by industry or other criteria would be appropriate. The parties adopted the Commission's prior decisional practice in their submissions, but the facts of this case caused the Commission to narrow its view of the appropriate market definition. The Commission concluded that health market research services were a separate product market, and that within this product market numerous segmentations might be appropriate. The Commission identified three possible segmentations of the health market research services market, namely: (1) between health market research services for prescription as opposed to over-the-counter drugs; (2) between health market research services offering primary/raw data as compared to secondary/processed data; and (3) between the provision of health market research services at a national level and at cross-country level. The Commission's investigation produced evidence of differing levels of competition among these proposed segments. However, in this case, the Commission did not define separate antitrust markets based on the above factors.

The Commission's investigation of the transaction's competitive effects focused on the vertical relationship between IMS Health's health market research services and pharmaceuticals sold by a TPG subsidiary. The Commission's investigation gathered evidence indicating that even though IMS Health's services are not a direct input into the production of pharmaceutical products, "*they could constitute a seminal factor in shaping and evaluating the marketing strategies of pharmaceutical companies as well as their understanding of customer and stakeholder needs.*" This potential relationship was sufficient for the Commission to envisage the possibility that vertical foreclosure could result from the transaction. However, the Commission's investigation found no evidence that the transaction would give rise to any such foreclosure. The marginal market share of TPG's pharmaceutical subsidiary removed the incentive for IMS Health to foreclose competitors in the downstream market. Similarly, the modest amount of health market research services purchased by TPG's pharmaceutical subsidiary eliminated any ability to attempt customer foreclosure against IMS Health's competitors.

Case COMP/M.5732 *Hewlett-Packard/3COM*

On February 12, 2010, the European Commission cleared HP's acquisition of 3Com, which merged the two companies' computer network equipment businesses.

The main issue of interest presented by this case related to the potential existence of post-transaction anticompetitive conglomerate effects. In order to provide customers with a full range of network equipment products, HP acted as a distributor for companies (including competitors) that were able to provide customers with the products HP did not produce. The Commission received a complaint alleging that, post-transaction, HP would have the ability and incentive to foreclose customers and/or competitors that traditionally supplied with products missing from HP's portfolio and that, as a result of the transaction, HP no longer required. According to the complaint, HP would engage in anticompetitive tying or bundling of its products, which could ultimately lead to the exclusion of competitors.

The Commission found that no such risk existed. First, it was clear from the case file that, post-transaction, HP did not have the market power required to exercise any anti-competitive foreclosure in any of the relevant markets. Second, there would be sufficient alternative sources of supply post-transaction from which customers would be able to purchase products.

ABUSE OF DOMINANT POSITION

Commission decisions

French electricity supply markets (EDF)

On March 17, 2010, the European Commission adopted a decision rendering legally binding commitments offered by EDF relating to the French market for the supply of electricity to large industrial customers. The decision was adopted under Article 9 of Regulation 1/2003, according to which the Commission may accept, prior to issuing, and in place of, a formal infringement decision, commitments offered by the company to remedy concerns identified by the Commission in its preliminary statement of objections. The Commission has previously made use of Article 9 decisions in a number of cases relating to the liberalisation of energy markets.[5]

In December 2008, the Commission sent a statement of objections to EDF, setting out the Commission's preliminary finding that EDF had abused its dominant position on the French market for the supply of electricity to large industrial customers. The Commission's concerns related specifically to: (1) EDF's conclusion of long-term exclusive supply contracts with large industrial consumers, and (2) the inclusion in the supply contracts of restrictions on the ability of customers to resell electricity purchased from EDF. The Commission considered that EDF's practices impeded the entry of alternative suppliers on the French market, by limiting their opportunities to conclude primary or secondary supply agreements with large industrial customers and increasing the lack of liquidity in the electricity trading market, thereby delaying the effective liberalisation of the French electricity market.

EDF offered a number of commitments intended to address the Commission's concerns:

- EDF undertook to return to the market a minimum of 60% of the total volume of electricity supplied by EDF to large industrial customers under its supply contracts in each calendar year (and an average of at least 65% across all calendar years within the commitment period);
- EDF undertook to limit the duration of its supply contracts with large industrial customers to a duration of five years;
- EDF undertook to offer large industrial customers a choice between an exclusive supply contract or a contract that allowed the customer to purchase additional electricity from an alternative supplier; and
- EDF undertook not to include restrictions on resale in new contracts with large industrial customers for a period of 10 years.

The Commission published a summary of these commitments on November 4, 2009, inviting comments from market participants. The market test confirmed that the commitments were suitable to address the concerns identified. The commitments will apply for 10 years, beginning January 1, 2010. Application of the commitments will be suspended for a period of one year if the annual volumes sold by EDF on the market for the supply of electricity to large industrial consumers fall below 40%, and will terminate definitively if the annual volumes sold by EDF remain below 40% for two consecutive years.

STATE AID

ECJ – Judgments

Case C-1/09 *Centre d'exportation du livre français (CELF) and others v. Société internationale de diffusion et d'édition (SIDE)*

On March 11, 2010, the Court of Justice of the European Union issued this preliminary ruling in response to two questions referred to it by the French *Conseil d'État* in a State aid case involving French book and media exporters *Centre d'exportation du livre français* (CELF), which had received aid from the French government from 1980 to 2002, and *Société internationale de diffusion et d'édition* (SIDE), which complained against the granting of the aid. The aid granted to CELF formed the subject matter of three subsequent Commission decisions between 1992 and 2004, all three of which found the aid to be compatible with the common market. However, the General Court overturned each decision. In the context of national proceedings aimed at determining the amount of aid CELF should be required to reimburse, the French *Conseil d'État* referred to the Court the two questions that form the subject matter of these proceedings.

5 See, *e.g.*, Case COMP/39.388 – German electricity wholesale market; Case COMP/39.389 – German electricity balancing market; Case COMP/39.316 – GDF foreclosure; Case COMP/39.402 – RWE Gas Foreclosure.

With its first question the French Court inquired as to whether a national court, before which proceedings have been brought on the basis of Article 88(3) EC (now 108(3) TFEU) for repayment of unlawful aid, *i.e.*, aid granted in breach of the requirement to give prior notification of the proposed aid to the Commission, may stay proceedings until the Commission has decided on the compatibility of the aid with the rules of the common market, when a first decision of the Commission declaring the aid to be compatible has been annulled by the General Court.

The Court added that a decision to stay proceedings would amount to maintaining the benefit of the aid during the period in which implementation is prohibited, which would be inconsistent with the purpose of Article 108(3) TFEU and would render this provision ineffective. Therefore, the Court concluded that, in these circumstances, a national court cannot stay the proceedings pending before it without rendering Article 108(3) TFEU ineffective, contrary to the principle of effectiveness of the applicable national procedures.

The Court recalled that Article 108(3) TFEU entrusts national courts with the task of preserving, until the final Commission decision, the rights of individuals prejudiced by a possible breach of the prior notification requirement laid down by that provision. Consequently, national courts must take the necessary measures to remedy the unlawfulness of the implementation of the aid, in such a way that the aid does not remain at the disposal of the recipient during the period between its unlawful granting and the Commission decision.

With its second question, the referring judge asked the Court of Justice whether the adoption of three successive Commission decisions declaring a given aid compatible with the common market, which were subsequently annulled by the General Court, is capable of constituting an exceptional circumstance justifying a limitation of the recipient's obligation to repay the unlawfully granted aid within the meaning of the case law. The Court answered this question in the negative on the ground that a positive decision of the Commission cannot give rise to a legitimate expectation on the part of the aid recipient, where that decision has been challenged before the General Court, which annulled it, and/or so long as the period for bringing an action for annulment has not expired or, where an action has been brought, so long as the courts have not delivered a definitive ruling.

AG Opinions

Case C-399/08P *Commission v. Deutsche Post AG*

On March 24, 2010, Advocate General Jääskinen advised the Court of Justice of the European Union to confirm the General Court's judgment annulling the Commission's decision of June 19, 2002, concerning measures adopted by the Federal Republic of Germany in favor of Deutsche Post. In its decision, the Commission found that Deutsche Post had received from the German State certain compensatory payments aimed at covering the costs of Deutsche Post's public service obligations, which amounted to illegal State aid. Since, during the same time period over which the relevant payments were granted, Deutsche Post had also engaged in loss-making predatory conduct in breach of Article 102 TFEU (and, more generally, its activities were loss-making), the Commission concluded that Deutsche Post must have used some of the sums received from the State to finance its predatory conduct. This, in turn, according to the Commission, meant that the relevant sums exceeded what was necessary to cover the additional costs incurred by Deutsche Post to discharge its public service obligations.

The General Court annulled the Commission decision on the ground that the Commission did not demonstrate that the sums received by Deutsche Post exceeded the additional costs borne by the company to discharge its public service obligations, and therefore that these sums conferred upon Deutsche Post any anti-competitive advantage. The General Court also held that, based on the information in the case file, Deutsche Post's predatory prices could not have been financed with the public funds received by the company.

Advocate General Jääskinen considered the circumstances in which financial compensation granted by the state to an undertaking entrusted with the provision of services of general economic interest constitutes state aid within the meaning of 107 TFEU. The Advocate General noted that, according to one theory, any public funding of a public service obligation amounts to state aid under Article 107 TFEU, but can nonetheless be considered compatible with the common market, if it does not exceed what is necessary to compensate the additional costs generated by the provision of the public service. By contrast, according to the so-called "compensation" theory, compensation for public service obligations does not constitute State aid, as it does not confer upon its recipient any economic advantage capable of distorting competition. However, when this compensation goes beyond what is necessary to cover the cost of the public service, state aid may be involved. The Advocate General concluded that, under either theory, identifying the "additional costs" for the company arising from the discharging of its public service obligations is crucial to determine whether State aid is involved.

The Advocate General criticized the Commission for not engaging in the calculation of these additional costs in the decision, and for limiting itself to inferring from the fact that Deutsche Post engaged in predatory conduct and that the company's activities were loss-making in the period under consideration, that the sums received by Deutsche Post were used to finance Deutsche Post's predatory conduct, thereby assuming that they exceeded what was necessary to cover the costs to discharge its public service obligations. According to the Advocate General, the Commission's reasoning would lead to the paradox that, if a company entrusted with public service obligation incurs losses, no such company's expenditure could ever be deemed to be financed by internal resources, but would always be considered as being financed with public resources. Advocate General Jääskinen thus concluded that the General Court's reasoning was correct and did not exceed the limits of its powers when it concluded that the Commission had committed a manifest error by not examining if the sums granted to Deutsche Post exceeded the amount of the additional costs borne by the company to discharge its public service obligations.

The Advocate General also considered, however, that the General Court had exceeded the limits of its powers by engaging in its own assessment, based on economic data included in the case file, of whether the sums granted to Deutsche Post could have financed the company's predatory conduct. The Advocate General noted that this type of evaluation falls within the exclusive competence of the Commission, which enjoys a wide margin of discretion in this regard. The Advocate General also noted that this finding should not have any impact on the validity of the judgment under appeal, as the other ground, discussed above, on which the General Court annulled the Commission decision would still stand.

FINING POLICY

AG Opinions

Cases C-407/08 P *Knauf Gips KG, formerly Knauf Westdeutsche Gipswerke KG v. Commission*

On February 11, 2010, Advocate General Mazák advised the Court of Justice of the European Union to partially set aside the General Court's judgments[6] rejecting the appeals filed by Knauf and Lafarge against a Commission decision fining them for violating Article 101 TFEU as a result of their participation in a cartel on the plasterboard market.[7]

Concerning the issue of whether the Knauf group constituted a single economic unit (with the result that the actions of one company can be attributed to another within that economic unit and that one can be held liable to pay a fine for the other), the Advocate General noted that this question requires a case-by-case analysis and that a number of facts may be relevant, none of which would individually substantiate such a finding. The Advocate General stated that the absence of control of 100% of the shares of another company does not prevent a finding on other grounds that two companies form an economic unit. The analysis is not merely formalistic. Rather, one has to consider the reality of the situation, and in particular whether a company enjoys no real freedom to determine its course of action on the market. In this case, the mere legal possibility of fluctuating majorities within the Knauf group was not sufficient to conclude that it did not form one economic unit. The Advocate General agreed with the General Court's assessment that a number of facts, taken together rather than in isolation, demonstrated that the companies owned by the Knauf family constituted one economic unit. The Advocate General noted, in particular, that all the companies within the Knauf group have the same 22 shareholders, which are made up of the two branches of the Knauf family and that the same two Knauf cousins managed all those companies, in accordance with the Knauf family contract, which seeks to ensure that the companies within the Knauf group are under a single management with a common purpose. In addition, there was no evidence that the two Knauf cousins did not represent the Knauf group within the framework of the infringement and the sales figures exchanged during the infringement related to all the companies in the Knauf group. These elements tends to indicate that those companies acted as an economic unit with a common interest, and it was not necessary that such an exchange should demonstrate some formal structural link between the companies in question. Finally, the Advocate General noted that, in answer to a Commission request for information designed to calculate the appropriate amount of the fine, Knauf volunteered, without being requested, the turnover of all the companies within the Knauf group.

6 Case T-52/03 *Knauf Gips v. Commission* ECR [2008] II-115 and Case T-54/03 *Lafarge v. Commission* ECR [2008] II-120.

7 *Plasterboard Cartel*, OJ 2005 L 166/8.

Concerning the General Court's agreement with the Commission's argument that Knauf was estopped form arguing that the fine should not be imputed to Knauf Gips KG, because Knauf had failed to contest this point during the Commission proceedings, the Advocate General considered that the General Court had erred in law, observing that the mere failure by a company to contest a particular position adopted by the Commission, and more specifically in the Statement of Objections, cannot limit that company's rights of defence before the General Court and thereby deny it full access to justice. The Advocate General nevertheless considered that sufficient evidence demonstrated that Knauf Gips KG had been responsible for coordinating the conduct of the Knauf Group and that the fine should therefore be imputed to it.

Case C-413/08 P *Lafarge SA v. Commission*

On February 11, 2010, Lafarge argued that the General Court had failed to address its submissions relating to the unequal treatment it suffered compared to Gyproc, and that the judgment was therefore inadequately reasoned. According to Lafarge, the General Court had accepted evidence proffered by the Commission as proof of Lafarge's participation in the infringement as early as 1992, whilst the Commission had itself considered such evidence to be insufficient with respect to Gyproc. The Advocate General accepted Lafarge's arguments and called on the Court to refer these issues back to the General Court.

Lafarge also challenged the increase in its fine due to recidivism. In 1994, the Commission had fined Lafarge for its involvement in the cement cartel. Lafarge subsequently appealed this decision. The General Court's judgment dismissing the appeal was handed down in May 2001 and became definitive two months later. When fining Lafarge for its involvement in the plasterboard cartel, the Commission took account of Lafarge's involvement in the cement cartel to increase the fine due to repeated infringement. However, the Commission had found that the conduct in the context of the Plasterboard cartel had ended in November 1998, prior to the General Court 2001 judgment.

Lafarge argued that it could not be treated as a repeat infringer in these circumstances, pointing to the practice in a majority of countries that an undertaking would not be considered a repeated infringer until the first decision has become definitive at the time of the second infringement. The General Court had ruled that it was sufficient for an undertaking to have been found guilty of an infringement of the same type, even if the decision was still subject to review by the courts, since the decisions of the Commission are presumed to be lawful until and unless they are annulled or withdrawn. The General Court conceded that there might be a problem if an earlier decision, which served as the basis for an increased fine for recidivism in a subsequent decision, were to be annulled after that subsequent decision had become final, and could thus not be appealed. In such case, the General Court suggested that the deadline for filing an appeal against the second decision would start running afresh.

The Advocate General considered that the General Court's interpretation of the rules on time limits for appeals was contrary to the wording of Article 230, and advised that this part of the judgment should be set aside, since the issue of the right to appeal was inherent to the general Court's reasoning on whether the Commission had erred in finding a repeated infringement. The Advocate General also suggested that Lafarge's arguments would overly restrict the Commission's ability to invoke repeated infringement as a means of suppressing illegal activities. It would mean that certain infringements would be under-sanctioned and would undermine the presumption that the acts of the institutions were lawful. Referring to the above hypothetical, if the first decision were annulled, a company could always request that the Commission reconsider its later decision finding a repeated infringement, and an action for annulment could be brought against a refusal by the Commission to do so.

The Advocate General dismissed the appellant's other grounds of appeal relating to the calculation of the fine, holding it to be proportionate, justified and properly calculated.

POLICY AND PROCEDURE

AG Opinions

Case C-439/08 *VERBIC v. The Belgian Competition Council*

On March 25, 2010, Advocate General Mengozzi advised the Court of Justice of the European Union that a Belgian law identifying the Federal Minister of the Economy as the respondent in appeals against decisions rendered by the Belgian Competition Council that does not allow the Belgian Competition Council to intervene in these appeal proceedings does not comply with the requirements of Regulation 1/2003. In this case, the Federal Minister of the Economy failed to respond to the appeal, and the Court of Appeal of Brussels was concerned that the Belgian law did not permit, or require, the Belgian Competition Council to respond in its stead.

The Advocate General explained that Regulation 1/2003 requires national competition authorities to ensure the effective application of Articles 101 and 102 TFEU, and that the principles of sincere cooperation and effectiveness under EU law require that the national competition authorities have the necessary powers to do so. More particularly, the Advocate General recalled that Article 15(3) of Regulation 1/2003 authorizes national competition authorities to submit, on their own initiative, written observations to the national courts of their Member States on issues relating to the application of Articles 101 and 102 TFEU. According to the Advocate General, Article 15(3) applies also in this case. The Advocate General advised that Regulation 1/2003 should be interpreted as requiring that the national competition authorities enjoy the status of parties to court proceedings involving Articles 101 and 102 TFEU so as to be able to exercise their power to intervene in these proceedings. However, Regulation 1/2003 should not be construed as requiring national competition authorities to defend their decisions in every case and without exceptions.

Commission developments

Guidelines on Best Practices in Antitrust Proceedings, Submission of Economic Evidence and the Role of Hearing Officers

On January 6, 2010, the Commission published three guidance documents, outlining antitrust procedures with the aim of improving transparency, while at the same time introducing some changes to existing practice. These documents are: *Best practices for antitrust proceedings, aimed at improving procedures by enhancing transparency, Best practices for the submission of economic evidence, and Guidance on the role of the Hearing Officer.*

The *Best practices for antitrust proceedings* provides guidance on the day-to-day conduct of proceedings before the European Commission concerning Articles 101 and 102 TFEU. The Commission has amended its procedure by providing for an earlier opening of formal proceedings as soon as the initial assessment phase has been concluded, offering state of play meetings to the parties at key points of the proceedings, disclosing key submissions (*e.g.*, giving early access to the complaint, if applicable, so as to allow the parties to express their views already in the investigative phase), publicly announcing the opening and closing of procedures (as well as when the Statement of Objections has been issued), and providing guidance on how the commitment procedure is intended to be used in practice.

The *Best practices for the submission of economic evidence* outlines the criteria that economic evidence must fulfill to be acceptable to the Commission, and explains the interaction between Chief Economist, case teams, and third parties providing such evidence. According to the Guidelines, any tested hypotheses need to be explicitly formulated and based on economic theory, and datasets need to undergo thorough inspection and quality control. Although it recognizes the limitations of imperfect data, the paper provides that these limitations should not preclude economic analysis, and statistical techniques should be used to improve the quality of the analysis in such cases. The chosen methodology should be substantiated by explicitly providing its pros and cons, and generally accepted methods are preferred. Any necessary documentation must be shared to allow for timely replication of the analysis. Results must be reported in the standard format found in academic papers, and a robustness analysis should always accompany any economic and econometric analysis. The parties should be careful to avoid presenting economic opinions misleadingly as statements of fact, and, given that parties often use data that they have not audited or verified themselves, the parties should carefully acknowledge the sources of information. Lastly, the paper provides that data provided in response to Data Requests need to be complete, correct and timely.

The *Guidance on the role of the Hearing Officer* clarifies the current practice of Hearing Officers as guardians of fair proceedings and parties' rights of defense on procedural issues before the Commission. It also explains the reporting obligations and the role of Hearing Officers towards the Competition Commissioner, the College of Commissioners and the addressees of Commission decisions. Although Hearing Officers play a limited role in the investigative phase, their role becomes more significant once a Statement of Objection has been filed. The Guidelines clarify Hearing Officers' dispute resolution competencies in instances of disagreement between the parties and the Commission (*e.g.*, access to file, disclosure of confidential information, extensions of deadlines) and the Hearing Officer's role as responsible for the Oral Hearing itself (*e.g.*, coordinating participation of third parties, organization of the Oral Hearing, post-oral hearing and decision-making procedures). Oral Hearings are an integral part of Commission's process for reaching a final decision, as they provide to the parties an opportunity to express their views on Commission's preliminary findings.

Insurance Block Exemption Regulation 267/2010 of the European Commission

On March 24, 2010, the Commission adopted a new block exemption regulation for the insurance industry.[8] The Regulation will be in force until March 17, 2017. The Commission also published an explanatory communication.[9]

The Regulation identifies those business risks that are special to the insurance sector and that lead to an enhanced need for cooperation amongst insurers. The Regulation exempts cooperative arrangements relating to these risks when they are expected to ensure effective competition and provide benefits to consumers, providing for the following specific exemptions:

- Collaboration between insurance undertakings or within associations of undertakings in the compilation of information (which may also involve some statistical calculations) allowing the calculation of the average cost of covering a specified risk in the past or, for life insurance, tables of mortality rates or of the frequency of illness, accident and invalidity.
- Joint studies on the probable impact of extraneous circumstances that may influence the frequency or scale of claims, or the yield of different types of investments.
- Joint compilations of the past cost of risks on condition that the available statistics are provided with as much detail and differentiation as is actuarially adequate.
- Pooling arrangements offering the co-insurance or co-reinsurance of new risks or of risks which have materially chaged so it is not possible to know in advance what subscription capacity is necessary in order to cover them. Such arrangments are exempeted for a period of three years.
- Pooling arrangements offering the co-insurance or co-reinsurance which have existed for more than three years, or which are not created in order to cover a new risk, on condition that the combined market share held by the participating undertakings does not exceed 20% in case of co-insurance and 25% in the case of co-reinsurance.

8 Regulation 267/2010, OJ 2010 L 83/1. The Regulation replaced Commission Regulation 358/2003, which expired on March 31.

9 Communication 2010/C 82/02, Official Journal OJ 2010 C 82/20.

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