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MERGERS AND ACQUISITIONS

First-Phase Decisions Without Undertakings

Case COMP/M.6189 Imerys/Rio Tinto Talc Business

On July 7, 2011, the European Commission unconditionally cleared Imerys's acquisition of all the share capital of five subsidiaries of Rio Tinto Plc: Luzenac America Inc., Luzenac Inc., Rio Tinto Talc Limited, Luzenac Australia Pty Limited, and Luzenac NV.

The principal competition concern raised by the transaction was whether the minerals in Imerys's portfolio could be considered substitutes for talc, leading to possible horizontal effects, or complements to talc, leading to potential conglomerate effects. In addition, the decision discussed the vertical relationship that would arise out of the transaction.

With respect to potential horizontal effects, the Commission determined, following its market investigation, that other minerals could not be viewed in the same relevant product market as talc for various end-use applications. It found, in particular, that the products could not be substituted by customers given the different properties, functionalities, and price points of talc and other minerals, with one exception. Kaolin, one of the minerals in the Imerys portfolio, was considered functionally similar to talc in one end-use application, paper coating for rotogravure printing. However, the Commission noted that they could not be considered close substitutes given their different properties and diverse prices. It declined to provide a precise market definition since, even in a hypothetical market for that application comprising talc and kaolin, the merged entity would face significant competition from other talc and kaolin producers, raising no serious doubts with respect to potential horizontal effects.

The decision also discusses the possibility of conglomerate effects resulting from the addition of talc to Imerys's portfolio of minerals, analyzing the ability, incentive, and effect of foreclosure by the merged entity. The Commission's investigation found that the merged entity would have the ability to at least somewhat foreclose its rivals given its high market share in talc and that, contrary to what the notifying party argues, talc is not an interchangeable commodity. However, the Commission found that the merged entity would lack the incentive to bundle or discount its minerals. Bundling is uncommon in the sector since customers prefer to source their minerals separately in order to keep their formulations secret. In addition, competitors do not typically face supply constraints. Thus, attempts to bundle would be unprofitable. Similarly, prices are negotiated individually for each mineral on a volume basis and not related to a purchase of a portfolio of minerals. Customers interviewed also showed no concerns related to potential conglomerate effects.

The Commission's concern as regards any possible vertical foreclosure effect involved cordierite, a mineral alloy constructed by Imerys, because it typically consists of talc, kaolin, and other minerals. The Commission found that since talc represents only 0-5% of the total products costs of kiln furniture, an attempt by the merged entity to raise its' rivals costs for talc would have a limited impact on total production costs. Moreover, the Commission agreed with the notifying party that talc is not an essential mineral in cordierite and could be replaced by other materials without significant change to the cordierite's properties or cost. Even if the merged entity were to increase talc prices, customers could simply switch to similar suppliers and other talc producers would be induced to enter this segment. The notifying party tried to argue further that cordierite itself is increasingly replaced by silicon carbide in its principal use in kiln furniture. However, the Commission found that silicon carbide was not substitutable for cordierite in terms of price or performance, but left the precise market definition open since there were no vertical foreclosure concerns.

Case COMP/M.6205 Eli Lilly/Janssen Pharmaceutica Animal Health Business Assets

On July 7, 2011, the European Commission approved Eli Lilly's acquisition of Janssen Animal Health.

Through the transaction, Elanco acquired products, manufacturing licenses, distribution rights and the existing contract portfolio, as well as the related intellectual property and marketing authorizations, of Janssen Animal Health. The acquisition gave Elanco a portfolio of around 50 marketed animal health products.

The Commission found that although the combined market shares of the merging parties would be relatively high in certain areas, in particular in relation to the control of poultry coccidiosis (an intestinal disease), the increment to Eli Lilly's market shares through the addition of Janssen Animal Health's products to its portfolio would be low. In addition, the Commission found that customers (feed companies, pre-mixers and poultry producers) would continue to benefit from a sufficient choice of alternative suppliers. The merged entity, therefore, would be sufficiently constrained by a number of credible competitors. The Commission concluded that the transaction would not significantly impede effective competition in the EEA or any substantial part of it.

Case COMP/M.6278 Takeda/Nycomed

On July 29, 2011, the European Commission unconditionally cleared Takeda's acquisition of Nycomed. The principal antitrust issue was whether the parties' licensees should be considered autonomous players or part of their licensors when determining relevant market share in the analysis of horizontal overlaps. The decision also briefly discusses vertical concerns.

Both Takeda and Nycomed have licensing arrangements whereby they grant the licensee the right to manufacture and commercialize in the licensee's name, one or more of the pharmaceutical products the licensor has developed. Normally, the licensor also provides, for a price, the active pharmaceutical ingredient ("API") in order to ensure the quality of the end product. The Commission examined a number of factors in determining whether the market share of these licensees should be included in that of its licensor, including the degree of exclusivity of the relationship, the risk and cost of any leakage of sensitive information to competitors, change of control provisions and the effective possibility to change provider, the period in which such a change could be effected, and the degree of lock-in of the contracts. In this case, Takeda provided evidence that the licensees can and do act independently and are not mere agent distributors of the pharmaceutical originators. Licensees are free to and do usually determine their own pricing, distribution system and marketing strategy for the products that they produce under license from the originator. Therefore, the Commission concluded their sales should not be attributed to Takeda or Nycomed.[1]

In previous cases, the Commission distinguished three Groups of affected human pharmaceutical markets, depending on the parties' joint market share and the increment attributable to the merger. Here, the Commission identified one Group 1 affected market (where parties' joint market share exceeds 35% and increment exceeds 1%) in Austria and two Group 3 affected markets (where parties' joint market share is between 15-35%) in Germany and Italy, all antiulcerants classified under Anatomical Classification Guidelines ("ATC") 4 class A2B2. Given strong entry by generics in Austria and the parties' still-moderate combined market share in all three affected markets, the Commission determined that the transaction raised no serious horizontal concerns.

With respect to potential vertical foreclosure, the Commission's investigation found it both costly and lengthy to switch API supplier or customer due to the regulatory procedures needed to switch to a new API and to the long terms of the licensing agreements themselves. The only market in which vertical foreclosure would even be a concern is the Belgian proton pump inhibitor ("PPI") market where combined market share of Takeda and Nycomed is above 25% downstream and either one or both parties supplies a licensee or third party with an API for the production of PPIs classified under ATC4 class A2B2. However, the Commission determined that even if the parties could terminate Takeda's licensing agreement in Belgium post-merger, given Nycomed's low market share on the EEA market for APIs and the existence of several alternative API suppliers, it was unlikely that the transaction would lead to input foreclosure on the Belgian PPI market.

STATE AID

ECJ – Judgments

Case C-403/10 P Mediaset SpA v. European Commission

On July 28, 2011, the Court of Justice dismissed an appeal brought by Mediaset seeking to set aside the General Court judgment of June 15, 2010, in case T-177/07, *Mediaset v. Commission*. In the judgment under appeal, the General Court had dismissed the application made by Mediaset for the annulment of the Commission's decision of January 24, 2007, finding that the measures implemented by Italy between 2004 and 2005 for the subsidised purchase of digital decoders constituted illegal and incompatible State aid.

By its 2004 Finance Law, Italy had provided, within the spending limit of €110 million, a State subsidy of €150 to every user who purchased or rented equipment for the reception of televisions signals transmitted using digital terrestrial technology. The following year it

1 Similarly in Case No IV/M.737 – *Ciba-Geigy/Sandoz*, decision of 17 July 1996, the Commission declined to include products distributed through other firms when calculating the parties' market shares (paras. 201-205).

had refinanced the measure with the same spending limit, but had reduced the subsidy per decoder to €70. The Commission in its decision found that the measure at issue constituted State aid to digital terrestrial broadcasters offering pay TV services and to digital cable pay-TV operators. It also held that the measure could not be justified under Article 107(3)(c) TFEU, which allows for derogations when an aid instrument has a common interest objective, as the measure, even if favouring the transition from analogue to digital television broadcasting, was not technologically neutral since it did not apply to digital satellite decoders.

On appeal, Mediaset claimed that the General Court's analysis was unlawful to the extent it had not autonomously examined whether the measure had effectively conferred an economic advantage to a recipient. The Court, however, dismissed this plea as the General Court had correctly observed that the measure offered an incentive to consumers to switch from analogue to digital terrestrial mode and enabled terrestrial television broadcasters to consolidate their existing position on the market in terms of brand image and customer retention. Furthermore, the General Court had not erred in finding that aid, the direct beneficiaries of which are consumers, can nonetheless constitute indirect aid to economic operators and that the Commission had thus demonstrated that there was a link between the subsidy and the broadcasters in question.

Mediaset also contested that Article 107(3)(c) TFEU was found not to be applicable on the sole ground that the measure at issue was not technologically neutral and was for that reason selective. According to that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Court therefore analysed whether the selectivity of State aid stemming from the fact that it is not technologically neutral can be sufficient to render that article inapplicable. It found that to the extent that the measure at issue was liable to favour the marketing and sales of terrestrial decoders it was capable of affecting trading conditions in the common market and thus causing a distortion, owing to the fact that it places a consumer in a more favourable situation when he purchases such decoders than when he purchases a satellite one.

As to recovery of the aid in question, Mediaset expressed the view that the principle of legal certainty precluded recovery of the unlawful aid because the provisions of the contested decision did not make it possible to establish an adequate recovery methodology. However, the Court held that the General Court had correctly found that the Commission is not required to fix the exact amount of the aid to be recovered as it is sufficient that its decision contain information and give guidance enabling the addressee to work out itself, without too much difficulty, that amount. Therefore, the Commission can legitimately leave it to national authorities to calculate the exact amounts to be repaid and the obligation on national authorities to calculate this exact amount forms part of the obligation incumbent upon the Commission and the Member States of sincere cooperation in the implementation of the State aid rules.

Case C-279/08 P European Commission v. Kingdom of the Netherlands

On September 8, 2011, the Court of Justice set aside the judgment of the General Court of April 10, 2008, in Case T-233/04, *Netherlands v. Commission*, which had annulled the Commission's decision of June 24, 2003, on State aid N 35/2003 concerning the emission trading scheme for nitrogen oxides notified by the Netherlands. In its decision the Commission held that the national legislation implemented in the field constituted State aid which was compatible with the common market.

The national measure examined set a target of 55 kilotons of nitrogen oxides (NOx) emissions for large industrial facilities, approximately 250 undertakings in the country with installed total thermal capacity of more than 20 thermal megawatts, and laid down an emission standard for each facility depending on the amount of energy used. The measure provided that the undertaking concerned could comply with its standard by reducing its own emissions, buying emission allowance from other undertakings, or by combining these options. Furthermore, facilities whose emissions fell below the emission standard could offer emission reductions in the form of credits on the emission market and, to this end, each year NOx credits could be bought, saved, or lent for future periods. However, if a facility exceeded its standard, a fine was imposed and it was required to compensate the surplus the following year. The Commission held that this scheme constituted State aid to the extent it attributed a selective advantage to large industrial facilities. It claimed that the Netherlands had the option of selling or auctioning the emission allowances and to the extent they were offering these free of charge as intangible assets, they were foregoing revenues and attributing an advantage to a specific group of undertakings. In any event, the Commission held the measure to be compatible with the Treaty.

In its appeal to the General Court, the Netherlands contested the Commission's view that the measure in question constituted State aid. In its judgment, the General Court held that the measure granted an advantage, as the possibility of trading allowances had conferred on them a value on the market and were thus to be assimilated to intangible assets. In addition, to the extent they were given free of charge, the Netherlands had foregone the collection of State resources. On the other hand, the General Court held that the measure lacked selectivity as, taken as a whole, it believed that it did not favour certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU. In particular, the General Court held that the criterion for the application of the measure was an objective one (thermal capacity) which was in conformity with the measure's goal consisting in the protection of the environment. In addition, the factual and legal situation of the undertakings subject to the specific NOx ceilings was not comparable to that of the undertakings to which that ceiling did not apply and which were not subject to the same obligations, thus it concluded that the measure did not confer an advantage to the former vis à vis the latter.

On appeal, the Court of Justice reached the opposite conclusion, and held that the General Court had erred in finding that the measure was not selective. The Court stated that the measure gave an advantage to large industrial undertakings which was not available to other undertakings, as the former were able to monetise the economic value of the emission reductions achieved, whereas the latter could not. Furthermore, all undertakings were in a comparable situation as every undertaking the operations of which produce NOx emissions must comply with obligations regarding the limitation or reduction of those emissions. However, only those undertakings covered by the measure benefited from its advantages. Finally, the Court also held that the quantitative criterion (total installed thermal capacity) used by the national legislation to differentiate between undertakings could not be regarded as inherent to a scheme intended to reduce industrial pollution and, therefore, could not be justified by the nature or general scheme of that legislation, meaning it could not deprive the measure in question of its State aid character.

GC – Judgments

Case T-442/07 Ryanair Ltd v. European Commission

On September 29, 2011, the General Court partially upheld the appeal brought by Ryanair seeking a declaration that the Commission had failed to act in unlawfully failing to define its position on the applicant's complaints concerning aid allegedly granted by Italy to various airlines.

On November 3, 2005, Ryanair had complained to the Commission that Italy had allegedly granted State aid to the airlines Volare and Alitalia. This complaint was followed by several other letters in which Ryanair provided the Commission with information on new measures it equally believed to constitute unlawful State aid. On August 2, 2007, having received no response to its complaint, the applicant sent a letter of formal notice to the Commission, by which it formally called on it to act under Article 232 EC.[2] In November 2007, Ryanair then brought an action against the Commission for its failure to act.

The main issues debated in front of the General Court were the extent to which each single national measure criticized by Ryanair had been effectively addressed in a letter of formal notice, necessary prerequisite for bringing an action for failure to act, and the extent to which in relation to each the Commission was under a duty to act which had allegedly been violated.

The General Court clarified that, while there is no particular requirement as to its form, the letter of formal notice must be sufficiently clear and precise to enable the Commission to ascertain in specific terms the content of the decision which it is being asked to adopt and must make clear that its purpose is to compel the Commission to state its position.

As to a declaration that the Commission has failed to act, the Court recalls that, in order for it to rule on the substance of such a claim, it must determine whether the Commission was under a duty to act at the time when it was formally called upon to define its position. Under the State aid rules, the Commission is required to act when (i) in possession of information regarding unlawful aid, it must examine it without delay;[3] or (ii) when considering there are insufficient grounds for taking a view on the case, it is required to inform the interested parties in order to allow them to submit additional comments within a reasonable period.[4] In the latter event, once the comments have been lodged or the period expired, the Commission

2 Now Article 265 TFEU.

3 Article 10(1) of Regulation No. 659/1999.

4 Article 20(2) of Regulation No. 659/1999.

is obliged to close the preliminary stage by adopting a decision stating either that the aid does not exist, raising no objections, or initiating the formal investigation procedure.

In this case, the Court verified whether the Commission was effectively seized of a complaint concerning each measure and, thus, put in possession of information regarding alleged unlawful aid in relation to which it was required to act. The following principles emerged from the Court's analysis.

In the first place, the Court clarified that, in the case of State aid, there is no specific formal requirement attached to the lodging of a complaint. Therefore, information given in a letter containing no indication that it was meant to be a complaint, still qualifies as such if the applicant clearly refers therein to the transfer of State aid. It is also not required that interested parties provide the Commission with detailed information in order for the Commission to be regarded as having in its possession information giving grounds for an examination. On the other hand, the Court clarified that the interested party must at least specify that the measure complained of is alleged to be unlawful aid and it found that in relation to certain measures Ryanair had not given indication that the airlines had benefited from them, thus it could not be said that there was a complaint concerning them. It is therefore not enough, for this requirement to be fulfilled, that the applicant claim for the first time in the letter of formal notice that an undertaking benefited from measures that constituted unlawful aid. The Court also clarified that it is not sufficient for the Commission to claim it had acted upon a complaint by questioning the national authorities or that it state that the measure did not constitute State aid, as the Commission is in any event required to adopt a formal decision in order to close the preliminary stage of examination.

FINING POLICY

ECJ – Judgments

Cases C-520/09 P Arkema v. Commission and C-521/09 P Elf Aquitaine v. Commission

On September 29, 2011, the Court of Justice set aside the General Court's judgment and the relevant Commission decision, in so far as the decision (which the General Court confirmed) held Elf Aquitaine liable for the conduct of its subsidiary Arkema. On January 19, 2005, the Commission imposed fines on several companies, including Arkema and its parent company Elf Aquitaine, for operating a cartel in the monochloroacetic acid market.[5] The Commission had found Elf Aquitaine liable for the conduct of its 98%-owned subsidiary Arkema and imposed a fine of €45 million jointly and severally on Elf Aquitaine and Arkema.

In its appeal, Elf Aquitaine argued that the General Court had applied a non-rebuttable (rather than a rebuttable) presumption that the parent company was responsible for the actions of its subsidiaries. The Court rejected this argument, holding that the General Court had correctly applied a rebuttable presumption, which was not negated by the fact that it might have been difficult to rebut in the circumstances.

However, the Court accepted Elf Aquitaine's argument that the Commission had violated its obligation to state reasons for finding Elf Aquitaine responsible for Arkema's actions under Article 253 EC (now Article 296 TFEU). The Court specified that where a decision relates to several addressees, it must include adequate reasons with respect to each of the addressees. The Court further found that where a Commission decision is based exclusively, with regards to certain addressees, on the rebuttable presumption of a parent company's decisive influence over the conduct of a subsidiary, the Commission is in any event required to set out adequate reasons explaining why the factual and legal elements relied upon were insufficient to rebut that presumption. In this case, the Court found that the Commission had not given sufficiently reasoned answers to several of the arguments submitted by Elf Aquitaine that Arkema in actual fact determined its conduct on the market independently. The Court held that the statement of reasons rejecting those arguments consisted solely of a series of mere assertions and negations, which were repetitive and by no means detailed.

Moreover, the obligation to state reasons must be appreciated according to the specific circumstances of each case which, in this instance, included inter alia a change of approach by the Commission between the contested decision and an earlier decision relating to a cartel in the organic peroxides market in which Elf Aquitaine and Arkema were not considered to be part of the same undertaking for purposes of EU competition law. According to the Court, this change of approach should have triggered more scrutiny by the General Court as to whether the Commission had fulfilled its obligations.

In light of the above, the Court is likely to reach the same conclusion with regard to the recent General Court's judgment of July 14, 20113

5 Case COMP/37.773, *Monochloroacetic Acid*, Commission decision of January 19, 2005. Monochloroacetic Acid is a strong and aggressively reactive organic acid which involves reacting acedic acid with chlorine. It comes in liquid, flake and molten form.

which confirmed a 2006 Commission decision holding Total and Elf Aquitaine in part jointly and severally liable for the €78.66 million fine imposed on their subsidiary (Arkema) for its participation in cartels in the hydrogen peroxide and perborate markets.[6] Total and Elf Aquitaine appealed the General Court judgment on September 27, 2011. In its decision, the General Court applied a similar reasoning to the Court of Justice in rejecting the arguments raised by Total and Elf Aquitaine.

GC – Judgments

Case T-113/07 Toshiba Corp. v. European Commission and Case T-133/07 Mitsubishi Electric v European Commission

On July 12, 2011, the General Court annulled the fines imposed by the Commission on Mitsubishi and Toshiba ("Japanese parties") for their participation in a cartel involving European and Japanese companies on the gas-insulated switchgear ("GIS") market,[7] from April 15, 1988, until May 11, 2004.[8] The Court also reduced the fines imposed by the Commission on Fuji, holding that it had provided essential information which the Commission should have taken into account when calculating its fine. The Commission had found that the companies participating in the cartel coordinated the allocation of GIS projects worldwide on the basis of a joint Japanese and European quota.

The Court found that the method used by the Commission to calculate the fines imposed on Mitsubishi and Toshiba infringed the principle of equal treatment. The Commission used a different reference year for Mitsubishi and Toshiba, than the one used for the European undertakings involved in the cartel. The European undertakings' fines were calculated on the basis of turnover rates for the year 2003, while the year 2001 was used to calculate the Japanese parties' fines. The Commission justified this divergent approach on the basis that, for the most part of the infringement (1988-2001), Mitsubishi and Toshiba were independent, and only after 2001 did the two parties operate as a joint venture. Therefore, the Commission decided to use as more representative the last available individual turnover figures for each company (*i.e.*, those of 2001) to calculate the two companies' fines. The Court found that while this was a legitimate objective, it could have been achieved without necessarily treating the European and Japanese parties differently. For instance, the Commission could have applied the two parties' market shares in 2001 to their 2003 joint turnover to calculate each company's individual liability. Accordingly, the Court annulled the fines imposed by the Commission on the parties Mitsubishi and Toshiba.

In reducing the fine imposed on Fuji, the Court held that Fuji had provided essential information to the Commission, which should have been taken into account when calculating the fine. It was only on the basis of these agreements that the Commission was able to prove that the cartel lasted until at least September or October 2001.

The Court nevertheless upheld the Commission's findings as to the underlying infringement. In particular, the Court found that the Japanese parties' illegal agreement was confirmed by statements from several undertakings involved in the cartel and the witness statements of an employee in one of those undertakings, providing information about the parties involved, the existence, the essential content, and the duration of the common understanding. This evidence was further corroborated by the existence of a notification and account loading mechanism. The European undertakings would notify the Japanese undertakings of the allocation of GIS projects in certain EU countries and load these projects into the joint European quota system. This mechanism acted as a type of compensation for the Japanese undertakings, as under the quota system they would then be entitled to more project allocations in countries outside the EEA. Based on these arrangements, the Court confirmed that the European undertakings were potential competitors to the Japanese companies, and that that their arrangement brought about collusive and anti-competitive effects.

Cases T-38/07 Shell Petroleum NV And Others

On July 13, 2011, the General Court issued judgments in response to seven appeals to European Commission decisions of 29 November 2006 that imposed a total of €519 million in fines against 13 companies for participation in a cartel in the market for synthetic rubbers used most widely in the production of tires.[9] In its decisions,

6 Case COMP/38.620 – Hydrogen peroxide, Commission decision of May 3, 2006.

7 Gas insulated switchgear (GIS) is heavy electrical equipment used to control energy flows in electricity grids, and is the major component of turnkey power substations. Substations are auxiliary power stations where electrical current is converted from high to low voltage or the reverse. GIS is sold both as items of equipment to be integrated into a turnkey power substation and as an integral part of turnkey power substations. The function of switchgear is to protect the transformer from overload and/or insulate the circuit and the faulted transformer: as described in COMP/F/38.899 – *Gas Insulated Switchgear*, Commission Decision of January 24, 2007.

8 Case COMP/F/38.899 – *Gas Insulated Switchgear*, Commission Decision of January 24, 2007.

9 Cases T-38/07 *Shell Petroleum NV and others*; T-39/07 *Eni SpA*; T-42/07 *The Dow Chemical Company and Others*; T-44/07 *Kaučuk a.s.*; T-45/07 *Unipetrol a.s.*; T-53/07 *Trade-Stomil sp. Z o.o.*; and T-59/07 *Polimeri Europa SpA v. Commission*.

the Court upheld fines against Shell for €160.88 million and Dow for a total of €64.58 million. However, the court reduced the fine against Eni and its subsidiary Polimeri Europa from €272.25 million to €181.50 million and cancelled fines against Unipetrol and its subsidiaries Kau□uk and Trade Stomil.

The Commission decisions found that the companies had agreed on price targets, shared customers and exchanged sensitive information on prices, competitors and customers continuously between 1996 and 2002. The Court addressed issues relating to the Commission's burden of proof in establishing anticompetitive activity as well as the appropriateness of fines imposed on holding companies for conduct by a subsidiary.

With regards to the appeals brought by Shell group companies, the Court upheld all fines imposed by the Commission. The primary legal issue in these appeals related to who bears the burden of proof for purposes of attributing the conduct of a wholly-owned subsidiary to a parent holding company. Shell argued that the Commission bears the burden to prove by specific circumstances that a holding company exercised influence over a subsidiary for purposes of imposing fines on the parent. The Court rejected Shell's argument and, agreeing with the Commission, explained that there is a rebuttable presumption that a parent exercises decisive control over, and is thus responsible for the activities of, a wholly-owned subsidiary, so that fines can be imposed on the parent company, unless the company is able to rebut the presumption in a particular case. Finding that Shell could not meet its burden to rebut the presumption of control, the Court rejected Shell's pleas and upheld all fines on the subsidiaries and parent companies implicated by the Commission.

In its judgment on appeals brought by Dow Deutschland and other Dow companies, the Court concluded that Dow's participation in the cartel did not begin until September 1996, not July 1996 as the Commission originally argued. The Commission's only evidence for the time period in question was that employees of Dow were seconded to members of the cartel for brief working periods. The Court explained that an inference of refraining from anticompetitive activity is just as reasonable as inferring participation, thus without more the Commission could not meet its burden of proof. The Commission's decision was thus annulled in that respect. Nevertheless, the Court sustained the amount of the fine imposed on the Dow companies respecting the Commission's discretion to determine the starting amount of the fine and relevant increases for the duration and seriousness of the infringement.

The Court did however annul a 50% increase in fines over the basic fine amount imposed on Eni and Polimeri for recidivism and repeated infringement by companies owned by Eni that were involved in previous cartels. The Court explained that, although the legal standard for repeated infringement does not require that the legal persons be identical, the complex nature of the corporate structure and changes in ownership did not justify a finding of repeated infringement.

Finally, in its decisions addressing the appeals brought by Unipetrol, Kaucuk, and Trade Stomil, the Court annulled the Commission's decision and cancelled all fines imposed on the undertakings. The undertakings pleaded that the Commission had contradictory facts and incomplete proof to establish that certain personnel related to the undertakings were involved in seminal meetings when the cartel was supposedly initiated. The Court explained that even though the existence of anticompetitive behavior most often has to be inferred from "coincidences and indicia" that taken together constitute evidence of infringement, any doubt about an undertaking's participation in a cartel must operate to the undertaking's advantage. As such, due to doubts arising from incomplete and contradictory facts, the Commission did not meet its legal burden of proof.

Case T-138/07 Schindler Holding Ltd and Others v Commission

On July 14, 2011, the General Court issued judgments in appeals against the European Commission decision of February 21, 2007[10] that imposed over EUR 990 million in fines against of a number of companies in the Otis, Kone, Schindler, and ThyssenKrupp groups for their participation in four separate cartels in the market for the sale, installation, maintenance and modernization of elevators and escalators in Belgium, Germany, Luxembourg, and the Netherlands.[11]

With regard to the appeals by companies in the Otis, Kone, and Schindler groups, the General Court dismissed all of the parties' claims and maintained the level of their fines. In particular, the Court

10 Commission Decision C (2007) 512 final relating to a proceeding under Article 81 [EC] (Case COMP/E-1/38.823 – *Elevators and Escalators*) (OJ 2008 C 75, p. 19).

11 Case T-138/07 *Schindler Holding Ltd and Others v Commission*; Joined Cases T-141/07 *General Technic-Otis Sàrl v Commission*, T-142/07 *General Technic Sàrl v Commission*, T-145/07 *Otis SA and Others v Commission* and T-146/07 *United Technologies Corp v Commission*; Joined Cases T-144/07 *ThyssenKrupp Liften Ascenseurs NV v Commission*, T-147/07 *ThyssenKrupp Aufzüge GmbH and Others v Commission*, T-148/07 *ThyssenKrupp Ascenseurs Luxembourg Sàrl v Commission*, T-149/07 *ThyssenKrupp Elevator AG v Commission*, T-150/07 *ThyssenKrupp AG v Commission* and T-154/07 *ThyssenKrupp Liften BV v Commission*; Case T-151/07 *Kone Oyj and Others v Commission*.

upheld the Commission's ruling that the four national cartels had a significant effect on trade *between* Member States, and that EU competition law thus applied to the companies' conduct and the Commission had jurisdiction to render its decision. The Court also agreed with the Commission's finding that non-binding statements made by national competition authorities awarding provisional immunity at the national level have no bearing on the Commission's ability to pursue a case under EU law.

Moreover, the Court upheld the Commission's conclusion that the parent companies of each group exercised control over the subsidiaries, making them jointly and severally liable for the infringement. The Court noted that when a parent company holds 100% of the shares of a subsidiary that has engaged in unlawful conduct, there is a rebuttable presumption that the parent company exerts decisive influence over, and is thus responsible for, its subsidiary's conduct, and that the parent companies here had failed to rebut this presumption. Finally, the Court upheld the Commission's decisions regarding the calculation and reduction of fines, both within and outside the scope of the Leniency Notice, observing that as a general matter the Commission enjoys broad discretion in its choice of methods for calculating fines.

With regard to the appeals by companies in the ThyssenKrupp group, the General Court found that a 50% increase in fines imposed by the Commission on the grounds of recidivism and repeated infringement was not justified, and reduced the aggregate fine imposed on the ThyssenKrupp group from approximately €480 million to approximately €320 million.

In 1998, the Commission had penalized certain companies belonging to the ThyssenKrupp group for their participation in a cartel fixing alloy surcharges in the market for stainless steel.[12] The Court observed that the Commission had, in its earlier decision, made a finding of infringement only against certain ThyssenKrupp subsidiaries, but not against the parent company, of which ThyssenKrupp AG was the legal and economic successor. More particularly, the Court pointed out that the Commission had not established, in its earlier decision, whether the subsidiaries and their parent companies formed a single economic entity in the earlier case, in the sense that the subsidiaries did not determine their conduct independently on the market, so that responsibility for those violations could be attributed to the parent companies. Indeed, the parent companies were not involved in the administrative proceedings in that earlier case. In addition, the Court noted that it was not clear from the Commission's decision whether the subsidiaries, whose conduct was penalized in the earlier alloy surcharge case, were the same companies whose conduct was the subject of the appeal in this case.

Case T-12/06 Deltafina SpA v. Commission

On September 9, 2011, the General Court confirmed the Commission Decision whereby the Commission imposed a €30 million fine on Deltafina SpA ("Deltafina") for its participation in a cartel in the Italian raw tobacco market, after refusing to grant it final immunity. Although Deltafina was the first undertaking to reveal the existence of the cartel and as such was granted conditional immunity, the Commission had found that Deltafina had infringed its obligation to cooperate in accordance with paragraph 11(a) of the Leniency Notice,[13] by disclosing to the other cartel participants that it had applied for leniency before the Commission could carry out unannounced inspections, thus putting the investigations in jeopardy. As a result, the Commission did not grant Deltafina final immunity.[14]

Deltafina challenged that decision before the General Court, arguing *inter alia* that first, the disclosure of its immunity application was the direct consequence of its obligation to immediately put an end to the infringement in accordance with paragraph 11(b) of the Leniency Notice and that it did not jeopardize the investigations since the other cartel participants were already aware of the Commission investigation; and, second, that the Commission violated the principle of protection of legitimate expectations. The Court dismissed the appeal on all grounds.

First, the Court agreed with the Commission that even assuming that Deltafina was forced to disclose its immunity application as a result

12 Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding pursuant to Article 65 [CS] (Case IV/35.814 – *Alloy surcharge*) (OJ 1998 L 100, p. 55) and Decision C (2006) 6765 final relating to a proceeding under Article 65 [CS] (Case No COMP/F/39.234 – *Alloy surcharge – re-adoption*).

13 Paragraph 11 of the Leniency Notice states that "*[I]n addition to the conditions set out in points 8(a) and 9 or in points 8(b) and 10, as appropriate, the following cumulative conditions must be met in any case to qualify for any immunity from a fine: (a)"the undertaking cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned; (b) the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under points 8(a) or 8(b), as appropriate; (c) the undertaking did not take steps to coerce other undertakings to participate in the infringement.*" OJ 2002 C 45/03.

14 However, the Commission took Deltafina's cooperation into account as a mitigating factor and agreed to a reduction of 50% of its fine.

of its obligation to immediately put an end to the infringement or that the disclosure did not have any negative effect on the investigation, Deltafina remained in any event under the obligation to inform the Commission quickly of that disclosure under the obligation for genuine cooperation. Although in this case, Deltafina had expressed concerns during a meeting with the Commission about not being able to keep secret its immunity application for very long, it had not informed the Commission of its intention to disclose it spontaneously to the other cartel participants and did not inform the Commission once it did disclose.

Second, the Court rejected Deltafina's claim to legitimate expectations. In particular, the Court recalled that conditional immunity granted at the beginning of the administrative procedure testifies that the undertaking was the first to satisfy the conditions mentioned in paragraph 8(a) or (b) of the Leniency Notice[15] and ensures the undertaking concerned that the Commission will grant it immunity if at the end of the administrative procedure, it concludes that the undertaking complied with the conditions mentioned in paragraph 11 of that same notice. In other words, the immunity applicant does not receive immunity as such before the final decision, but merely enjoys a procedural status likely to be transformed into immunity at the end of the administrative procedure, if the conditions are met. Therefore, Deltafina had no legitimate expectations that it would be granted final immunity because it had previously obtained conditional immunity.

Case T-216/06 Lucite v. Commission

On September 15, 2011, the General Court dismissed the appeal brought by Lucite International and its subsidiary Lucite International UK (together, "Lucite") against a decision of the European Commission of May 31, 2006, relating to a cartel in the methacrylates industry.[16] According to the Commission, Lucite and the other parties to the cartel had been discussing and agreeing on price levels, implementing and monitoring their price agreements and exchanging commercially sensitive information relating to methacrylate products (commonly known as acrylic glass) in the EEA from 1997 to 2002.[17] The Commission had levied fines totaling €344.562 million on Lucite and three other undertakings. Lucite had been granted immunity for the final period of the cartel as well as a fine reduction on account of its cooperation under the 2002 Leniency Notice, which resulted in a fine of €25.025 million.

Before the General Court, Lucite argued that the Commission had infringed the 1998 Fining Guidelines[18] by failing to take into account certain factors in determining the starting amount of the fine or, alternatively, as attenuating circumstances, namely: (i) the lack of involvement of senior management in the cartel and the fact that Lucite's involvement in the infringement was limited to participation by former employees of ICI's Acrylics business unit (which Lucite acquired in 1999); and (ii) the fact that the commercial policy put in place by Lucite after the acquisition of ICI's acrylic business was in contradiction with the anti-competitive discussions and was decisive in undermining the cartel.

The Court rejected Lucite's plea in its entirety and upheld the fine imposed on it. In particular, the Court held that the factors relied on by Lucite could not be taken into account for determining the starting amount of the fine, since they all related to the gravity of Lucite's own participation in the infringement (and not to the gravity of the infringement itself), and they thus needed to be assessed only as potential attenuating circumstances. However, when turning to attenuating circumstances, the Court held that the factors mentioned above under (i) were not such as to attenuate the gravity of the infringement and that, in any event, the people participating in the anti-competitive meetings had important responsibilities within Lucite. As regards the factors mentioned under point (ii) above, the Court found, first, that even at the time when Lucite breached the pricing agreements, it still participated in the exchange of confidential information. Secondly, the case file showed that Lucite did not refrain completely from implementing the pricing agreements. Thirdly, the alleged commercial policy was only applied in respect of one type of product, which constituted by far the smallest market. Moreover, other participants also departed from the

15 Paragraph 8(a) and (b) of the Leniency Notice states that "*[T]he Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if: (a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 (2) in connection with an alleged cartel affecting the Community; or (b) the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC (3) in connection with an alleged cartel affecting the Community.*"

16 Case COMP/F/38.645, *Methacrylates*.

17 The products involved included: (i) Polymethyl-methacrylate (PMMA)-moulding compounds, which are mainly used in the car industry for the production of headlamps, tail-lights and glass for dashboards as well as household appliances, optical media (DVDs, lenses) and electronics; (ii) PMMA-solid sheet, which is mainly used for illuminated advertising applications and shop interior displays; and (iii) PMMA-sanitary ware, which is mainly used in the production of bath tubs and shower trays.

18 Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ 1998 C 9/3. Lucite also argued that the Commission had infringed the obligation to state reasons and the principles of the protection of legitimate expectations and equal treatment.

agreements during certain periods, and Lucite's conduct was therefore not much different from that of the other participants.

The Court also rejected the Commission's request at the hearing that the Court withdraw the partial immunity granted to Lucite for the final period of the cartel (March 2001 – September 2002) on the basis that it had failed to genuinely cooperate under the Leniency Notice as it acknowledged in its pleadings that the cartel remained "dormant" between July 2001 and August 2002. The Court rejected the Commission's request, stating that Lucite in its pleadings had simply drawn the Court's attention to the objective fact that the Commission decision did not refer to any anti-competitive meeting taking place during a certain period. In the Court's view, this did not amount to casting doubt on the evidence which was the basis for the grant of partial immunity, as Lucite had not contested the duration or continuous nature of the infringement, or its own responsibility for the entire period considered.

Case T-243/07 Koninklijke Grolsch v Commission

On September 15, 2011, the General Court upheld the appeal of Koninklijke Grolsch against the European Commission's decision fining the appellant for its participation in a cartel on the Dutch beer market.[19] The Commission had found that the main Dutch brewers, i.e., Koninklijke Grolsch, Heineken, InBev and Bavaria, had coordinated prices, price increases and other commercial practices as well as allocated customers in the on-trade and off-trade distribution channels in the Netherlands from February 27, 1996 to November 3, 1999. In essence, the analysis of the Court focused on two grounds of appeal: whether the appellant had directly participated in the infringement and whether the Commission had properly discharged its duty to state reasons with regards to the attribution of responsibility for the infringement identified.

First, the Court rejected the Commission's plea of inadmissibility on the alleged basis that the appellant could not invoke the lack of a direct participation in the infringement if it had not done so during the administrative proceedings, notably in response to the Statement of Objections ("SO"). The Court pointed out that there is no provision under EU law that requires an undertaking to challenge the factual and legal elements on which an SO is based, or face the risk of no longer being able to do so during court proceedings reviewing the legality of the Commission's decision. Absent a clear provision to that effect, the interpretation proposed by the Commission would be incompatible with the fundamental principles of EU law as well as the right to an effective remedy and access to a fair trial, as enshrined in the Charter of Fundamental rights of the EU.

Second, the Court found that the evidence put forward by the Commission to prove the appellant's direct participation in the infringement was limited to three elements: the statements made by InBev in the framework of its leniency application, the handwritten notes taken by a representative of the appellant during a meeting and two telephone contacts between this latter and Heineken. However, none of them was sufficient to establish direct participation in the single and continuous infringement identified by the Commission. First, InBev's statements at best proved the appellant's participation in a single meeting, while all other meetings had been attended by the employees of its wholly-owned subsidiary, Grolsche Bierbrouwerij Nederland. Second, the above-mentioned handwritten notes, together with the two telephone contacts with Heineken, constituted isolated indicia and, thus, did not suffice to establish a long-lasting involvement in a complex arrangement, which required regular contacts between the interested parties. As a result, the Court upheld the appellant's ground relating to the lack of direct participation in the infringement.

Finally, the Court analyzed the statement of reasons put forward by the Commission to justify the attribution of responsibility to appellant. The Court recalled that it is settled case law that the Commission is entitled to make use of a rebuttable presumption according to which a parent company holding 100% of the capital of a subsidiary is presumed to have exercised decisive influence over the conduct of such subsidiary. However, in the contested decision the Commission assimilated the appellant with the Grolsch group and made no reference to the economic, organizational, and legal links between the appellant and its wholly-owned subsidiary, Grolsche Bierbrouwerij Nederland. In fact, the Court noted that nowhere in the statement of reasons was the subsidiary's name mentioned, in spite of the fact that only this latter's employees attended the anti-competitive meetings on a regular basis. Therefore, the Commission failed to explain its reasons for attributing to the appellant the conduct of its subsidiary and, consequently, deprived Koninklijke Grolsch of the possibility of reversing the above-mentioned rebuttable presumption as well as prevented the Court from exercising its power of review in that regard.

19 Case COMP/37.766, , Commission Decision of April 18, 2007.

Commission Decisions

Case COMP/39.180 Aluminium Fluoride

The Commission published a decision of June 25, 2008, in which it fined aluminium fluoride producers a total of €4.9 million for taking part in an anti-competitive agreement between July and December 2000. Boliden Odda (Norway) received full immunity from fines under the Commission's 2002 Leniency Programme, as it was first to provide information about the cartel.

The Commission found that at a Milan meeting in July 2000, the producers had looked at various regions worldwide, including Europe, with the intention of establishing a general price level and, in some cases, a market division. The parties exchanged commercially sensitive information and agreed that their overall objective was to achieve a higher price level and discourage deep price discounting. The agreement was followed with bilateral contacts to ensure the agreement was being implemented. According to the Commission, these actions limited the producers' commercial autonomy and substantially, if not completely, reduced the uncertainty of how competitors would conduct themselves on the market, thereby hampering competition.

A number of parties argued that the actual effects of the cartel needed to be proven, and that, in effect, the agreements had not been implemented. The Commission contested this point, but held that, in any case, whether the price increases were implemented or not was immaterial. In the absence of proof that a concerned undertaking had not distanced itself from the agreement at the meeting with competitors, the fact that it did not abide by the agreement does not relieve it of its full responsibility in relation to that agreement or concerted practice.

In calculating fines, the Commission took into account the short period of the infringement, and the relatively low amount of turnover in the market. The Commission also took into account the fact that the companies operate on a worldwide basis by employing, for the first time,[20] Point 18 of the 2006 Guidelines on fines.[21] This provision allows fines to be calculated on the basis of sales relating to the infringement within the relevant geographic area, beyond the EEA. In this case, the Commission found that the infringement was worldwide in scope. If the producers had not taken part in the cartel, they could have set their price policy without any commitment to competitors, and therefore sold their products below the prices fixed by the cartel, thereby increasing their market share in Europe. By utilizing Point 18, the Commission could evaluate the economic capacity of the cartel members to harm competition within the EEA.

20 European Commission Press Release, June 25, 2008, IP/08/1007.

21 Point 18 of the *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* states: "Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements."

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