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VERTICAL RESTRAINTS

CFI – Judgments

Case T-450/05 *Peugeot SA and Peugeot Nederland NV v. Commission*

On July 9, 2009, the Court of First Instance upheld the European Commission's prohibition of measures taken by Peugeot to restrict parallel exports from the Netherlands, but reduced the € 49.5 million fine imposed on Peugeot by 10% because, in assessing the amount of the fine in light of the infringement's effects on parallel trade, the Commission had failed to consider the role of diminishing price differentials between Member States in reducing parallel trade.

According to the Commission, Peugeot had violated Article 81 EC by agreeing with the dealers of its selective network in the Netherlands on a bonus scheme that rewarded only domestic sales between January 1997 and September 2003. In addition, the Commission found that Peugeot had exerted pressure on dealers that had developed a significant export business by, for example, threatening to reduce the number of cars supplied to them.

The Court rejected Peugeot's contention that the bonus scheme had no anticompetitive object, citing settled case law that a distribution agreement has a restrictive object for the purposes of Article 81 if it clearly aims to treat export sales less favorably than national sales, thereby leading to a partitioning of the market in question. This can be achieved, not only by direct restrictions on exports, but also through indirect measures, such as the exclusion of export sales from a bonus system, as they influence the economic conditions of such transactions.

The Court also rejected Peugeot's argument that there was no agreement, citing settled case law that an apparently unilateral act can constitute an agreement for the purposes of Article 81(1), if it is an expression of the concurrence of wills of at least two parties. This may result from the clauses of the dealership agreement and from the conduct of the parties, tacit acquiescence also being potentially indicative of such concurrence. In this case, the Court found that the dealers accepted the conditions relating to their remuneration, as proposed by Peugeot in its circulars, whenever they filed a purchase order for a vehicle in accordance with the conditions set by the circulars.

The Court confirmed the Commission's classification of the infringement as "very serious" and rejected pleas from the car company concerning the regulator's findings on the duration of the breach. However, it reduced the fine from € 49.5 million to € 44.5 million on the ground that, in assessing the gravity of the infringement, the Commission had failed to take sufficient account of declining price differentials between the Netherlands and other European countries, which caused a decline in vehicle exports.

HORIZONTAL AGREEMENTS

ECJ – Judgments

Case C-511/06 P *Archer Daniels Midland Co. v. Commission*

On July 9, 2009, the European Court of Justice reduced the fine imposed on Archer Daniels Midland ("ADM") for its participation in a cartel in the market for citric acid by €10.2 million. ADM was originally fined €39.6 million. This fine included a 35% increase to reflect the company's role as the cartel's ringleader.

ADM appealed the European Commission's decision before the Court of First Instance, requesting either its annulment so far as it applied to ADM, or a reduction in its fine. ADM argued that the European Commission had erred in classifying ADM as ringleader. The Court of First Instance dismissed the appeal, and ADM subsequently appealed to the European Court of Justice.

The Court upheld the company's argument that the Commission had unlawfully increased ADM's fine on the basis of its leadership of the cartel. ADM claimed that the Commission had breached its rights of defense by failing to set out clearly all the essential facts regarding ADM's role as ringleader in its statement of objections. The Commission merely annexed the relevant evidence, without referencing it in the main document.

The Court held that the Commission need not indicate in the statement of objections that it might classify an undertaking as ringleader. However, the statement of objections must set forth clearly all the essential facts on which the Commission is relying at

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that stage in the procedure so as to enable the undertaking concerned to make known its views on both the alleged facts and the documents on which the Commission intends to rely.

The Court held that the European Commission had not afforded ADM such an opportunity in this case, as it merely annexed the relevant documents to the statement of objections. Moreover, as the Commission did not even refer to the annexed documents in its statement of objections, ADM was not able to assess the weight that the Commission intended to give to each of the items of evidence. The Court therefore concluded that the Commission denied ADM the opportunity to fully exercise its rights of defense and that the Court of First Instance had subsequently erred in law in upholding the Commission's classification of ADM as ringleader. In light of this conclusion, the Court also upheld ADM's plea that, as ADM had not been lawfully classified as ringleader, the Court of First Instance could not lawfully have ruled out the possibility that ADM should have benefited from the application of Section B of the Leniency Notice.

For these reasons, the Court set aside the Court of First Instance's judgment in so far as it rejected ADM's plea regarding the infringement of its rights of defense during the administrative procedure and the application of Section B(b) of the Leniency Notice. It also reduced the amount of the fine payable by ADM to €29.4 million.

Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v. Commission*

On September 3, 2009, the European Court of Justice annulled the Commission's decision fining Bolloré EUR 22.68 million for its participation in a cartel in the carbonless paper sector. The Court upheld the judgment of the Court of First Instance that the Commission had breached Bolloré's rights of defence in failing to indicate, in the statement of objections, that it intended to hold Bolloré liable for the infringement on account of its responsibility as the parent company owning all the shares in Copiograph, which participated directly in the cartel.

Bolloré appealed the Commission's decision on the ground that its rights of defence had been breached, since it had been unable to foresee from the wording of the statement of objections that the Commission intended to hold Bolloré liable for the cartel conduct of its wholly owned subsidiary. Bolloré claimed that it was, as a result, unable to defend itself against this aspect of the Commission's objections during the administrative proceedings.

The Court agreed with the Court of First Instance's finding that the Commission had breached Bolloré's rights of defence. The Court recalled that a statement of objections constitutes the procedural safeguard that ensures observance of the principle of the right of defence. It must set forth clearly all the essential facts on which the Commission is relying at that stage in proceedings, including specifying the legal persons on whom it intends to impose a fine. The statement of objections should also indicate the capacity in which an undertaking is called upon to answer the allegations. The Court found that the Commission had failed to indicate in the statement of objections that it intended to hold Bolloré liable for the cartel conduct of its subsidiary Copiograph.

However, following the Advocate General's opinion in this case, the Court rejected the Court of First Instance's conclusion that this error of law could not justify the annulment of the contested decision. The Court held that, as the Commission's decision held Bolloré liable on the basis of its capacity as Copiograph's parent as well as its direct involvement in the cartel conduct, it could not be precluded that the Commission's decision may have been based on conduct in respect of which Bolloré had been unable to defend itself. It therefore upheld Bolloré's appeal, set aside the Court of First Instance's judgment, and annulled the Commission's decision so far as it concerned Bolloré.

Case C-534/07 P *William Prym and Others v. Commission*

On September 3, 2009, the European Court of Justice dismissed Prym's appeal against the judgment of the Court of First Instance, which upheld a Commission decision finding that that Prym, Coats Holding and Entaco had entered into a series of written, formally bilateral, agreements between September 1994 and December 1999 under which they had agreed to share the product markets by segmenting the European market for hard haberdashery and the geographic markets by segmenting the European market for needles. The Commission decided to treat the two issues as two separate infringements of Article 81(1) EC and deemed them as "very serious".

Prym brought an appeal before the Court of First Instance seeking annulment of the Commission's decision or a reduction of the fines imposed. The Court of First Instance dismissed the application for annulment, but did grant a 10% reduction in the fine on the ground that Prym had wrongly been refused the benefit of the 1996 Leniency Notice.

The Court dismissed Prym's appeal against the Court of First Instance's judgment on all five following grounds put forward by Prym.

Prym argued that the Commission had breached its right to be heard by splitting the investigation into two separate proceedings. The Court confirmed the Court of First Instance rejection of this argument on the ground that Prym had been informed of the division into two proceedings at the time the Commission sent the first statement of objections. The Court of First Instance concluded that Prym could have raised this defense against the separation of the proceedings already in its reply to the statement of objections.

The Court found that two phases of the administrative procedure must be distinguished, namely the investigation phase preceding the statement of objections and the phase corresponding to the remainder of the administrative procedure. The first stage must enable the Commission to adopt a position on the course, which the procedure is to follow, and the second must enable the Commission to reach a final decision on the infringement concerned. The Court found that the assessments made in the statement of objections are intended to define the scope of the administrative procedure. As such, the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. In the instant case, Prym did not deny that the statement of objections in the present case was worded sufficiently clearly to enable it properly to identify the conduct complained of by the Commission and the course, which it intended the procedure to take. Furthermore, the Court found that the Commission need not give reasons for its decision to split the proceedings because they are not essential to the conduct of the proposed procedure.

Prym also argued that the Commission arbitrarily split a single infringement and the Court of First Instance was wrong to find the division of the proceeding lawful. The Court dismissed that argument on the grounds that an infringement of EC competition law may be split and may lead to the adoption of several decisions imposing separate fines. Moreover, the Commission does not need to ascertain in the statement of objections whether the offending conduct amounted to separate infringements. The Court underlined that a subsequent decision does not necessarily need to be a copy of the statement of objections, since the Commission must take into account the factors emerging from the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Also, it remained open to Prym to argue that there was only a single infringement once the fasteners decision was handed down, but prior to that, Prym could not claim that it had been denied justice.

In addition, Prym claimed that the Court of First Instance had failed to annul the Commission's decision although it had found that there was an infringement of the obligation to state reasons with respect to the size of the relevant market and the impact of the infringement on the market. Moreover, Prym argued that the Court of First Instance erred by failing to take into account the incorrect determination of the actual impact of the infringement on the market.

The Court dismissed these arguments stating that the gravity of infringements must be assessed in the light of numerous factors, such as, inter alia, the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up. The size of the relevant market and an anticompetitive practice's impact on the market are not conclusive criteria, but just two among a number of other factors to be taken into account in evaluating the gravity of an infringement and in setting the amount of the fine. The Court of First Instance had taken into account both factors and had correctly considered whether the defect, which it had identified in respect of the assessment of the actual impact of the infringement, had had an effect on the calculation of the amount of the fine. The Court added that the fact that the Court of First Instance did not judge it appropriate, in the circumstances of the case, to adjust the starting amount set by the Commission does not mean that it regarded the amount provided for in the Guidelines as a minimum threshold below which it is not possible to descend.

As to Prym's argument that the Court of First Instance had failed to take into account as an attenuating circumstance the fact that the appellants voluntarily terminated the infringement, the Court pointed out that no benefit can granted under the third indent of Section 3 of the Guidelines where the infringement has already come to an end before the date on which the Commission first intervenes or where the undertakings concerned have already taken a firm decision to put an end to it before that date. Accordingly, the Court of First Instance was right to uphold the Commission's finding refusing to grant Prym the benefit of attenuating circumstances because as Prym admitted the decision had been taken before and independently of any intervention by the Commission.

Finally, Prym argued that the Court of First Instance had breached the principle of proportionality in determining the amount of the fine, by applying the 1998 Fining Guidelines in a too formalistic way and failing to take an overall view of the facts of the case. The Court deemed this argument to be inadmissible, noting that it could

not substitute its own assessment for that of the Court of First Instance when exercising its unlimited jurisdiction to rule on the amount of the fines imposed.

Case C-97/08 P *Akzo Nobel NV and Others v. Commission*

On September 10, 2009, the European Court of Justice dismissed Akzo's appeal against the Court of First Instance's judgment upholding the Commission's decision fining Akzo for the participation of its subsidiaries in the Choline Chloride cartel.[1]

In holding Akzo jointly and severally liable for the conduct of its subsidiaries (notwithstanding that it had not itself participated in the cartel), the Commission applied the rebuttable presumption that, as the direct or indirect holder of all the shares in these subsidiaries, Akzo and its subsidiaries constituted a singe economic unit, and that Akzo was able to, and did, exert decisive influence over their commercial policy. The Court of First Instance found that it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence.

In its appeal, Akzo claimed that it had rebutted the presumption of decisive influence and that joint and several liability had been wrongly imputed to it, because the Commission had failed to provide evidence other than Akzo's 100% shareholding in its subsidiaries. Akzo also claimed that the Court of First Instance had committed an error of law in defining the Commission's burden of proof with respect to the decisive influence of parent companies over wholly-owned subsidiaries. Relying on the Court of First Instance's judgment in *Stora*,[2] Akzo claimed that, where the parent adduces some evidence to rebut the presumption of decisive influence, the Commission must then show more than a 100% shareholding in order to prove that the parent did, in fact, exercise real commercial influence. Akzo noted that, in *Stora*, the Court of First Instance also referred to a number of other *indicia*, such as the fact that its was not disputed that the parent company exercised influence over the commercial policy of its subsidiary and the fact that the parent and its subsidiaries were jointly represented during the proceedings.

The Court dismissed Akzo's claim, specifying that the Court of First Instance in *Stora* referred to *"other indicia"* for the sole purpose of identifying all the elements on which it had based its reasoning. Contrary to Akzo's claim, this was not intended to require proof of other circumstances indicating the actual exercise of influence by the parent company. As a result, the Court held that the Commission is not required to provide any evidence of any indicia other than the 100% shareholding, unless the parent company adduces sufficient evidence to show that its subsidiary acted independently on the market.

Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/05 P, *Erste Bank der Österreichischen Sparkassen and Others v. Commission*

On September 24, 2009, the European Court of Justice handed down its judgment in the Austrian Banks (Lombard Club) cartel appeal. In 2002, the Commission fined eight Austrian banks for fixing fees and rates of interest on a range of deposit and lending services. Seven of the eight banks brought appeals before the Court of First Instance, which rejected all but that of Österreichische Postsparkasse AG ("OPA"). The Court of First Instance reduced OPA's fine because the European Commission had determined the starting point for the fine using documents on which it was not entitled to rely. Erste Bank der Österreichischen Sparkassen AG ("Erste"), Raiffeisen Zentralbank Österreich ("RZO"), Bank Austria Creditanstalt AG ("BAC") and Österreichische Volksbanken-AG ("OVA") subsequently brought appeals before the European Court of Justice, all of which were rejected by the Court as either inadmissible or unfounded.

Each of the four appellants raised pleas regarding the European Commission's assessment of the concept of effect on trade. First, RZO and OVA claimed that the Court of First Instance had erred in finding that the cartel arrangements were capable of affecting trade between Member States without proving their partitioning effect. In rejecting the claim, the Court recalled its case law that application of an agreement in just one Member State cannot exclude the possibility of an effect on trade between Member States since anticompetitive agreements may, by their very nature, reinforce the partitioning of national markets. As the Lombard Club effectively restricted access to the Austrian banking market, the Court upheld the Court of First Instance's conclusion that it was capable of having an affect on inter-state trade.

The Court also rejected OVA's argument that the Court of First Instance had erred in upholding the Commission's assessment of the effects on trade based on an examination of the overall effects of the Lombard Club, rather than assessing each of its constituent banking committees individually. The Court held that, where an agreement is held to constitute a single, continuous infringement of

1 Commission Decision 2005/566/EEC of 9 December 2004 relating to a proceeding under Article 81 or the EC Treaty and Article 53 of the EEA Agreement (Case COMP/E-2?37.533 – Choline Cholride).

2 Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I9925.

Article 81, it is inappropriate to sub-divide it for the purpose of analyzing its effect on trade. Finally, the Court confirmed that the European Commission need not show that the agreement actually affected trade between Member States, merely that it was capable of having that effect.

Erste raised a further plea claiming that the Court of First Instance had erred in finding that the Commission was entitled to hold Erste liable for the infringement committed by GiroCredit before Erste has acquired that company from Bank of Austria Group ("BAG"). The Court held that the fact that Girocredit was controlled by BAG during the first part of the infringement did not preclude the European Commission from finding Erste liable for the entire duration of the infringement. In particular, the Court suggested that requiring the Commission to determine whether liability could be attributed to a company's different parents would impose an excessive burden on the Commission. Finally, the Court observed that, as a fellow participant in the cartel at the time of the acquisition, Erste was fully aware of the infringement and its likely exposure to fines as beneficial owner of the company at the time of the acquisition. The Court therefore concluded that the European Commission was entitled to find Erste, as the new parent, liable for the entire duration of the infringement committed by Girocredit.

The Court rejected all of the other claims made by the applicants, including that the Court of First Instance had erred in its assessment of the gravity of the infringement for the purpose of setting the basic amount of the fine, in taking into account as an attenuating circumstance the participation of public authorities in the committees, and in its assessment of the European Commission's application of the Leniency Notice. Finally, as BAC had been given the proper opportunity to express its views on the level of its fine, the Court also rejected BAC's claim that its rights of defence had been breached.

Commission decisions

Candle Waxes

The Commission has published its decision of October 1, 2008, fining a number of companies for their participation in a paraffin wax cartel.[3]

The parties argued that the parent companies were not responsible for the actions of their subsidiaries that were involved in the cartel, arguing that they did not exercise control over the commercial decisions of their subsidiaries, that they had no knowledge of their illegal actions, and that the paraffin wax activity was minor within their respective groups and therefore attracted very little attention from the parent companies,

In rejecting these arguments the Commission recalled the presumption that a wholly owned subsidiary essentially follows the instruction given to it by its parent company. The burden lies on the parent company to rebut this presumption by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. The Commission observed that the exercise of decisive influence on the commercial policy of a subsidiary does not require day-to-day management of the subsidiary's operation. The subsidiary's management may well be entrusted with the subsidiary, but this does not rule out that the parent company imposes objectives and policies which affect the performance of the group and its coherence and disciplines any behaviour departing from those objectives and policies. In response to the arguments that there was no indication of direct involvement of the parent companies in the anti-competitive conduct and to their alleged lack of awareness, the Commission responded that attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that the two entities constitute a single undertaking for the purposes of the EC competition law and not from proof of the parent's participation in or awareness of the infringement.

The Commission considered the argument that paraffin wax was of very limited importance for certain parent companies to be inconclusive with respect to the effective autonomy of a subsidiary, adding that the fact that the parent company itself is not involved in the different businesses it holds is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities that compose it. Group companies and business units that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership form a single economic unit and hence cannot be considered to constitute separate economic units in their own right.

3 Decision available on http://ec.europa.eu/competition/antitrust/cases/decisions/39181/provisional_public_version.pdf.

Somewhat ironically, the Commission found evidence for the involvement of a parent company in the day-to-day conduct of its subsidiary in the fact that the parent company tried to introduce an anti-trust compliance program in the subsidiary. The Commission also refused to consider the existence of such program as an attenuating consideration in setting the fine level.

In relation to the parental liability of parent companies to a 50/50 joint venture with another parent company, the Commission recalled the judgment of the Court of First Instance in *Avebe*[4] according to which the anti-competitive conduct of a company can be attributed to another company where it has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by that other company. In this case the Commission considered that veto rights (*i.e.* negative control) secured the decisive influence of the parent companies in the joint venture and imputed liability on both parent companies.

Marine Hoses

On January 28, 2009, the Commission fined five companies for their participation in a cartel for marine hoses from 1986 to 2007. The European Commission launched its investigation following an immunity application by Yokohama. In addition to surprise inspections of the cartel participants' business premises, for the first time the Commission also exercised its powers under Article 21 of Council Regulation No. 1/2003 to inspect the private residence of an individual suspected of coordinating the cartel.

The cartel arrangements, which covered the entire EEA, included agreements on prices, quotas and sales conditions as well as a system of penalties in case of deviation. Within this framework, cartel members fixed prices according to reference price lists and allocated customers, either by allowing the cartel coordinator to allocate specific customers to individual cartel members or by reserving certain geographic markets as home markets for specific cartel members.

The Commission imposed fines on five of the six undertakings found to have participated in the cartel. The immunity applicant, Yokohama, received 100% immunity. Two other undertakings, Bridgestone and Parker, saw their fines increased by 30% to reflect their leadership role in the cartel. The Commission granted Manuli a 30% reduction in fine for cooperation under the Leniency notice. While Manuli had provided the Commission with documents that were helpful in proving the existence of a cartel, the Commission did not consider they qualified Manuli for a greater reduction in the fine as, at the time of Manuli's leniency application, the Commission already had a substantial number of documents in its possession with which it could prove the main elements of the cartel.

Four of the undertakings involved in the cartel have appealed to the Court of First Instance, each alleging that the European Commission erred in fact and in law in its finding of a single and continuous infringement from 1986 to 2007. They argue that an infringement cannot be classified as continuous, or even repeated, where long periods of time intersect separate periods of the infringement. As it lacked strong evidence for the period mid-1995 to mid-1997 in the present case, the Commission substantiated its finding of a single and continuous infringement by construing the period as one of low or limited activity. It further held that whether the cartel has the same object before and after the period of limited activity is more important than the duration of that period.

In addition to the fines imposed by the Commission on the infringing undertakings, the United Kingdom's Office of Fair Trading ("OFT") also brought criminal charges against several individuals for their participation in the cartel. This is the first time that the OFT has exercised this power under section 188 of the UK's Enterprise Act 2002. Three of the UK nationals convicted by the OFT have appealed their sentences to the UK's Court of Appeal on the grounds that they exceeded the sentence they had previously incurred as part of plea bargains with the United States' Department of Justice ("DOJ"). While the Court of Appeal noted its objection to the DOJ imposing sentencing restrictions in this way, it nonetheless reduced the sentences accordingly. The Court of Appeal's judgment sets out useful guidance for the OFT on factors it should consider in future sentencing decisions for cartel offences.

MERGERS & ACQUISITIONS

ECJ – Judgments

Case C- Case C-440/07 P *Commission v. Schneider*

On July 16, 2009, the Court held that there was no causal link between the Commission's illegal decision prohibiting Schneider's acquisition of Legrand and ordering Legrand's divestiture and the loss incurred by Schneider as a result of this forced divestiture, because the divestiture was implemented a number of months before the decision's divestiture deadline.

4 Case T-314/01 *Avebe v Commission* [2006] ECR II-3085.

In this case, the Commission found that Schneider's acquisition of Legrand was incompatible with the common market and that the proposed commitments were insufficient. By the time the decision was issued Schneider, through a public bid, acquired majority shares in Legrand. As a result, in October 2002 the Commission ordered the separation of the companies. Schneider brought an action for annulment of the divestiture decision and the Commission extended the divestiture period. In July 2002, Schneider concluded a sale agreement with Wendel-KKR to be implemented no later than December 10, 2002, allowing Schneider, in the event of the annulment of the Commission decision, to cancel the agreement by December 5, 2002, subject to a cancellation fee.

In October 2002, the Court of First Instance annulled the Commission's decision. One month later, the Commission announced a reopening of the merger control procedure and informed Schneider that the concentration was liable to undermine competition even with the new proposed commitments. On December 10, 2002, Schneider transferred its holding in Legrand to Wendel-KKR.

Schneider brought an action before the Court of First Instance seeking compensation for the damage it had sustained as a result of the Commission's illegal decision. The Court of First Instance accepted that there was a sufficiently close causal link between the unlawful act committed and two types of damages suffered by Schneider, namely i) costs incurred in participating in the resumed merger control; ii) and the reduction in the transfer price which Schneider had had to accept in order to secure an agreement on the date on which the disposal was to take effect.

The Commission appealed this decision. The Court accepted that Schneider was compelled, because of the existence of negative decision, to enter into the sale agreement and fix the transfer price. It also accepted that the obligation prompted Schneider to accept a lower price than it would have obtained in the absence of an illegal negative decision. However, the Court also noted that, by the time Schneider entered into the agreement, the Commission had extended the divestiture period until February 2003. It also noted that before December 10, 2002, the Court of First Instance had already annulled the Commission's negative decision. Schneider decided not to exercise the cancellation option because of its fear that on resumption of the investigation, it would not obtain a decision upholding the compatibility of the concentration.

The Court noted that the risk of incompatibility is inherent in every merger control procedure and that a divestiture risk is normally assumed by undertakings, which exercise the option to implement a concentration through a public bid before the Commission's decision on the transaction concerned. The Court thus decided that the Court of First Instance had erred and that there was no direct causal link between the price reduction and the illegality vitiating the Commission's negative decision. The Court found that the direct cause of the damage alleged was Schneider's decision, which it was under no obligation to take, to allow the transfer of Legrand to take effect on December 10, 2002. Therefore, Schneider's claim in so far as it concerned compensation for that damage was dismissed.

First-phase decisions without Undertakings

PepsiCo/Pepsi Americas and PepsiCo/The PepsiCo Bottling Group

On October 26, 2009, the European Commission ("Commission") in two separate decisions unconditionally cleared the acquisition by PepsiCo of its two largest bottlers, Pepsi Americas ("PAS") and The PepsiCo Bottling Group ("PBG").

Prior to the transaction PepsiCo owned 43% of the shares of PAS, and its acquisition represented a change of control. In addition to noting the minority level of PepsiCo's shareholding in PAS, the Commission highlighted a number of aspects of the relationship between PepsiCo and PAS pre-transaction as evidence of a lack of pre-transaction control, including: (1) PepsiCo's inability to marshal a stable majority of shareholder votes at shareholder meetings in the three previous years; (2) the absence of any veto right for PepsiCo over PAS' business affairs; and (3) the absence of any special right of PepsiCo to appoint (rather than nominate for a vote) board representation or PAS management.

Both the PAS and the PBT decisions give significant space to a consideration of whether the combinations would give rise to portfolio effects. In *PepsiCo/PAS*, despite PepsiCo's strength in sport drinks and ready-to-drink teas, the Commission rejected any contention about the merger specific portfolio effects associated with controlling both products. In view of the Commission, the products marketed by PepsiCo are not "must have brands". Such must have brands were defined as "a brand with strong spontaneous demand that most retailers have on their shelves." The Commission's decision is not clear as to whether the "must have" measure of retail success is a proxy for dominance, or whether it is a pre-condition for a finding of portfolio effects involving a retail operation.

In *PepsiCo/PBT*, the Commission examined PepsiCo's ability to bundle soft drinks and snacks, where it had a material share of the market in both products. Despite the fact that PepsiCo had a material share

of the domestic soft drink market in Greece, the Commission rejected concerns about bundling with snacks because PepsiCo's soft drink products are not "must have". Because PepsiCo's inferior status in soft drinks was checked by Coca-Cola, which was found to be an effective single-product player, the Commission found that the transaction did not present a real risk of effective bundling.

ABUSE OF DOMINANT POSITION

ECJ – Judgments

Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland GmbH*

On July 16, 2009, the European Court of Justice affirmed the judgment of the Court of First Instance, upholding the European Commission's decision that Duales System Deutschland ("DSD") had abused its dominant position on the German market for waste packaging management. Although the Court found that the Court of First Instance had failed to adjudicate on the case within a reasonable time, the Court held that this did not have any effect on the outcome of the case.

In Germany, national legislation requires manufacturers and distributors to collect and recover the packaging waste they produce at the point of sale of the packaged goods. Manufacturers and distributors may obtain an exemption (in whole or in part) from this legal obligation by participating in local collection schemes authorized at the level of the Länder. The exemption systems are intended to guarantee a regular collection and recovery service throughout the distributor's sales territory, at or near the homes of final consumers. In 1993, DSD, a private company, received approval to run an exemption system in each of the individual Länder, creating a network covering the whole German territory. Manufacturers and distributors participating in DSD's exemption system were permitted, in return for a fee, to affix DSD's "Der Grüne Punkt" ("DGP") logo to packaging included in the DSD system.

The Commission found that DSD was dominant on the market for waste packaging management in Germany, as it was the only undertaking to operate an exemption system spanning the entire country, and collected approximately 70% of all sales packaging in Germany. The Commission noted that DSD charged a licence fee for packaging carrying the DGP logo, regardless of whether or not such packaging was in fact collected via the DSD system. Imposition of the licence fee deprived customers of any realistic economic possibility of contracting with a competitor to DSD. Customers wishing to switch a portion of their collection requirements to a competitor of DSD would incur significant costs as a result of the need to selectively label packages. Moreover it would be impossible, in practice, for a customer to implement a system that ensured DGP and non-DGP packaging was separated from each other, and disposed of at the appropriate collection point designated by DSD or a competitor. The Commission therefore concluded that DSD had imposed excessive prices and unfair contractual terms on undertakings using, or wishing to use, DSD's services for only a portion of their packaging collection requirements. The Commission did not impose a fine on DSD, since existing case law provided DSD with little guidance on the compatibility of its system with competition rules. However, the Commission required DSD to modify its exemption system, eliminating the licence fee imposed on manufacturers and distributors with respect to DGP-logo packaging put into circulation in Germany that was not collected through the DSD exemption service.

The Court of First Instance upheld the Commission's decision in its entirety, noting, inter alia, that neither applicable national legislation, nor DSD's rights as holder of the DGP logo trademark, justified the imposition of a licence fee on undertakings able to demonstrate that a quantity of their packaging bearing the DGP logo had been recovered using a competing exemption system.

DSD appealed to the European Court of Justice. The Court, however, agreed with both the Commission and the Court of First Instance, declaring that that the DSD exemption system constituted an excessive pricing practice by a dominant undertaking, contrary to Article 82(a) EC. From a competition law perspective, DSD's key grounds of appeal related to DSD's right to grant a licence, and collect a licence fee, in respect of packaging bearing the DGP logo that was not collected through the DSD system.

First, DSD argued that the Court of First Instance had contradicted itself by acknowledging DSD's right as a trademark holder to charge a fee for the use of the DGP logo on packaging while, at the same time, holding that DSD had committed an abuse in charging the license fee for removal of packaging bearing the DGP logo. The Court rejected the argument, explaining that while DSD was entitled to charge a fee for the use of its logo, that fee should be separate from, and inferior to, the fee charged for use of DSD's collection service.

Second, DSD argued that the Commission's decision (as confirmed by the Court of First Instance) in effect imposed an obligation on DSD to grant a licence for use of the DGP logo independently of a company's participation in the DSD exemption system. The Court rejected this argument, noting that it was not the intention of the

Court of First Instance or the Commission to impose a compulsory licence on DSD but merely to prohibit DSD from using its dominant position to exclude competing exemption systems. The Court, citing case law of the European courts establishing that an undertaking abuses its dominant position where it charges a fee that is disproportionate to the economic value of the services provided, confirmed the Court of First Instance's finding that DSD had committed an abuse by requiring payment of a fee for a service that was not used. The Court confirmed that, where an abuse has been committed, the Commission has the power to require the undertaking concerned to put an end to the infringement. The Court therefore confirmed that the Commission was entitled to require DSD not to charge a license fee in respect of packaging bearing the DGP logo that had not been collected by DSD.

DSD did, however, prevail on its argument that, by taking almost six years to bring a judgment in the case, the Court of First Instance had failed to dispose of the case within a reasonable time. However, the Court held that there was no evidence that this failure had affected the outcome of the dispute. The Court therefore agreed with the opinion of Advocate General Bot that, given the need to ensure compliance with EC competition law, and the fact that all the appellant's pleas had been rejected as unfounded, the Court should not set aside the Court of First Instance's judgment solely on the basis of this procedural irregularity. However, the Court noted that DSD could on this ground attempt to bring a claim for damages.

CFI – Judgments

Case T-301/04 *Clearstream Banking AG and Clearstream International SA v. Commission*

On September 9, 2009, the Court of First Instance dismissed the appeal of Clearstream against a June 2004 decision finding that Clearstream Banking AG (and its parent company Clearstream International SA, collectively "Clearstream"), had abused its dominant position on the market for primary clearing and settlement services, by refusing to grant a competitor, Euroclear Bank SA ("Euroclear"), access to an electronic platform for clearing and settling trades in German-registered shares, and by charging Euroclear discriminatorily high per-transaction prices for certain clearing and settlement services.

Clearstream Banking AG is Germany's only Central Securities Depository ("CSD"). CSDs provide custody and administration services for securities, and (like Clearstream) may also provide clearing and settlement services. Clearing and settlement takes place after a trade in securities has been matched by a trading system, so that the seller gets paid and the buyer acquires ownership of the security traded. CSD clearing validates and matches delivery instructions; settlement involves the final payment and transfer of ownership in securities, customarily at the end of the third day following the trade. CSDs may be national or international. International CSDs ("ICSDs") sell trades in international securities (in addition to domestic securities), relying on links with local CSDs to do so. Euroclear is an ICSD, and also acts as the national CSD in Belgium, Finland, France, Ireland, the Netherlands, Sweden and the UK.

The Commission's 2004 decision confirmed that Clearstream, as the only final custodian of German securities, held a monopoly position on the market for holding services, and subsequently also occupied a dominant position on the market for primary clearing and settlement services. The Commission held that Clearstream had abused its dominant position with respect to primary clearing and settlement services. The Commission's investigation identified two specific abuses.

- Clearstream had unlawfully refused to grant Euroclear access to the part of its electronic trading platform (known as "CASCADE") required for the entry and matching of settlement instructions for registered shares. The refusal had lasted more than two years. As the monopoly provider of primary clearing and settlement services, Clearstream was an unavoidable trading partner. Euroclear could not duplicate the services requested. Although Euroclear had been able to use the services of an intermediary to clear and settle registered share transfers, this was more costly and less efficient than receiving the services directly from the primary service provider, Clearstream.
- The Commission found that Clearstream had also price discriminated against Euroclear over a five-year period, charging a higher per transaction price to Euroclear than it charged to other CSDs and ICSDs outside Germany for clearing and settlement services. The Commission found no objective justification, e.g., as differences in the detail or content of the services or the cost of providing them, for the differences in prices charged by Clearstream to Euroclear and other CSDs or and ICSDs.

The Commission held that Clearstream's conduct had raised Euroclear's transaction costs and impaired Euroclear's ability to provide efficient cross-border clearing and settlement services to clients in the single market. Increased transaction costs raised would ultimately be passed on to consumers buying and selling shares.

While the Commission adopted an Article 82 infringement decision against Clearstream, it did not impose a financial penalty. The Commission noted that there was no precedent in the area of clearing and settlement, and that it therefore had not been sufficiently clear to Clearstream that its behaviour might violate Article 82. Clearstream nevertheless appealed the Commission's decision. On September 9, 2009, the Court of First Instance dismissed Clearstream's appeal, upholding the Commission's decision in its entirety.

The Court confirmed that Clearstream had a factual monopoly in the post-transaction processing of securities issued under German law. The Court noted that CSDs located in other Member States could only provide clearing and settlement services for securities issued in Germany to their customers if given access to Clearstream's trading platform. The Court held that Clearstream had abused its dominant position by failing to provide Euroclear with access to the portion of the CASCADE system used for trading German registered shares. The Court noted that Clearstream usually provided the electronic link within a matter of months, as it had done for its affiliate in Luxembourg. In addition, the Court confirmed the Commission's finding that Clearstream had charged a higher price to Euroclear than it had to national CSDs for equivalent primary clearing and settlement services. Such discriminatory pricing was without objective justification and violated Article 82.

Commission decisions

Intel

On September 21, 2009, the Commission published a provisional non-confidential version of its May 13, 2009 decision finding that Intel Corporation ("Intel") abused its dominant position in the market for central processing units ("CPUs") using the x86 architecture and fining Intel €1.06 billion.[5] The Commission found that Intel's abuses were part of a continuous strategy aimed at foreclosing competition from its only significant competitor, Advanced Micro Devices ("AMD").

Based on the facts as determined by the Commission, the decision does not make new law. The case is significant, however, as the Commission's first application to rebate schemes of the methodology outlined in its 2009 Guidance on enforcement priorities in applying Article 82 of the EC Treaty (new Article 102 of the Treaty on the Functioning of the European Union, TFEU) to abusive exclusionary conduct by dominant undertakings (the "Guidance"),[6] and in particular the analysis of the foreclosure effects of anti-competitive rebate schemes.

The decision reinforces doubts about the practicality of the Commission's methodology for evaluating anti-competitive foreclosure effects. Moreover, the Commission nowhere makes clear the legal significance of the foreclosure analysis for its decision, although this analysis accounts for about a third of the entire decision.

Intel is the world's largest semiconductor manufacturer and the developer of the x86 microprocessor architecture. These processors, based on Intel's 80286 chip, which was used in the first IBM personal computers and the first generation of IBM "clones," are the industry-standard CPU for computers designed to use the Windows and Linux operating systems. Since 2000, Intel and AMD have essentially been the only two manufacturers producing x86 CPUs.

The Commission's investigation was triggered by a complaint from AMD submitted in October 2000 and supplemented in November 2003. In May 2004, the Commission carried out unannounced inspections at Intel's facilities and those of its customers, in cooperation with various national competition authorities in the United Kingdom, France, Germany, Italy and Spain.

On July 26, 2006, the Commission issued a Statement of Objections addressing Intel's dealings with five original equipment manufacturers ("OEMs"), namely: Dell, HP, Acer, NEC, and IBM. The investigation continued through 2008, and included inspections at the premises of European PC retailers and further unannounced inspections at Intel's premises. The Commission issued a Supplemental Statement of Objections on July 17, 2008. After the Court of First Instance denied Intel's applications for interim measures and its request for an extension of the deadline to reply to the Commissions' Supplemental Statement of Objections, Intel filed its written submission to the Commission on February 5, 2009.

The Commission adopted its final decision on May 13, 2009. The decision held that Intel engaged in a single and continuous infringement of Article 82 EC from October 2002 until December 2007 and imposed a fine of €1.06 billion. The Commission defined the relevant market as the market for x86 CPUs. Other CPUs were excluded from the relevant market because there was insufficient demand-side and supply-side substitutability. On the demand side, most OEMs did not consider switching from CPUs based on the x86

5 European Commission, COMP/37.990, Intel; http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745

6 European Commission, Guidance on enforcement priorities in applying Article 82 of the EC Treaty, 2009/C 45/02, available at: http://ec.europa.eu/competition/antitrust/art82/guidance.pdf

architecture to non-x86 CPUs, because non-x86 CPUs were not compatible with the Windows PC operating system that runs on the vast majority of desktop and laptop computers. On the supply side, the Commission found that a manufacturer of non-x86 CPUs would need to expend significant time and resources to switch production to the manufacture of x86 CPUs.

The Commission also found that Intel held a dominant position on the relevant market, with market shares of around 80% or more in an overall x86 CPU market and 70% in the sub-markets of x86 CPUs for desktop computers, laptop computers and for server computers throughout the six-year observation period. The Commission also identified a number of barriers to entry and expansion in the relevant market relating to the nature and the size of investment required (both in terms of research and development and investment in manufacturing facilities), combined with capacity constraints and significant product differentiation, in particular through brands. The Commission found Intel's to be a "must-stock" brand that provided it with additional market power.

The Commission found that Intel engaged in two types of abusive conduct: granting rebates conditioned on customers' buying all or almost all of their needs from Intel and "naked restrictions," outright payments to customers in exchange for not using AMD products.

The Commission first analysed Intel's conditional rebates in the traditional way. It held that Intel's conditional rebates represented an abuse of its dominant position under long-standing case law prohibiting exclusivity rebates and fidelity rebates by dominant companies.[7] Although Intel did not operate an overt fidelity rebate system, the Commission found that the level of Intel's rebates was de facto conditional upon customers purchasing all or nearly all of their x86 CPUs (at least in certain segments) from Intel and thereby restricted customers' freedom. The Commission considered that the rebates were part of a long-term comprehensive strategy aimed at foreclosing competitors from the market. The Commission cited e-mails and other evidence referring to rebates to OEMs and Media Saturn Holding, Europe's largest PC retailer ("MSH"),[8] as proof that these rebates were conditioned on customers' not (or essentially not) using AMD chips.

Although the Commission found that Intel's rebates were de facto conditioned on the customers' agreement to buy all or substantially all of their needs from Intel and that this system constituted an abuse of Intel's dominant position under existing case law, the Commission went on to apply the methodology set out in the Guidance to evaluate the capability of Intel's rebates to foreclose a non-dominant competitor that was as efficient as Intel.

In the Guidance, the Commission announced that in exercising its prosecutorial discretion to investigate alleged abuses under Article 82 EC, the Commission would give priority to rebate cases in which the dominant company's rebate system is capable of hindering expansion or entry by competitors that are as efficient as the dominant company. In particular, in the case of rebates, the Commission will focus on the question of what price a competitor would have to offer to compensate the customer for the loss of the rebate if the customer switched part of its demand away from the dominant company. The effective price that the competitor would have to match would be the dominant company's normal price less the rebate from the dominant company that the customer would lose by switching. In this regard, the Guidance recognizes the importance of the size of the portion of the customer's requirements that might be switched and that would result in losing the dominant company's discount (referred to as "the relevant range").[9] The smaller this quantity is, the greater the likelihood that the dominant company's rebate will be considered illegal, because the entire rebate the customer would lose must be applied to the small quantity, lowering the effective unit price the competitor must offer in order to make a competitive offer. As long as the effective price that the competitor would need to match remains above the dominant firm's costs, an equally efficient competitor would normally be able to compete profitably notwithstanding the rebate. In those circumstances, the rebate would not normally result in anti-competitive foreclosure.

The Commission's "as-efficient-competitor" analysis thus depends on the assessment of a number of elements, each of which appears difficult to establish and was apparently the object of dispute in Intel. In particular, the Commission's approach involved the determination of (i) the amount of the rebate granted by Intel for the (near)

7 See e.g., Case 85/76 *Hoffmann-La Roche*, [1979] ECR 461, paragraph 89.

8 MSH is not a direct customer of Intel but purchases computers from the OEMs. MSH received marketing contributions from Intel, which were treated by the Commission as if they were rebates.

9 The Guidance (at 42) notes that in the case of incremental rebates (*i.e.*, rebates that apply only to additional volumes purchased), the relevant range is normally the additional purchase volumes that are eligible for the incremental rebate. For retroactive rebates (*i.e.*, rebates that apply to all volumes purchased from the dominant company during the relevant period of time), the relevant range would need to be established as the amount for which the customer may realistically be willing and able to switch from the dominant company's product (referred to as the "contestable share") and which the competitor would actually be able to supply.

exclusivity, (ii) the "relevant range" of the customers' demand that AMD could realistically have supplied, and (iii) Intel's relevant costs.

Regarding (i), the Commission never determined the actual amount of the rebate. Rather, it considered that all "or at least a large part" of Intel's rebate was granted in return for fidelity.[10] This ambiguity is surprising, considering that the nature of Intel's rebate system is the basis for the Commission's finding of abuse.

Regarding (ii), in discussing the customers' contestable share of demand as a basis for the establishment of the relevant range for which AMD could have realistically competed, the Commission noted that Intel was an unavoidable trading partner with a "must-stock" product. The Commission observed that, "[d]ue to Intel's strong brand and long track record, many final customers would not consider switching away from Intel-based computers, even if an AMD-based alternative were offered. The contestable part of the market is thus limited by the fact that AMD-based computers would only be the most attractive product for a sub-segment of all the OEM's ultimate customers."[11] In addition, the Commission looked at submissions of Intel's customers and AMD that detailed the rates at which these companies considered it was feasible to increase their supplies from AMD if they wanted to. On this basis, the Commission concluded that the contestable portion of the customers' demand was quite low.[12]

Regarding (iii), the Guidance refers to two different cost measures, average avoidable cost ("AAC", referring essentially to variable costs) and long-run average incremental cost ("LRAIC", referring essentially to average total production cost).[13] In the Decision, the Commission calculated Intel's AAC, i.e., the cost more favorable to Intel.

Based on its analysis of these factors, the Commission determined that the loss of the conditional rebate from Intel, in light of the limited contestable share of customers' demand, would have been such that AMD would have had to offer its CPUs at a price below Intel's costs to be able to compete. In other words, even if AMD were as efficient as Intel, it would not have been able to match Intel's after-rebate price, because the quantities for which AMD could have competed would have been relatively small, and AMD could not have competed with Intel for those quantities without profit sacrifice.

The decision shows not only that the Guidance's "as efficient competitor" analysis is conceptually complicated, but also that it is very difficult to establish all of the facts necessary to apply that analysis. The discussion of these factors in the decision suggests that neither the dominant company itself, nor its customers and competitors, can realistically use this approach to evaluate a proposed rebate scheme in advance, since the scheme's legality could be determined only with confidential information of both the dominant company (its costs) and individual customers (the contestable portion of their demand), and neither the dominant company nor any customer or competitor will have access to all the required information.[14]

In spite of the Commission's as-efficient-competitor analysis (accounting for about one-third of the entire decision), the Commission never really explained the significance of the foreclosure analysis for its decision. The decision describes the foreclosure analysis only as "one possible way of examining whether exclusivity rebates are capable or likely to cause anticompetitive foreclosure", but the Commission had already concluded that Intel's rebates violated Article 82 EC (Article 102 TFEU) under the established case law of the European Courts before proceeding to the foreclosure analysis. Indeed, in discussing the amount of Intel's fine, the Commission stated that "the as efficient competitor analysis . . . is not relevant for the purpose of deciding whether the Commission should impose a fine or determining its level as it does not relate to the existence of the infringement or to the question whether it was committed intentionally or by negligence, or to its gravity" under Regulation 1/2003 or the Commission's fining guidelines .

While the Commission recognizes that the as-efficient-competitor analysis suggested in the Guidance does not (and of course cannot) replace the European Courts' case law on exclusionary rebates, the Guidance suggests that the Commission would no longer pursue rebate cases if the test were not met, even if the rebate scheme

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10 *E.g.*, at 280.

11 European Commission, COMP/37.990 Intel, at 1010.

12 Ibid. at 1009-1012, 1202ff., 1339ff., 1473ff., 1551ff.

13 The Guidance (at 43, 44) suggests that where the effective price remains above LRAIC, the rebate should normally not be considered abusive. In contrast, where the effective price was below AAC, the rebate should generally have an exclusionary effect. If the effective price is between LRAIC and AAC, all "other factors" would need to be considered.

14 *See*, Centre for European Policy Studies Task Force Report, Treatment of Exclusionary Abuses under *Article* 82 of the EC Treaty (2009) pp. 46-58. Temple Lang, John, Article 82 *EC – The Problems and the Solution* (September 3, 2009), FEEM Working Paper No. 65.2009, at 14. Commission officials have suggested that customers who agree to participate in an abusive rebate scheme may violate Article 81 EC (Article 101 TFEU).

under investigation would be abusive under established case law. This approach could lead to the counterintuitive result that the Commission would devote extensive resources to assessing whether a rebate scheme would result in foreclosure, but then drop the case even if a dominant company had committed a violation under applicable case law. The legal status of the as-efficient-competitor test would be much clearer if it were addressed specifically by the European Courts. Indeed, the Commission may have devoted so much time to this analysis in the Intel case in the hope that its significance would be evaluated on appeal.

In its defense, Intel claimed that its rebate scheme was required by an objective justification (meeting competition from AMD) and resulted in efficiencies (lower prices, scale economies, production efficiencies, and risk sharing and marketing efficiencies). The Commission rejected both claims:

The Commission rejected Intel's meeting-competition defense on the ground that Intel's individualized pricing systems conditioned on exclusivity or quasi-exclusivity were not necessary to respond to price competition, and in any case the meeting-competition argument was inconsistent with Intel's claim that AMD's difficulties resulted from capacity limitations and other problems of AMD itself, and not from Intel's conduct.

The Commission similarly rejected Intel's efficiency defense, noting that Intel failed to demonstrate precise efficiencies, and in any case the Commission did not object to Intel's rebates, which could be justifiable based on cost savings, but on Intel's conditioning those rebates on exclusive or quasi-exclusive purchasing.

Intel also argued that the fine should have been reduced because of the novelty of the as-efficient-competitor analysis. The Commission rejected this argument, noting that "any element of novelty involved in the analysis and its application could only work in Intel's favor". This observation suggests that the absence of foreclosure effects might be asserted as a defense, though this approach is not suggested in the Guidance and indeed Intel did not assert the absence of foreclosure as a defense under Article 82 EC.

The Commission further found that Intel abused its dominant position by restricting the commercialization of specific AMD-based products by forcing its customers to postpone, cancel or restrict their launch in other ways.

According to established case law, such "naked restrictions" of competition by a dominant company violate Article 82 EC. In *Irish Sugar*, the Court of First Instance concluded that a dominant undertaking agreeing with a wholesaler and a retailer to swap competing retail products for its own product constituted an abuse.[15] Through those swap arrangements, the dominant firm prevented the competitor's brand from being present on the market, since the retailers no longer had competing products. The Court found that these arrangements undermined the competition that might have been offered by the new product.[16]

The Commission based its finding that Intel engaged in naked restrictions on competition, inter alia, on the following communications:

In an internal Intel e-mail dated September 2003, an Intel executive reported: "good news just came from [a senior Acer executive] that Acer decides to drop AMD K8 [notebook computer] . . . They kept pushing back until today."

In an internal HP e-mail dated September 24 2004, an HP executive stated: "You can NOT use the commercial AMD line in the [retail distribution] channel in any country, it must [only] be done direct [to consumers]. If you do and we get caught [by Intel] (and we will) the Intel moneys (each month) is gone (they would terminate the deal). The risk is too high."

In an internal Lenovo e-mail dated September 2006, a Lenovo executive reported that: "[an Intel executive] told us . . . the deal is base[d] on our assumption to not launch AMD NB [notebook] platform . . . Intel deal will not allow us to launch AMD."

Intel argued that the objective justifications it advanced in defense of its conditional rebates applied mutatis mutandis to the naked restrictions identified by the Commission. The Commission rejected this argument, noting that it could not discern any economic justification for such conduct. The Commission concluded that Intel's conduct constituted "recourse to methods different from those governing normal competition" and therefore to an abuse under Article 82 EC.

In calculating the amount of Intel's fine, the Commission took into consideration the gravity of the infringement, its duration, and aggravating or mitigating circumstances, as well as Intel's market share of 70% or more in the x86 CPU market during the relevant

15 Case T-228/97 *Irish Sugar v Commission*, para. 226.

16 Case T-228/97, *Irish Sugar v Commission*, para. 233.

period. The volumes of such sales in the EEA were also factors in this assessment. As noted, the Commission did not consider the degree of anti-competitive foreclosure to be relevant to the calculation of Intel's fine.

Intel is the Commission's first decision dealing with fidelity rebates since it published the Guidance. On the facts as determined by the Commission, Intel does not make new law. However, the decision reinforces long-standing concerns about the treatment of fidelity rebates in EU competition law, while failing to allay doubts about how the Commission's effects-based analysis will be applied in practice.

EU law on fidelity and exclusivity rebates has long been criticized for applying a per se rule without any economic analysis to determine whether a given rebate scheme actually results in anti-competitive effects. The Guidance was intended to introduce an effects-based analysis grounded in modern economics to the Commission's enforcement of EU law in this area. Of course, in the Guidance, the Commission could not, and did not claim to, reverse the law on rebates and Article 82 EC laid down in the case law of the European courts. Unfortunately, however, *Intel* arguably combines some of the worst elements of the form-based case law of the European courts and the complexity and unworkable aspects of economic theory as set out in the Guidance.

With respect to the formalistic aspects of EU law as set out in the case law of the European courts, the Commission found that Intel's rebate scheme violated Article 82 EC without any analysis of whether scheme actually harmed consumers.

With respect to the effects-based approach promised in the Guidance, the Commission devoted about one-third of the decision to analyzing the foreclosure effects of Intel's rebates based on Intel's costs and the contestable portions of its customers' demand. This analysis was not relevant to the Commission's enforcement priorities, since the Commission made the decision to launch the Intel investigation long before publishing the Guidance, nor was it relevant to the Commission's finding of the abuse by Intel or the amount of Intel's fine.

Indeed, the length and complexity of the Commission's foreclosure analysis suggest that this approach is not effective as a filter to help the Commission allocate scarce enforcement resources, since a full-scale investigation was apparently required simply to apply the test.

Similarly, the need for confidential information of the dominant company and its customers suggests that companies will be unable to apply the test to assess the legality of a proposed rebate scheme. Neither the supplier nor the customer — much less competitors — will normally have access to all the required information.

The Intel decision highlights the fact that the economic approach the Commission sought to bring to Article 82 EC enforcement through the Guidance does not sit easily with Article 82 EC jurisprudence. Since Intel has appealed the decision, the European Courts will have an opportunity to discuss the relevance of the Commission's approach. Indeed, the Commission may have devoted so much time to this aspect of the case — even though it was not clearly relevant to the decision — precisely to invite the European Courts to incorporate elements of the Commission's effects-based analysis into EU jurisprudence.

STATE AID

AG – Opinions

Case C-139/07 P *Commission v. Technische Glaswerke Ilmenau*

On December 14, 2009, the Court of First Instance annulled a Commission decision, by which the Commission refused Technische Glaswerke Ilmenau ("TGI") access to documents related to an investigation into alleged State aid granted to TGI, after the end of the Commission proceedings. The Court found that the Commission had failed to conduct a concrete, individual assessment of each document to which TGI requested access in order to determine whether it was entitled to refuse access. On September 8, 2009, Advocate General Kokott gave an opinion on the appeal lodged by the Commission against the Court of First Instance's judgment and recommended to the Court of Justice dismiss the Commission's appeal.

Regulation 1049/2001 defines the principles and conditions governing the right of access to European Parliament, Council and Commission documents as provided for in Article 255 of the EC Treaty.[17] According to Article 2 of the Regulation, any citizen of the European Union, and any natural or legal person residing in the European Union, has a right of access to documents of the institutions unless the disclosure of the documents would undermine the protection of certain public interests, including, *inter alia*, Court proceedings and/or the purpose of inspections and investigations.

17 OJ 2001 L 145/43.

Advocate General Kokott confirmed the Courts' case law that the disclosure of documents can only be refused where the risk of undermining and harming protected legal interests is reasonably foreseeable and not merely hypothetical. As such, the need to preserve the confidentiality of negotiations with a Member State concerning State aid issues could qualify as an interest worthy of protection depending on the circumstances. However, the Advocate General noted, the risk posed by disclosure of any document related to such negotiations no longer subsists once a final decision has been reached. Nor, according to the Advocate General, could the Commission invoke the possibility of subsequent legal challenges as a justification for non-disclosure.

Advocate General Kokott agreed with the Court of First Instance in finding that the Commission was not entitled to deny access to an entire file of documents without examining each individual document. The Advocate General took the view that not only a concrete, individual examination of every single requested document is necessary in order to justify a refusal to grant access, but also every single element and content in each such document must be analyzed in order to verify if disclosure may harm a legally protected interest.

Concerning the Commission's claim that its refusal to access the documents was justified on the ground that interested parties do not have a right to access the file in State aid proceedings, the Advocate General recalled that, according to established case law, the right to access of file under Regulation 659/1999[18] is unrelated to the right to access documents under the Regulation, and took the view that the absence of a right to access of file for interested parties in State aid proceedings pursuant to Regulation 659/1999 does not exclude or limit the general right of access to documents granted by the Regulation to all European citizens.

CFI Judgment

Case T-291/06 *Operator ARP v. Commission*

On July 1, 2009, the Court of First Instance partially set aside a Commission decision ordering the recovery of restructuring aid granted by Poland to steel producer Huta Czestochowa S.A. ("HCz") before Poland's accession to the European Union.

In 2005, the Commission initiated an in-depth investigation to determine whether certain State aid involved in the restructuring of HCz was compatible with the terms set out in Protocol 8 of the Polish Accession Treaty. The Commission concluded that the State aid granted to HCz was only in part compatible with the common market and ordered Poland to recover unlawfully granted aid for an amount of around €4 million from HCz's successor companies.

On appeal before the Court of First Instance, one of HCz's successor companies, Operator ARP — to which all of HCz's assets not linked to production had been transferred — claimed that the Commission exceeded the limits of its discretion in finding that Operator ARP was to be considered as a "beneficiary" of the unlawful aid in question.

The Court emphasized that, in order not to render the provisions of a recovery order inoperative, the term 'beneficiary' within the meaning of Article 14(1) of Regulation 659/1999 did not encompass solely the original beneficiary of State aid, but also any undertaking to which assets had been transferred. However, according to the Court, to justify the widening of the group of entities required to repay an unlawfully granted State aid to the acquirers of the assets formerly belonging to the original beneficiary of the aid, the Commission is required to demonstrate either that the transfer of assets led to a risk of circumvention of the recovery order, or that the person or entity acquiring the assets retained the actual benefit of the competitive advantage deriving from the receipt of the unlawful aid.

In the present case, the Court ruled that, on the date on which the Commission decision was adopted, a transfer of assets to Operator ARP had not yet taken place. Since the legality of a contested measure in an action of annulment has to be assessed on the basis of the elements of fact and of law existing at the time when the measure is adopted, the Court held that the Commission had erred to include unconditionally the applicant in the group of entities required to repay the aid. The Court further pointed out that, as claimed by Operator ARP, the value of the debt transferred to the appellant significantly exceeded the market value of the assets transfer to it. As a consequence, according to the Court, the Commission could not legitimately claim, without further explanation, that there was a risk of circumvention of the unlawful State aid recovery order and/or that the appellant, which was not active in the steel sector, and whose main activity was that of a buyer-back of debts and assets of undertakings in difficulty, would actually benefit from a competitive advantage as a result of the unlawfully granted State aid.

18 OJ 1999 L 83/1.

The Court therefore concluded that the Commission was wrong to include Operator ARP in a group of entities jointly and separately liable to repay the aid in question and annulled the Commission decision to the extent that it concerned the applicant.

Commission developments

Commission's Communication on the Application of State Aid Rules to Public Service Broadcasting

In recent years audivisional markets have undergone important changes, which have led to the ongoing development and diversification of the broadcasting offer. On July 2, 2009, the Commission adopted a new Communication in order to address the application of State Aid Rules, which went beyond broadcasting activities in the traditional sense (the "Communication").[19] The Communication, which replaces the 2001 Broadcasting Communication,[20] puts an increased focus on accountability and effective control at the national level, including a transparent evaluation of the overall impact of publicly funded new media services.

The key substantive changes introduced by the Communication can be summarized as follows:

- The *ex ante* assessment of the compatibility of significant new services launched by public service broadcasters with Article 86(2) EC has to be conducted by the Member States, by balancing the market impact of such new services with their public service value. According to the Communication, Member States are entitled to use State aid to provide audiovisual services over new technology-neutral distribution platforms for the fulfilment of their public service obligations, as long as they do not entail a disproportionate effect on the market.
- The Communication clarifies that the inclusion of pay services in the public service remit does not automatically mean that these services are not part of the public service obligation. The Commission considers pay-per-view services compatible with EC State aid rules, as long as the pay element of these services does not compromise the distinctive character of the public service in terms of serving the social, democratic, and cultural needs of the society, which distinguishes public services from purely economic activities.
- Member States are free to choose the means of financing public service broadcasting. As a general rule, the amount of public compensation must not exceed the net costs of the public service mission. While the Commission allows public service broadcasters to retain yearly overcompensation above the net costs of the public service to the extent that such a measure is necessary to finance their public service obligations, an amount in excess of 10% of the annual budgeted expenses of the public service mission will only be allowed in duly justified cases. The appropriate financial control mechanisms to ensure that there is no overcompensation must be provided by the Member States.

POLICY AND PROCEDURE

Commission developments

The Commission's Final Report in the Pharmaceutical Sector Inquiry (Case No COMP/D2/39.515)

On July 8, 2009, the Commission released its Final Report on its inquiry into competition in the EU pharmaceutical sector.[21] The Final Report brought to an end an 18 months long inquiry that was launched on January 15, 2008[22] in response to indications that might have suggested that competition in that sector is restricted or distorted: fewer new pharmaceutical products are being brought to the market and the entry of generic products seems to be delayed. The inquiry begun with unannounced inspections at a range of pharmaceutical companies and continued with a long series of detailed questionnaires that were sent from March to September 2008 to pharmaceutical companies, public authorities and other stakeholders. On November 30, 2008 the Commission publish its Preliminary Report that was followed by public consultation and further questionnaires that were sent to stake holders. Shortly before the publication of the Final Report, an investigation was opened against Servier and several generic companies for abuse of dominant position and restrictive agreements.[23] Another spin-off of the inquiry was the dawn raids conducted on the premises of Sanofi-Aventis, Sandoz (the generic arm of Novartis) and Teva on October 6, 2009. The pharmaceutical industry thus presents a clear enforcement

19 Communication from the Commission on the application of State aid rules to public service broadcasting [2009] OJ C 257/01.

20 Communication from the Commission on the application of State aid rules to public service broadcasting [2001] OJ C 320.

21 Available on http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html.

22 Commission Decision of 15 January 2008 initiating an inquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 (Case No COMP/D2/39.514) available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/decision_en.pdf.

23 See press release on http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/322& format=HTML&aged=0&language.

priority for the Commission; in the words of competition commissioner Neelie Kroes: "the inquiry has told us what is wrong with the sector, and now it is time to act. When it comes to generic entry, every week and month of delay costs money to patients and taxpayers. We will not hesitate to apply the antitrust rules where such delays result from anticompetitive practices. The first antitrust investigations are already under way, and regulatory adjustments are expected to follow dealing with a range of problems in the sector."[24]

Similarly to the Preliminary Report, the Final Report is mainly concerned with competition between originator and generic companies. It identifies a number of practices (referred to collectively as "the tool-box") that originator companies may use in order to try to restrict the access of generic companies to the market:

- *Filing numerous patent applications across the EU in relation to a single medicine ("patent clustering").* The Preliminary Report suggested that originator companies try to inhibit competition by registering patents of dubious quality, referring to some of them as "secondary patents" and "defensive patents". In its Final Report the Commission made few statements to correct the impression left by the Preliminary Report. Thus the Commission explained that the use of concepts such as "secondary patents" and "defensive patents" should not be understood to reflect an idea of lower quality or value of these patents but rather tries to capture a classification made in the industry for this type of patents from a commercial perspective. The Final Report concedes that patent applications must be evaluated on the basis of "statutory patentability requirements" rather than on the "underlying intentions" of a particular patenting strategy. The Final report seems to have also accepted the premises that if indeed it is felt that patents of lower quality are being registered, it is primarily the responsibility of the patent authorities to improve the procedures for examining patent applications rather than a misconduct on the part of the applicants. Nevertheless, the Final Report seems to target patent strategies as an enforcement priority stating that "strategies that mainly focus on excluding competitors without pursuing innovative efforts and/or the refusal to grant a license on unused patents will remain under scrutiny in particular in situations where innovation was effectively blocked".

  In the Preliminary Report it was argued that originator companies apply for divisional patents as an instrument to prevent or delay generic entry. The Final Report did not suggest that filing for divisional patents may be in violation of EU competition law and seemed to be content that the solution for the prevention of abuse should lie with the patent authorities.

- *Engaging in high volumes of disputes and litigation with generic companies.* In the Preliminary Report it was suggested that originators use patent litigation or the threat of litigation as a deterrent for generic entry. Although the Final Report did reiterate this allegation, it did not conclude that violation of EU competition law may ensue.

- *Concluding settlement agreements with generics that may delay generic entry to the market.* The main brunt of the Final Report was directed against settlement agreements. The Commission has declared that it would focus on monitoring and pursuing settlement agreements that "limit generic entry and include value transfer from an originator company to a generic company". The main concern of the Commission was reverse payment settlements in patent cases whereby an originator pays a generic company in return for the generic company agreeing not to enter a market. However, the Final Report does not identify the specific conditions under which such agreements could be qualified as unlawful. The Report states that that the Commission is "not in the position to make any policy recommendations whether and if so which settlements should be regulated", due to the Commission's lack of experience with such settlements.

- *Intervening in national procedures for the approval of generic medicines.* The Preliminary Report suggested that some originator companies intervene in marketing authorization and reimbursement procedures as a deliberate strategy to delay generic entry. The Final report has accepted the arguments made by some originator companies in relation to the importance of the interventions of originator companies in relation to safety and quality concern stating that "marketing authorization bodies might not be able simply to disregard information submitted by third parties during the marketing authorization procedure". Furthermore, the Final Report admitted that the legal responsibility lies with the authorities not to accept arguments of patent linkage by stating that the Commission will enforce these rules on marketing authorization bodies. Nevertheless, the Final Report suggested that interventions before marketing authorization bodies may constitute a breach competition rules and invited applicants in marketing authorization procedure to complain in cases where

24 See press release http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1098&format=HTML &aged=0&language=EN&guiLanguage=en.

clear indications exist that a submission by a stakeholder intervening before a marketing authorization body was primarily made to delay the market entry of the applicant.

- *Launching "second-generation" medicines.* In its review of follow-on products the Preliminary Report stated that "the circumstances typically associated with the introduction of follow-on products to the market suggests that the latter often form part of originators companies' broader life cycle strategy attempting to delay or prevent generic erosion". The Final Report acknowledged the importance of incremental development and stated that it does not "question the appropriateness of follow-on products themselves". However, the Final Report goes on to say that "circumstances associated with the introduction of follow-on products to the market suggest that originator companies may sometimes use different means in an endeavour to prevent the follow-on products being confronted with competition". The Final Report remain obscure on the exact character of such "circumstances" noting only that "it is not the purpose of this sector inquiry to provide guidance as to the compatibility of certain practices with EC competition law. The Commission will further investigate whether individual company behaviour may have fallen foul of the competition rules".
- *The Regulatory framework.* A significant development in the position of the Commission, which was advised by the submissions of different stakeholders, was the greater importance placed on the role played by the regulatory and legal proceedings that apply to the pharmaceutical industry in the timing of generic entry:
  - The Commission reaffirmed the urgent need for the establishment of a unified Community patent and patent litigation system.
  - The Commission has welcomed the stricter procedural rules and shorter time limits set by the European Patent Office.
  - The Commission stated that it will focus on the full implementation and effective enforcement of the regulatory framework for marketing authorizations and price and reimbursements.
  - The Commissions invited Member States to reform their price and reimbursement procedures so as to grant reimbursement status to generics automatically when an originator product already enjoys this status.

The Commission's 2008 Report on Competition Policy {SEC(2009) 10004}

On July 23, 2009, the Commission released the 2008 Report on Competition Policy. The report assessed that 2008 has been a very fruitful year for competition policy, be it in antitrust, state aid or merger control.

For the first time, the 2008 Annual Report includes a special chapter on a topic considered to be of particular importance in the field of competition policy. The topic chosen is "Cartels and consumers". According to the Commission, the pursuit of cartels is one of the main means to protect consumers. According to Commission services estimates, the harm to the economy caused by the cartels fined by the Commission between 2005 and 2007 amounts to at least €7.6 billion. In 2008, the Commission fined 34 undertakings in seven cartel decisions.

Pursuing its fight against cartels, the Commission has introduced a mechanism to settle cartel cases with the agreement of the parties involved, through a simplified procedure, which allows to deal more quickly with cases and free up resources to pursue other cartel cases and open new investigations. The **settlements package**, which entered into force on 1 July 2008, consists of a Commission Regulation[25] accompanied by a Commission Notice.[26] If companies, having seen the evidence in the Commission file, choose to acknowledge their involvement in the cartel, the precise nature of their infringement and their liability for it, the fine imposed on the parties will be reduced by 10%.

The Commission also adopted a **White Paper on damages actions for breach of the EU** antitrust rules. The White Paper represents a step forward to overcoming the obstacles currently encountered by victims of competition problems from receiving effective compensation.

In the fight against abuses of dominant market positions, the Commission adopted in 2008 important decisions in the energy and IT sectors. As a follow up to the Commission's energy sector competition inquiry and after sustained investigations by the Commission, the German energy company E.ON voluntarily offered to divest significant parts of its business to address the concerns raised in the course of the investigation. This will allow new competitors to enter the German energy market and offer more choice to consumers in Germany. The separate management of the

25 Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3).

26 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1).

transmission infrastructure will also improve the functioning of the European energy market by providing equal access to all players. Also in 2008, the Commission imposed a second penalty payment of €899 million on Microsoft for its non-compliance with a 2004 Commission decision requiring it to share essential interoperability information with its rivals on reasonable terms.

Due to the very difficult financial and economic circumstances that Europe experienced in 2008, the focus of the Commission shifted in 2008 from the implementation of the State Aid Action Plan to the **rescue and restructuring measures** aimed at tackling the financial and economic crisis. The Commission adopted three Communications delineating the role of State aid policy in the context of the crises and the recovery process: (1) the initial guidance on the application of State aid rules to measures taken in relation to financial institutions[27], which exceptionally were based on Article 87(3)(b) of the EC Treaty which allows for aid to remedy a serious disturbance in the economy of a Member; (2) the subsequent Communication on how Member States can recapitalize banks in the current financial crisis[28] to ensure adequate levels of lending to the rest of the economy and stabilize financial markets, while avoiding excessive distortions of competition; and (3) the temporary framework[29] providing Member States with additional possibilities to tackle the effects of the credit squeeze on the real economy. All measures are time-limited until the end of 2010, although the Commission, based on Member States' reports, will evaluate whether the measures should be maintained beyond 2010, depending on whether the crisis continues.

27 OJ C 270, 25.10.2008, p. 8.

28 OJ C 10, 15.1.2009, p. 2.

29 OJ C 16, 21.1.2009, p. 1.

Contacts

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

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

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

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

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

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow 115054, Russia
T: 7 495 660 8500
F: 7 495 660 8505

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

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: 49 221 80040 0
F: 49 221 80040 199

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

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

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
T: 852 2521 4122
F: 852 2845 9026

BEIJING
Cleary Gottlieb Steen & Hamilton LLP
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022
T: 86 10 5920 1000
F: 86 10 5879 3902