CLEARY GOTTLIEB

EC Competition Report

MERGERS & ACQUISITIONS

ECJ – Judgments

Case C-202/06P Cementbouw Handel & Industrie BV v. Commission

On December 18, 2007, the European Court of Justice dismissed Cementbouw's appeal against a judgment of the Court of First Instance upholding the European Commission's approval of a joint venture between Cementbouw and Franz Haniel & Cie GmbH, subject to extensive commitments.

The first legal issue of interest in this case was whether the notifiability of a concentration to the Commission is affected where parties offer remedies, which, if implemented, would bring the proposed transaction below the EC merger control thresholds. The appellant argued that the Commission's jurisdiction is not determined exclusively by the concentration in the form in which it is notified, but by the form in which it is actually put into effect. The Court, following Advocate General Kokott, held that the Merger Regulation is based on the principle of a clear division of powers between national competition authorities and the Commission. It emphasized that this principle is in the interest of speed and efficiency of proceedings before the Commission, and that the principle of legal certainty requires that a competition authority be able to determine its jurisdiction in a foreseeable way. The Court concluded that the jurisdiction of the Commission must be defined when the duty to notify arises. Once its jurisdiction is established, the Commission can lose it only if the parties entirely abandon the transaction, but not if they propose to modify it partially. The Court ruled that the Court of First Instance was correct in finding that the remedies proposal did not change the concentration in such a way that it no longer existed. It held that the CFI therefore did not err in finding that the Commission still had jurisdiction even though the remedies, if implemented, would have brought the concentration below the EC merger control thresholds.

The issue also arose as to whether the principle of proportionality applies to commitments offered by the parties in the context of merger proceedings. Cementbouw claimed that the Commission infringed the principle of proportionality by not accepting the first set of commitments offered. Advocate General Kokott asserted that remedies offered by the parties must be presumed to be proportionate. According to the Advocate General, when the notifying parties voluntarily offer remedies, extraordinary circumstances are required to show that the Commission breached the principle of proportionality in accepting the parties' commitments. The Advocate General had rejected Cementbouw's argument that such circumstances existed in this case because the Parties had already implemented the transaction before the notification and because the Commission had required notification under the threat of fines. The Court did not explicitly endorse this reasoning. It nevertheless rejected Cementbouw's argument that the Commission had breached the principle of proportionality in rejecting the initial remedies proposal. The Court nevertheless confirmed that Commission decisions in merger proceedings must satisfy the requirements of the principle of proportionality. However, the Commission enjoys a margin of discretion in conducting assessments of an

economic nature and in deciding whether it is satisfied that the proposed commitments are sufficient to eliminate concerns.

First-phase decisions with Undertakings

Case COMP/M.4824 Kraft/Danone Biscuits

On November 9, 2007 the Commission approved Kraft Foods's acquisition of control of Danone Biscuits, subject to the divestiture of certain Spanish biscuit brands together with a plant in Spain, and a Hungarian chocolate bar brand.

The Commission's investigation focused on the markets for biscuits and chocolate confectionary and countlines. For the first time, the Commission distinguished two separate markets for sweet and savory biscuits, even though no such segmentation is used within the industry. For all products, the geographic markets are national in scope.

Because both Parties sell these products in a few Member States, the Commission identified competitive concerns only on the market for sweet biscuits in Spain and on the market for chocolate bars in Hungary. The commitments accepted by the Commission were designed to avoid the creation of a market leader or unavoidable trading partner in each of the Member States concerned.

With respect to the market for sweet biscuits in Spain, the transaction as originally proposed would have removed a competitive constraint on Kraft, and created a portfolio of "must-have" brands accounting for almost half of the market, enabling the merged entity to raise prices. Kraft undertook to divest a number of leading Spanish biscuit brands without territorial restriction (which almost entirely removed the overlap between the Parties) and a manufacturing plant in Spain (to ensure the divested business was a viable stand-alone business). One of the divested brands, *Marbú Dorada*, is currently sold under the *Fontaneda* umbrella brand. Kraft undertook to license the Purchaser of the divested business with the use of the umbrella brand for 12 months to ensure the viability of the divested business. The Commission noted that the 12 month transitional period *"even exceeds the norms for transitional use of an umbrella brand."*

With respect to the market for chocolate bars in Hungary, the Commission found that the proposed transaction would combine a number of strong brands and likely impede effective competition. Kraft proposed to divest the entire overlap between the Parties by divesting the leading *Balaton* brand. The Commission considered the commitment resolved the serious doubts in Hungary.

Second-phase decisions without Undertakings

Case COMP/M.4523 Travelport/Worldspan

On 21 August 2007, the Commission approved Travelport's acquisition of Worldspan. The affected product market was the market for electronic travel distribution services through a global distribution system ("GDS"). A GDS is a two-sided platform through which travel service providers ("TSPs") such as airlines, car rental companies and hotel chains distribute their travel content to travel agents ("TAs") and ultimately to end-consumers. At the same time, TAs can access and book travel content for end-consumers. Since a GDS allows access to a broad network of TAs (and indirectly to a large number of end-consumers), GDS providers are effective distribution channels for TSPs. A centralised search for fares in one GDS is also more effective and less time-consuming for TAs than multi-channel searches from numerous TSP-specific sources.

The Commission found that the transaction would reduce the number of GDS providers active in the EEA from four to three and increase significantly the merged undertaking's combined downstream market shares in a number of Member States. As regards non-coordinated effects, the Commission concluded that, due to recent market developments, the merged entity would be unable to use its strong market position downstream vis-à-vis TAs in order to increase prices vis-à-vis TSPs upstream ("vertical cross market effects"). The Commission found that TSPs generally use "multi-homing", as they have to distribute their content via all four GDSs in order to obtain the desired market coverage. Most TAs, however, use "single-homing", as one GDS suffices in most cases to provide them with the required TSP content.[1] In such case, GDS providers have exclusive access to TAs belonging to their respective TA networks.[2] Each GDS provider therefore has a certain degree of monopoly power in relation to TSPs that need to reach the TAs exclusively connected to one GDS. This monopoly power potentially allows the GDS provider to charge higher prices to TSPs.

However, the Commission's in-depth investigation showed that, even in a market with only three GDS providers, none of them would be able to increase prices because TSPs would maintain sufficient bargaining power. This conclusion was based on (i) the capacity of TSPs to channel bookings towards proprietary "supplier.com" websites; (ii) the capacity of TSPs to apply surcharges to TAs and thereby influence the use of a specific GDS; (iii) brand recognition in TSP home market(s); and (iv) the possibility for TSPs to develop new bargaining tools in the future.

Concerning the transaction's potential effect on price competition between GDS providers, the Commission found that it would be insignificant because the transaction would not eliminate a "pricing maverick". Worldspan was not typically the lowest priced GDS for TSPs and cheaper alternatives were available. Second, Worldspan's market shares did not show signs of growth. Third, Worldspan acted as a "price taker" rather than as a "price setter". Fourth, the merging parties were not each other's closest competitors.[3] Finally, decreasing pre-merger margins indicated that the scope for higher post-merger prices was, in any event, limited.

The Commission also found that the merged entity could not exert market power on the TAs in those national markets where the transaction would lead to high joint market shares. First, every GDS faces high fixed costs combined with the low cost of processing additional bookings, creating strong incentives for each GDS to maximize the revenues generated from bookings. As a result, there is intense competition between GDSs for each TA contract. Second, TAs enjoy a strong bargaining position since GDSs depend on multiple TAs for the distribution of their content, while TAs only need one GDS to obtain the necessary content for their customers. Finally, switching costs were not considered to be such as to create an

1 The Commission found that the two-sided GDS market contains a number of elements which are characteristic of multi-homing/single-homing situations as described in economic literature. These elements are (i) a limited degree of product differentiation, (ii) asymmetries in network effects (network externalities are generated mainly on the TA side and GDS providers have to create demand on that side in order to have demand on the TSP side) and (iii) a distribution of prices and revenues skewed towards one side of the platform (GDS providers obtain profit only on the TSP side of the market and partially use this profit to offset net losses on the TA side).

2 This kind of situation is often identified in economic literature as a "competitive bottleneck", see for example, Armstrong (2006) "*Competition in Two-Sided Markets*", Rand Journal of Economics, 37 (3), pp.668-691.

3 For example, British Airways considered that Worldspan had qualities and functionalities that set it aside from other GDSs (for example, in the automation of its fare filing and fare quoting systems) whereas in other respects its functionality was considered to be weaker (for example, in its agency front-end user interface).

insurmountable impediment to actual switching. As regards coordinated effects, the Commission found that the necessary conditions were absent with respect to either the upstream TSP market or downstream TA market. The Commission referred in particular to instability in the GDS market, including significant new market entry (in particular from supplier.coms), that would make it difficult for competitors to reach terms of coordination; complex pricing structures and product offerings that limited market transparency; and significant competitive constraints from alternative distribution channels that would destabilize any attempt at coordination.

ABUSE OF DOMINANT POSITION

Commission decisions

Distrigas

On October 11, 2007, the Commission adopted a decision giving legal effect to a commitment given by Distrigas, the incumbent gas provider on the Belgian market, in order to address competition concerns in connection with the supply of gas to large customers.

Article 9 of Regulation 1/2003 empowers the Commission to adopt decisions giving legal force to commitments proposed by companies in exchange for early termination of proceedings without a formal Commission finding of a competition law violation. This is the first decision adopted under Article 9 in the energy sector, and is a good example of the Commission's use of competition rules to enhance competitive conditions in newly liberalized markets.

The Commission was concerned with Distrigas's policy of supplying large volumes of gas under long-term agreements, which prevented customers from switching to alternative suppliers and foreclosed other suppliers from access to the Belgian gas market. The Commission considered that this would allow Distrigas to continue exercising market power despite having lost its monopoly position, contrary to the objectives of the EU liberalization efforts in the energy markets.

The Commission carried out its analysis with regard to high-calorific gas ("H-gas") to large customers with an annual consumption exceeding 1 million m^3. While it considered that this market could be further sub-segmented by customer categories, it left open the exact relevant product market, since this would not change the competitive assessment. Furthermore, consistent with prior practice, it considered this market to be national (Belgium), due to the regulatory regime, the structure of the market, and marked price differences with neighboring countries.

In reaching the conclusion that Distrigas held a dominant position on this market, the Commission took into account the high market share of 70-80% of Distrigas (and other companies within the Suez group), considerable entry barriers and the high degree of vertical integration of the Suez group. As regards the commercial practices deemed to be potentially abusive, the Commission considered that the duration of Distrigas's commercial relationships and the volume purchase requirements imposed on its customers made it difficult for competing producers to establish a viable customer base, thus foreclosing effective competition.

The Commission focused in particular on the fact that contracts would last normally at least one year and that most contracts provided for a fixed annual quantity to be purchased from Distrigas. Customers would thereby need to buy a minimum quantity from Distrigas, although it was normally

impossible to know in advance what their annual requirements would be. At the same time most of the customers were not large enough to source gas from several suppliers at the same time.

The Commission substantiated its assessment by examining how large a portion of the market was already tied to Distrigas and would so remain in the near future. It reached the conclusion that slightly more than half of the market was tied to Distrigas for the next six months, that almost half was tied for the next year, and that 20-30% of the market was tied to Distrigas for at least three years.

Distrigas therefore offered a package of commitments to address these foreclosure concerns. The main elements of the commitments were the following: (i) Distrigas would ensure that volumes corresponding to at least 70% on average of gas it supplied would regularly return to the market, although with some built-in flexibility to account for market fluctuations; (ii) new contracts cannot last more than five years and existing contracts lasting more than five years (two years in the case of resellers) can be unilaterally terminated by customers; and (iii) Distrigas is not entitled to impose restrictions with regard to field of use, resale and destination and must refrain from applying tacit renewal clauses. The commitments are designed to prevent Distrigas from tying any given customer for longer than five years and from supplying more than 20% of the market more than a year ahead, ensuring that customers (including the most attractive ones) return to the market regularly, allowing competitors to build up a viable customer base. The Commission took the view that market entry would be eased further as a result of setting a cap of two years duration for supply contracts with resellers, as this would prevent Distrigas from cherry-picking the most attractive customers.

After a market testing with mostly positive reactions, the Commission found that these commitments were suitable and proportionate in order to remedy any potential foreclosure concerns. The commitments will continue in force between 2007 and 2010, and will apply as long as Distrigas holds a share exceeding 40% and at least 20% more than the share of its next competitor. Furthermore, the commitments do not apply to certain categories of sales, *e.g.*, those to small customers and to electricity producers buying gas for large new installations. As regards supply to such large customers, the Commission held that predictability of supply is sufficiently important for such contracts not to be covered by the commitments. In fact, the very decision to invest in new electricity installations may be dependent on secure gas supply in the long term. Nevertheless, the Commission pointed to the possibility of reviewing the situation in this market segment should it appear that this exception could cause restrictions on competition.

Finally, those sales already covered by commitments offered in relation to Gaz de France's acquisition of Suez, and its subsidiary Distrigas, were not covered. In addition, in case of Distrigas's divestiture in accordance with the commitments offered in conjunction with this acquisition, the present commitments would apply also to the buyer's sales, except if they are very small compared to those of Distrigas.

STATE AID

ECJ – Judgments

Case C-441/06 Commission v France

On October 18, 2007, the European Court of Justice found that France had failed to comply with a Commission decision of August 2, 2004, prohibiting state aid granted to France Télécom

("FT"), as well as with Article 10 of the EC Treaty, by not proceeding to the timely recovery of such aid from its beneficiary.

The Commission's decision ordered the France to recover the aid from FT. The operative part of the decision did not indicate the specific amount to be recovered, but the reasoning of the decision clarified that such amount ought to be between € 798 million and € 1,140 million. The decision further indicated that the exact amount to be recovered would be defined by the Commission in cooperation with the French authorities by November 1, 2004.

The Court dismissed France's argument that it could not recover the aid because the decision failed to establish the exact amount to be recovered or the necessary criteria to calculate the amount. The Court held that the Commission need not determine the exact amount of the aid to be recovered, but only provide the elements required to allow the decision's addressee to determine without excessive difficulties the amount to be recovered. The Court found that the decision satisfied these conditions.

Case C-525/04 P Kingdom of Spain v Commission and Lenzing AG and Case C-260/05 P Sniace SA v Commission

On November 22, 2007, the European Court of Justice rendered two judgments that clarified the conditions under which a competitor of a beneficiary of state aid has locus standi to appeal against a Commission decision authorizing such state aid.

Case C-525/04 P concerned Lenzing's appeal to the Court of First Instance against a Commission decision authorizing granted to Sniace in Spain. On appeal, the Court of First Instance annulled the Commission's decision. Spain appealed the judgment to the European Court of Justice. Case C-260/05 P concerned Sniace's appeal to the Court of First Instance against a Commission decision authorizing state aid granted to Lenzing in Austria. The Court of First Instance found Sniace's action inadmissible, and Sniace appealed to the European Court of Justice.

In both cases, the key issue to be addressed by the Court was the admissibility of an appeal brought by a competitor of a state aid beneficiary against a Commission decision authorizing the state aid (and, by definition, addressed to the entity granting the aid). The Court referred to Article 230(4) of the EC Treaty, which provides that a person may institute legal proceedings against a decision addressed to another person only if that decision is of direct and individual concern to it. It further recalled its settled case law according to which persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain specific factors peculiar to them which distinguish them individually.

With respect to the notion of individual concern in the field of state aid, the Court noted that: (1) participating in the administrative procedure before the Commission is not a necessary precondition for an undertaking to be considered to be individually concerned by a Commission decision; (2) an undertaking cannot rely solely on its status as competitor of the beneficiary of the aid in order to be considered individually concerned by a Commission decision. It must additionally show that the grant of the State aid would have an adverse effect on its competitive position on the market; (3) such an adverse effect ought to be shown by reference to a number of factors, including, but not limited to, a significant decline in turnover, appreciable financial losses and/or a significant reduction in market share following the granting of the aid.

As a result, the Court found that the Court of First Instance correctly concluded that the Commission decision declaring the Spanish aid compatible with the common market was of individual concern to Lenzig while the Commission decision declaring the Austrian aid compatible with the common market was not of individual concern to Sniace.

POLICY AND PROCEDURE

CFI – Judgments

Joined Cases T-101/05 and T-111/05 BASF and UCB v. Commission

On December 9, 2007, the Court of First Instance increased the fine imposed by the Commission on BASF, arising out its participation in certain concerted practices, which included price-fixing and market sharing. It also granted a substantial reduction in the fine imposed on UCB in view of the value of the information that it provided. This is the first time that the Court of First Instance has increased a fine imposed by the Commission.

Four North American producers along with five companies from the Akzo Nobel Group as well as BASF and UCB had participated in meetings to divide up the worldwide markets in the choline chloride (vitamin B4 used in animal feed) sector between June 1992 and April 1994 (the "global arrangements"). Furthermore, the European producers, including BASF and UCB, participated in meetings leading to the division of the EEA market between March 1994 and October 1998 (the "European arrangements"). The North American producers, having ceased to participate in the global arrangements by April 20, 1994, were not fined, as, by the time the Commission launched its investigation on May 26, 1999, the five-year limitations period had passed, and any action would have been time-barred. The Commission, however, imposed fines on the European producers mentioned above, including BASF and UCB, for both the global and European arrangements as it concluded that they formed a single and continuous infringement.[4] Therefore, action against the European producers for the global arrangement would not be time-barred as it had been for the North American producers.

BASF and UCB appealed the decision. Agreeing with BASF, the Court held that the global and the European arrangements did not constitute one single and continuous infringement on the grounds that (i) there was no overlap in time between the global and European arrangements; (ii) the two arrangements pursued different objectives; (iii) the methods of implementation were different; and (iv) the Commission failed to establish that, by participating in the global arrangements, the applicants had the longer-term objective of allocating the EEA market as was done in the framework of the European arrangements. The Court therefore held that the European producers had committed two separate infringements. As a result, the Court annulled the Commission decision insofar as it imposed a fine on the applicants for their participation in the global arrangements as this separate infringement was now deemed time-barred. However, due to this annulment, the Court of First Instance found that BASF could no longer benefit from the 10% fine reduction granted as a reward for the information it gave to the Commission in relation to the global arrangements. By contrast, BASF had only provided information of minimal value in relation to the European arrangements, which the Court felt was insufficient to justify a reduction in the fine.

Subsequently, referring to its jurisdiction to substitute its own assessment for that of the

4 Case COMP/E-2/37.533 – Choline chloride, Decision 2005/566/EC.

Commission as regards the amount of a fine,[5] the Court recalculated BASF's fine. The starting amount remained at € 18.8 million. BASF's participation in the European arrangement lasted only three years and 10 months (as opposed to five years and 11 months had the global and European arrangements constituted a single infringement). The Commission's practice has been to increase the fine amount by 10% for every full year's participation and 5% for every six months' participation, meaning the increase would have been the same as if BASF had participated for three years and six months rather than three years and 10 months. The Court, however, decided that every single month should be accounted for and it thus took into consideration the additional four months, arguing that precise evidence existed of the duration of BASF's participation. The Court wanted the precise duration of the infringement to be reflected in BASF's fine to render the fine "more proportionate".[6] Accordingly, it increased the basic amount by 38%. The basic amount was increased by another 50% for recidivism as BASF had previously participated in cartels. Finally, the Court granted BASF a 10% reduction, as BASF did not substantially dispute the facts before the Commission. The Court thus fixed BASF's total fine at € 35.024 million, i.e., € 54,000 more than the fine imposed by the Commission.

The Court reduced the fine imposed on UCB by 90% in view of the substantial information provided by UCB on the cartel relating to Europe, which allowed the Commission to impose significant fines on the participants in the European cartel.

Commission decisions

First Cartel Decisions under the 2006 Fining Guidelines

On September 1, 2006, the Commission published new guidelines on the method of setting fines for violations of Articles 81 and 82 EC (the "2006 Fining Guidelines").[7] In November and December 2007, the Commission adopted its first cartel decisions applying the 2006 Fining Guidelines in the *Professional Videotape* case,[8] the *Flat Glass* case,[9] and the *Chloroprene Rubber* case.[10] These three decisions provide the first insights into how the Commission will apply the 2006 Fining Guidelines.[11] Under the 2006 Fining Guidelines, fines are calculated in a two-step process: First, the Commission determines the "basic amount," including the so-called "entry fee." Second, the Commission may adjust the basic amount upwards or downwards, taking into account aggravating and mitigating circumstances and the need to ensure that the fines have a sufficient deterrent effect.

5 Article 229 EC and Article 31 of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82.

6 Para. 219 of the judgment.

7 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2 (the "2006 Fining Guidelines"). The 2006 Fining Guidelines replaced the prior fining guidelines dating from 1998, *i.e.*, Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ 1998 C 9/3 (the "1998 Fining Guidelines").

8 Case COMP/38.432 – *Professional Videotape*, Commission decision of November 20, 2007, not yet published in the OJ.

9 Case COMP/39.265 – *Flat Glass*, Commission decision of November 28, 2007, not yet published in the OJ.

10 Case COMP/38.629 – *Chloroprene Rubber*, Commission decision of December 5, 2007, not yet published in the OJ.

11 On September 1, 2006, the Commission published new guidelines on the method of setting fines for violations of Articles 81 and 82 EC, i.e., the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2 (the "2006 Fining Guidelines"). The 2006 Fining Guidelines replaced the prior fining guidelines dating from 1998, *i.e.*, Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ 1998 C 9/3 (the "1998 Fining Guidelines"). The Commission intended to apply the 2006 Fining Guidelines to all cases where a statement of objections (the Commission's accusatory brief sent to undertakings suspected of having violated the EU competition rules) is notified to the undertaking concerned after September 1, 2006.

The basic amount is calculated as a proportion of the value of EEA sales affected by the infringement in the last full year of the undertaking's participation, multiplied by the number of years of infringement.[12] The proportion will normally be "*up to 30%*" of the value of such sales, determined in function of the gravity of the infringement. Factors relevant for assessing gravity include the nature of the infringement, the combined market share of the undertakings concerned, the geographic scope of the infringement, and whether or not the infringement was implemented.[13]

How the Commission would apply this "30% rule" has been a topic of much speculation. Under the 1998 Fining Guidelines, price fixing and market sharing violations were almost systematically characterised as "very serious" infringements of Article 81 EC, qualifying them for the highest "basic amount" of at least €20 million (regardless of the amount of affected turnover).[14] It was not known whether the Commission would apply the 2006 Fining Guidelines similarly *(i.e.*, typically seeking the maximum, with the basic amount based on 30% of relevant turnover for all serious infringements) or whether a genuine sliding scale would be adopted. The Commission appears to have chosen the latter course, although the criteria for establishing the appropriate position on the scale remain opaque.

In *Professional Videotape*, and *Flat Glass*, the basic amount was set at 18% of relevant sales, taking account of the following factors:[15]

- The infringement was limited to price fixing, while no market-sharing or output-limitation agreements were put in place.
- The parties' combined EEA-wide market share was more than 85% in the first case, and at least 80% in the second.
- The geographic scope of the infringement was at least EEA-wide.
- The unlawful agreement was generally implemented.

In *Chloroprene Rubber*, the basic amount was set at a slightly higher percentage of relevant sales, taking into account the following factors: [17]

- The infringement comprised market-sharing, the attribution of sales quotas, coordinated price increases, agreed minimum prices, customer sharing and the exchange of sensitive information.
- The parties accounted for all the relevant sales in the EEA.
- The geographic scope of the infringement was worldwide.
- The unlawful agreement was systematically implemented.

These cases would have been characterised under the 1998 Fining Guidelines as involving a "very

12 2006 Fining Guidelines, para. 13.

13 2006 Fining Guidelines, para, 25.

14 1998 Fining Guidelines, Section 1.A.

15 *Professional Videotape*, para. 215, and *Flat Glass*, para. 482.

16 In *Flat Glass*, the last full business year, *i.e.*, the reference year for the relevant sales figures, was 2004. Because ten new Member States joined the EU on May 1, 2004, the Commission disregarded sales achieved in the new Member States before that date in order not to count sales that were made outside the EU when the infringement occurred.

17 *Chloroprene Rubber*, paras. 525, 526, 535.

serious" infringement. Based on this and the criteria stated in the 2006 Fining Guidelines for assessing gravity (and thus the percentage for calculating the basic amount), percentages near the high end of the range might have been anticipated. It is not clear in what circumstances the 2006 Fining Guidelines' stated criteria could lead the Commission to apply higher percentages than in these cases, but the Commission has left some scope for increase in future cases.

In addition to the basic amount, the 2006 Fining Guidelines provide for an "entry fee" intended to deter undertakings from entering into unlawful agreements (regardless of their duration). The entry fee is set at 15-25% of the value of relevant sales used to calculate the basic amount. Factors determining the level of the entry fee are the same as those used for setting the basic amount percentage, *i.e.*, the nature of the infringement, the combined market share of the undertakings concerned, the geographic scope of the infringement, and whether or not the infringement was implemented.[18]

In each of *Professional Videotape, Flat Glass*, and *Chloroprene Rubber*, the Commission referred to the factors discussed when setting the proportion of sales for the basic amount, and then set percentage figures for the entry fee at 17% in *Professional Videotape*,[19] and in *Flat Glass*.[20] In *Chloroprene Rubber*, the entry fee was set at a slightly higher percentage.[21]

As with the basic amount, it seems clear that the Commission will not automatically select the highest possible percentage figure for the entry fee. Again, however, the criteria for establishing the selected percentage remain opaque.

The Commission increase or reduce the basic amount, taking into account all relevant circumstances, including aggravating and mitigating circumstances. In addition, the Commission may add a specific increase to the basic amount for deterrence.

- Aggravating circumstances include, *e.g.*, recidivism (having committed repeat infringements); refusing to cooperate with the Commission or obstructing the Commission's investigation; assuming the role of a leader or instigator of the cartel; and coercing other undertakings to participate.[22]

- Mitigating circumstances include, *e.g.*, having committed the infringement only negligently rather than intentionally; limited involvement in the infringement; and cooperation with the Commission beyond an undertaking's legal obligation to do so.[23]

- The specific increase for deterrence may be added if an undertaking (that is, the entire corporate group[24]) has large sales in addition to the sales affected by the cartel.[25]

18 2006 Fining Guidelines, para. 22.

19 *Professional Videotape*, para. 217.

20 *Flat Glass*, para. 486.

21 *Chloroprene Rubber*, para. 537.

22 2006 Fining Guidelines, para. 28.

23 2006 Fining Guidelines, para. 29.

24 *See* Case T-112/05 *Akzo Nobel*, December 12, 2007.

25 2006 Fining Guidelines, para. 30.

Professional Videotape, Flat Glass, and *Chloroprene Rubber* each discuss certain of these adjustments, with the most significant discussions concerning the aggravating circumstances of recidivism and obstruction and the specific increase for deterrence.

Repeat infringements. Under the 2006 Fining Guidelines, repeat infringements are treated as aggravating circumstances that may lead to an increase in the fine of up to 100% for each established instance of recidivism.[26] Two of the recent decisions involve interesting applications of the recidivism principle.[27]

In *Flat Glass*, The Commission did not increase the fines because of recidivism. For example, Saint Gobain had previously been found guilty of cartel infringements in the Flat Glass sector four times, *i.e.*, in 1980, 1981, 1984, and 1988.[28] Commissioner Kroes explained in her press statement that "*the Commission did not apply an aggravating factor to Saint Gobain for being a repeat offender because the most recent previous decision was a long time before the Flat Glass cartel was proved to have begun.*"[29]

By contrast, in *Chloroprene Rubber*, Bayer's fine was increased for recidivism by 50% and ENI's by a little more. ENI had been condemned for cartel infringements in 1986 and 1994,[30] and Bayer once in 2001.[31]

The Commission's approach to the recidivism issue in these decisions is interesting in light of the recent European Court of Justice judgment in *Danone v. Commission*,[32] in which the Court upheld the Commission's decision in the *Belgian Beer* case[33] to increase by 40% the fine imposed on Danone for its participation in the Belgian beer cartel on account of Danone's established participation in two prior cartels in 1974 and 1984.[34] The judgment emphasises the Commission's broad discretion in the appraisal of recidivism as an aggravating circumstance:

- The Court confirmed that "*the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion and … the Commission cannot be bound by any limitation period when making such a finding.*"

26 2006 Fining Guidelines, para. 28, first indent.

27 In *Professional Videotape*, none of the parties was a recidivist.

28 Case IV/29.869 – *Italian Cast Glass*, Commission decision of December 17, 1980, OJ 1980 L 383/19 (cast glass is one of three types of flat glass, the others being drawn glass and plate glass); Case IV/29.988 – *Italian Flat Glass*, Commission decision of September 28, 1981, OJ 1981 L 326/32; Case IV/30.988 – *Flat-glass Benelux*, Commission decision of July 23, 1984, OJ 1984 L 212/13; Case IV/31.906 – *Flat Glass*, Commission decision of December 7, 1988, OJ 1989 L 33/44.

29 Commissioner for Competition Neelie Kroes in her press statement about the *Flat Glass* decision, November 28, 2007 (Speech/07/763).

30 Case IV/31.149 – *Polypropylene*, Commission decision of April 23, 1986, OJ 1986 L 230/1; Case IV/31.865 – *PVC II*, Commission decision of July 27, 1994, OJ 1994 L 239/14.

31 Case COMP/E-1/36.604 – *Citric acid*, Commission decision of December 5, 2001, OJ 2002 L 239/18 (addressed to Harmann & Reimer, a 100% subsidiary of Bayer).

32 Case C-3/06 *Danone v. Commission*, judgment of February 8, 2007, ECR 2007 I-1331; upon appeal of Case T-38/02 *Danone v. Commission*, judgment of October 25, 2005, ECR 2005 II-4407. *See also* Cases T-101/05 BASF, judgment of December 12, 2007, paras. 64-73.

33 Case IV/37.614/F3 PO – *Interbrew and Alken-Maes ("Belgian beer")*, Commission decision of December 5, 2001, OJ 2003 L 200/1. This case was decided on the basis of the 1998 Fining Guidelines.

34 Case IV/400 – *Glass Containers*, Commission decision of May 15, 1974, OJ 1974 L 160/1; and Case IV/30.988 – *Flat-glass Benelux*, Commission decision of July 23, 1984, OJ 1984 L 212/13.

- In trying to identify undertakings that have exhibited a tendency to infringe competition rules, the Commission should take into account all relevant factors surrounding repeated infringements, including "*the time that has elapsed between subsequent infringements.*"

- On the facts of the *Belgian Beer* case, the Court found that "*a relatively short time, namely less than 10 years, had elapsed between infringements [committed by Danone]*" and that therefore the Commission's conclusion that Danone "*showed a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed those rules*" was justified.[35]

The broad discretion given to the Commission in the *Danone* judgment suggest that there is no firm rule on the existence of a "limitation period" for the application of a recidivism multiplier. Nevertheless, from this body of precedent one can begin to draw tentative conclusions as to the maximum time periods beyond which the Commission may no longer view recidivism as an aggravating circumstance.

In the *Belgian Beer* case, Danone's participation in the cartel began 8 years and 6 months after the adoption of the previous Commission infringement decision against it, and justified a 40% increase.[36] In *Chloroprene Rubber,* the circumstances were slightly different, as both ENI and Bayer had begun to participate in the cartel at issue even *before* the most recent previous infringement decisions against them had been adopted. In addition, ENI began its participation in the chloroprene rubber cartel 7 years after the adoption of another prior cartel decision against it (the 1986 *Polypropylene* decision). On this basis, the Commission rejected ENI's argument that the prior decisions against it were too distant in the past to be taken into account for purposes of establishing recidivism.[37]

In *Flat Glass*, the time period between the most recent past infringement decision and the beginning of participation in the Flat Glass cartel exceeded 15 years for Saint Gobain[38] and Glaverbel.[39] As noted, the Commission deemed this period too long to support a recidivism multiplier. The decision thus confirms that the Commission is prepared to disregard prior infringements that occurred many years previously. The relevant time period probably depends on the facts of each particular case,[40] but one might infer from these decisions that the "cut-off point" is somewhere between 8.5 years (*Danone*) and 15 years (*Flat Glass*). Note also that the Commission will presumably impose smaller recidivism multipliers in cases where the prior infringement was further into the past and

35 Case C-3/06 *Danone v. Commission*, paras. 38-40.

36 The most recent decision implicating Danone dated from July 23, 1984, and Danone's participation in the Belgian beer cartel began on January 28, 1993.

37 *Chloroprene Rubber,* para. 542. By contrast, Bayer had not been found guilty of cartel infringements prior to beginning its participation in the Chloroprene Rubber cartel in 1993, which arguably should eliminate the possibility of having a recidivism multiplier applied against it since there was no prior infringement decision against it from which to "learn its lesson." In fact, the Commission applied a 50% recidivism multiplier to Bayer, but since Bayer received full immunity from fines in the Chloroprene Rubber cartel, the issue may not have been contested. Whether this issue was considered is not clear from the decision.

38 The most recent decision implicating Saint Gobain dates from December 7, 1988, and Saint Gobain's participation in the *Flat Glass* cartel began on January 9, 2004.

39 The previous decision implicating Glaverbel was adoptedon July 23, 1984.

40 In *Danone v. Commission*, para. 39, the Court of Justice deferred to the Commission's appraisal of "*each individual case*" and identified the time that has elapsed between the infringements in question as only one of potentially many indicia for establishing an instance of recidivism.

accordingly is a less valid indicator of the undertaking's "tendency" to violate competition rules.

Obstruction. The "*refusal to cooperate with or obstruction of the Commission in carrying out its investigations*" is an aggravating circumstance on the basis of which the Commission may increase the basic amount of the fine.[41] In *Professional Videotape*, Sony's fine was increased for obstruction by 30% because Sony employees had refused to answer oral questions during the Commission's inspections and because one junior employee had shredded certain potentially sensitive documents. Sony contested the qualification of the incidents in question as being obstructive and pointed out that neither of the allegedly obstructive actions had any effect on the investigations. The Commission rejected this defence and maintained that it was sufficient for the conduct in question to be "*deliberately obstructive, irrespective of any effects it may have had on the course subsequently taken by the proceeding*."[42] This indicates the broad view that the Commission intends to take regarding obstruction.

Specific increase for deterrence. Under the 2006 Fining Guidelines, the Commission may, in order to ensure that fines have a sufficiently deterrent effect, increase the fine to be imposed on undertakings that have significant turnover outside the market to which the infringement relates.[43] The Commission applied specific increases for deterrence in *Professional Videotape* and *Chloroprene Rubber*.

In *Professional Videotape*, the Commission increased Sony's fine by 10%[45] because it found that Sony had a particularly large turnover beyond the sales to which the infringement related: Sony's Professional Videotape turnover was around € 46.9 million, representing some 0.1% of its € 55.3 billion total worldwide turnover. In addition, Sony's total worldwide turnover, in absolute terms, was much larger than Fuji's (€18.5 billion) and Maxell's (€ 1.3 billion).

In *Chloroprene Rubber*, the Commission found that ENI, Dow, DuPont, and Bayer each had significant sales beyond the market affected by the cartel and that these firms' total worldwide turnovers, in absolute terms, were much larger than the other defendants' (Tosoh and Denka).[46] Despite this, the Commission decided to increase only ENI's and Dow's fines for deterrence, but not DuPont's and Bayer's. The decision does not reveal the reasons for this discretionary application of the specific increase.

The fact that, in both *Professional Videotape* and *Chloroprene Rubber*, the Commission emphasised the relative size of the undertakings concerned is noteworthy. The only criterion in the 2006 Fining Guidelines justifying an increase for specific deterrence is that an undertaking has a particularly large turnover beyond the sales affected by the cartel. In these decisions, however, the

41 2006 Fining Guidelines, para. 28, second indent.

42 *Professional Videotape*, para. 221.

43 2006 Fining Guidelines, para. 30.

44 It is not known whether the Commission also applied a specific increase for deterrence on any of the undertakings implicated in *Flat Glass*.

45 *Professional Videotape*, para. 246.

46 *Chloroprene Rubber*, paras. 584-586. The firms' turnovers were as follows: ENI € 86.1 billion; Dow € 39.1 billion; Bayer € 28.9 billion; DuPont € 21.8 billion; Tosoh € 5.4 billion; and Denka € 2.3 billion

47 Commission Press Release IP/06/857, June 28, 2006.

Commission indicates that the total turnovers of the cartel participants relative to each other is also a criterion to determine whether a specific increase is warranted.

Increasing fines for undertakings that have significant turnover beyond the affected market, as under the Guidelines, already divorces the fine level from any notion of the amount of gain that might have been achieved from the cartel or the economic harm that it might have caused – at odds with Commissioner Kroes' description of the Guidelines at the time of their introduction, when they were presented as being intended to result in fines that "*better reflect the overall economic significance of the infringement.*" Extending the deterrence multiplier further to simply punish larger cartel participants more heavily than smaller ones – even though each participant's position in the affected market is already taken into account when calculating the basic amount of the fine – removes the fine level even further from the underlying infringement, potentially raising serious questions of fairness and equal treatment for larger and more diversified firms.

On their face, the 2006 Fining Guidelines are more objective than the 1998 Guidelines that they have replaced, as they introduce a more arithmetic methodology for calculating fines. After three decisions under the new Guidelines, however, it remains clear that the Commission retains significant discretion in setting cartel fine levels. On the positive side, the Commission has not, as some had feared, systematically sought the maximum fines available under the new Guidelines, but has applied genuine sliding scales for the various component elements going into the fine calculation to take account of the specifics of each case. On the other hand, the criteria behind some of the key elements (particularly the percentage of turnover figure underlying the basic amount and the application of the deterrence multiplier) remain opaque, and fines so far do not seem to be more predictable than under the previous rules. This is perhaps not surprising, since the Commission maintains that uncertainty in itself has a deterrent function: the Commission has long defended the need to maintain an element of uncertainty as regards potential fine levels in order to prevent companies from undertaking cost-benefit analyses before deciding whether to enter into cartel arrangements. If the criteria under the new Guidelines are applied transparently and consistently, however, fines should become more predictable as more decisions are adopted.

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