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HORIZONTAL AGREEMENTS

Commission Decisions

Case COMP/38.629 *Chloroprene Rubber*

On February 7, 2011, the Commission published its decision of December 5, 2007, in which it imposed a total of €243.2 million in fines on eleven participants in a market-sharing and price-fixing cartel.[1] The single, complex and continuous infringement concerned the market for chloroprene rubber ("CR") between 1993 and 2002, and covered the EEA. Bayer informed the Commission of the existence of the CR cartel. CR is a synthetic rubber which is an artificially-made polymer acting as an elastomer. It is mainly used for the production of technical rubber parts (cables, hoses, etc.), as a raw material for adhesives (particularly in the shoe and furniture industry) and as latex for diving equipment, bitumen modifications and inner sole of shoes.

The Commission found that the collusion aimed at ensuring the stability of prices, markets, market shares, and sales quotas for CR. The participants intended to freeze their market shares and sales quotas on the CR market and to allocate certain geographic markets and key customers to certain CR producers, thereby regionalizing production and supply by focusing on their respective "*home markets*." In addition, the parties discussed and agreed CR price increases, target prices as well as minimum prices.

The companies adopted a reporting and monitoring system, which included a regular exchange of sensitive commercial information, notably on pricing, shipment, and/or sales figures, capacity and capacity utilization figures, and offers to individual customers, and attended regular meetings and had other contacts and conversations to agree on the aforementioned illicit cartel arrangements and to monitor their implementation in the EEA.

The basic amount of the fine consisted of 21% of the sales of each participant during 2001, multiplied by the number of years of infringement, plus an additional amount (20% on each participant's sales) for deterrence. The Commission further found an aggravating circumstance for recidivism and decided to increase the basic amount on Eni by 60%, and on Bayer by 50%. Furthermore, a multiplication factor of 1.4 and of 1.1 was applied to the fines imposed on Eni and on Dow, respectively, in order to set the amount of the fines at a level ensuring a sufficient deterrent effect. The Commission did not accept any mitigating circumstances. Finally, based on the 2002 Leniency Notice, Bayer was granted full immunity from any fines (which would otherwise be approximately €200 million), as it was the first to inform the Commission of the infringement, while Tosoh and DDE (DuPont/DPE and Dow) were rewarded with a 50% and 25% fine reduction for their cooperation, respectively. The Commission refused to grant a reduction of the fine imposed on Polimeri and on a second subsidiary of Eni, as the information provided to the Commission by these companies did not represent significant added value.

Several companies have appealed the Commission Decision before the General Court.[2] In particular, DuPont and Dow claim that the Commission erred in holding them liable as parent companies for the involvement of their joint venture, DDE, in the cartel. The appeals are still pending before the Court.

VERTICAL RESTRAINTS

ECJ – Judgments

Case C-260/09 P *Activision Blizzard Germany GmbH v. Commission*

On February 10, 2011, the Court of Justice dismissed the appeal by Activision Blizzard Germany GmbH (formerly CD-Contact Data GmbH) against the General Court's judgment of April, 30, 2009, which had fined the applicant for participating in a complex of agreements and concerted practices designed to restrict parallel exports in the markets for Nintendo video games consoles and games cartridges.[3]

1 Case COMP/38.629 – *Chloroprene Rubber*, Commission decision of December 5, 2007 (OJ C 251).

2 Case T-76/08, *E.I. DuPont de Nemours and Others v Commission; Case T-77/08, Dow Chemical v Commission; Case T-83/08, Denki Kagaku Kogyo and Denka Chemicals v Commission*; and Case T-103/08, *Polimeri Europa and Eni v Commission*.

3 Case T-18/03, *CD-Contact Data GmbH v. Commission*, [2009] ECR II-1021.

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On October 30, 2002, the Commission found that Nintendo Co. Ltd and a series of exclusive distributors of Nintendo video games consoles and cartridges in Europe, including CD-Contact Data, had agreed that no exports from the exclusive distributors' territories were to occur and that they would monitor supplies to customers from whom exports could be expected.[4] CD-Contact Data was fined €1 million, although in practice CD-Contact Data allowed parallel exports to occur. The General Court reduced the fine imposed on CD-Contact Data to €500,000 on the ground of its exclusively passive role in the infringement.

In its first ground of appeal, Activision Blizzard claimed that the General Court erred in law by not examining whether CD-Contact Data's conduct was restricted to limiting active parallel sales, in accordance with the distribution agreement entered into between CD-Contact Data and Nintendo, or whether that conduct also related to a limitation of passive parallel sales.

In dismissing Activision Blizzard's claim, the Court noted that the General Court had analyzed whether there was an agreement relating to a limitation of passive sales on the basis of the correspondence between CD Contact Data, Nintendo, and Nintendo France identified by the Commission, which reflected a concurrence of wills between CD-Contact Data and Nintendo intended to limit active and passive sales.

Activision Blizzard also complained that the General Court had distorted the evidence by considering that the relevant documents reflected an illegal object, given that the wording of those documents concerned only a legal restriction on active sales in CD-Contact Data's exclusive territory. The Court found that the General Court's interpretation of the documents was plausible, and that it had therefore not distorted the evidence.

In addition, Activision Blizzard alleged that the General Court had made a manifest error of assessment in concluding that the documents the Commission relied on (letters and a fax sent by CD-Contact Data) sufficiently evidenced the existence of an illegal agreement between CD-Contact Data and Nintendo. Activision Blizzard argued that such an agreement would require, first, an invitation to join the illegal practice adopted by Nintendo, and secondly, at least tacit acquiescence on the part of CD-Contact Data.

The Court responded that the standard of proof is the same for vertical and horizontal relationships, and that the General Court had primarily based its decision on the fact that the correspondence showed that CD-Contact Data had joined an information exchange system to limit parallel trade, which means that Nintendo must have invited it to do so. Concerning the assessment as to whether CD-Contact Data had accepted, at least tacitly, Nintendo's invitation to participate in an agreement to restrict parallel trade, the Court held that the General Court relied principally on the correspondence and not on the fact that CD-Contact Data did not protest against Nintendo.

The Court finally held that the existence of a concurrence of wills between the parties could not be called into question by the fact that CD-Contact Data had participated in passive parallel trade by exporting goods outside Belgium and Luxembourg, noting that an exclusive distributor may have an interest in entering into an agreement with the manufacturer to limit parallel trade, as a means of further protecting its own distribution area, and also in secretly making sales contrary to that agreement in an attempt to use the agreement for its exclusive benefit.

UNILATERAL CONDUCT

ECJ – Judgments

Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB*

On February 17, 2011, the Court of Justice answered questions referred to it by the Stockholm District Court regarding an alleged abuse of dominance by Swedish telecommunications operator TeliaSonera Sverige AB on the wholesale market for ADSL products. The Court held that a margin squeeze could be abusive even though the dominant undertaking might not be under a duty to supply the wholesale input.

TeliaSonera, the former monopolist operator of the Swedish fixed telephone network, provides retail broadband services as well as (non-essential) wholesale access to its network via local loop or input for ADSL connections. In 2004 the Swedish Competition Authority found that TeliaSonera had abused its dominant position as the operator of the national fixed telephone network through an anti-competitive margin squeeze, setting the wholesale price for input ADSL products and retail price for DSL services at a level that would

4 Case COMP 35.587 PO *Video Games*, COMP 35.706 PO *Nintendo Distribution*, COMP 36.321 *Omega – Nintendo*, Commission Decision 2003/675/EC of October 30, 2002.

have been insufficient to cover its incremental costs on the retail market. The SCA requested that the Stockholm District Court order TeliaSonera to pay an administrative fine of SEK 144 million (approximately €15.1 million) for infringing Article 102 and Swedish competition rules on the abuse of a dominant position.

Advocate General Mazak argued that margin squeeze cases should be analyzed as constructive refusal to supply cases, an approach consistent with the Commission's Guidance Paper on Article 102 TFEU. Thus, a margin squeeze could only be abusive where either the dominant undertaking was under a regulatory obligation to supply the input in question or the input in question was indispensable ("*objectively necessary*," in the words of the Guidance Paper) to be able to compete on the downstream market. Absent a duty to supply the input for either reason, the dominant undertaking could not be found to have committed an abusive margin squeeze and its conduct should instead be analyzed as a possible pricing abuse.

The Court did not adopt this reasoning, finding that the indispensability of the product supplied by the dominant undertaking was a relevant factor, but not a pre-requisite, for an abusive margin squeeze. The Court considered that a margin squeeze is a form of abuse in its own right, which does not require showing concrete anti-competitive effect(s) resulting from the margin squeeze, but only the potential to exclude or disadvantage an "as efficient competitor," by making it more difficult for rivals to compete, either by making them unable to operate on the retail market other than at a loss or, in any event, with reduced profitability, such that they would suffer a competitive disadvantage on that market that would prevent or restrict their access to it or the growth of their activities on it.

An abuse will exist if a margin squeeze is actually implemented with the purpose of driving out as efficient competitors even if the desired result is not ultimately achieved. On the other hand, a pricing practice is not exclusionary and abusive where the penetration of the market by as efficient competitors is not made any more difficult by that practice. In determining the potentially exclusionary effect of a margin squeeze, the Court held that a national court would need to consider two factors: whether the input is indispensable and the potential margin between the input and the retail price.

Concerning the indispensability of the input, the Court explained that a potentially exclusionary effect is probable if the input is indispensable for the supply of the retail product. If the input is not indispensable, the Court noted that the national court will have to satisfy itself that the practice may be capable of having anticompetitive effects on the market.

Concerning the potential margin level between the input and the retail price, if the margin is negative, *i.e.*, the input price is higher than the retail price, the Court noted that a potentially exclusionary effect is probable. If it is positive, the Court held that it must then be demonstrated that the pricing practice was, by reason for example of reduced profitability, likely to have the consequence that would be at least more difficult for the operators concerned to trade on the retail market concerned.

The Court clarified that the wholesale price did not need to be excessive, nor the retail price predatory, for a margin squeeze to be abusive.

Consistent with the "as efficient competitor" test, the assessment would be carried out on the basis of the undertaking's internal costs, although rivals' costs could also be considered in certain circumstances, such as where the undertaking's dominant position conferred upon it a "*competitively advantageous situation*."

C-437/09 *AG2R Prévoyance v Beaudout Père et Fils SARL*

On March 3, 2011, the Court of Justice answered questions referred to it by a French district court regarding an alleged abuse of dominance in the French bakery sector. The ruling provides further guidance on the interaction between Articles 101, 102, and 106 TFEU in the context of State-approved insurance schemes.

The French Social Security Code provides for the partial state reimbursement of employee sickness and accident costs. Employees may subscribe to a supplementary healthcare scheme to cover part of the remaining costs. The Code provides further that persons employed within a given occupational sector may join a supplementary scheme via a sectoral or collective agreement negotiated between employers and employee representatives. In April 2006, the trade union of master bakers and various trade unions representing employees in that sector passed an amendment to their existing national collective agreement stipulating that all undertakings governed by the national collective agreement would subscribe to a supplementary healthcare scheme run solely by AG2R Prevoyance ("Prevoyance"), a "provident society" (*i.e.*, a cooperative society engaged in business activities intended to be for the benefit of the community). Upon request of the trade unions, the Minister of Labour made affiliation to the Prevoyance scheme compulsory. The arrangements were challenged by Beaudout Pere et Fils SARL, a French baker already affiliated to a competing supplementary

insurance scheme. Prevoyance applied to the French district court to force Beaudout to join the scheme and pay any outstanding backdated contributions.

The French court referred the matter to the Court, seeking guidance on, first, whether the arrangements making affiliation to the supplementary healthcare scheme compulsory infringed Article 101 and, second, whether by exercising its right to require undertakings active in the bakery sector to join the healthcare scheme, Prevoyance had abused a dominant position under Article 102.

Recalling the jurisprudential exception established in *Albany International* and *van der Woude*,[5] the Court held that collective bargaining agreements intended to improve employment and working conditions fell outside the scope of Article 101(1) by virtue of their nature and purpose (*i.e.*, to ensure that employees had the necessary means to meet sickness and accident expenses), notwithstanding the compulsory nature of membership of such schemes. As a result, the Court held that the decision of the State rendering membership of the scheme compulsory also fell outside the scope of Article 101.

With respect to Article 102, for which no "nature and purpose" exception is available, the ECJ first considered whether Prevoyance engaged in an economic activity and could therefore be considered an "undertaking" for the purposes of Article 102. The Court noted that supplementary social security schemes have been deemed not to involve an economic activity where they apply the principle of solidarity and are carried out under state control such that the entity implementing the scheme has no autonomy. The Court left whether these conditions were fulfilled in this case, noting that:

- Prevoyance's activities were non-profit-making and showed solidarity, since the services supplied by Prevoyance were not proportional to the scope of the cover provided and were supplied irrespective of the payment of contributions by a scheme member.
- Prevoyance enjoyed a degree of autonomy from the State in determining the level of contributions required and the value of the benefits provided, since the social partners were not required by law to use a collective agreement mechanism or appoint Prevoyance (rather than *e.g.*, an insurance company), such that Prevoyance was under no obligation to assume management of the scheme.

The Court went on to consider whether, if Prevoyance were found to be an undertaking, its conduct may have infringed Article 102. The Court noted that because membership of the insurance scheme was compulsory, Prevoyance had necessarily been granted an exclusive right within the meaning of Article 106(1). Consistent with established case law, Prevoyance could therefore be considered dominant for the purposes of Article 102. The Court recalled that the mere creation of a dominant position through the conferral of a special or exclusive right did not infringe Article 102, and that Article 102 would be infringed only where, for example, the beneficiary of the exclusive right was manifestly incapable of satisfying prevailing market demand for the service in question. The Court considered that this had not been demonstrated in this case and that, even if it had been, Prevoyance's exclusive right might be justified under Article 106(2) as necessary to enable Prevoyance to perform a service of general economic interest under economically acceptable conditions. In particular, the Court noted that compulsory affiliation to the Prevoyance scheme might be necessary to ensure its financial sustainability, by preventing lower risk participants, who effectively subsidize the higher risk participants, from switching to alternative insurance schemes.

MERGERS AND ACQUISITIONS

First-Phase Decisions With Undertakings

Case COMP/M.5927 *BASF/Cognis*

On November 30, 2010, the European Commission conditionally cleared BASF's acquisition of Cognis. The Commission identified serious competition concerns in the market for hydroxy monomers (a chemical used in coatings and adhesives), where the proposed transaction would have created a very strong player in an already highly concentrated market.

To resolve the Commission's concerns, BASF agreed to divest Cognis's entire hydroxy monomers production business and other related activities located in the United Kingdom. It also agreed to divest Cognis's multifunctional methacrylates and adducts business operating from the same location. To further increase the viability and attractiveness of the divestment package to potential purchasers, BASF also offered to provide a potential acquirer with an irrevocable license to produce polyalkylene glycols ("PAG") and PAG-based lubricants on the basis of Cognis's intellectual property and know-how. As is typical in divestiture cases under the Merger Regulation, BASF further agreed to enter into a time-limited

5 Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751; Case C-222/98, *Hendrik van der Woude v. Stichting Beatrixoord*, [2000] ECR I-7111.

agreement to purchase PAGs and PAG-based lubricants from the divested business, in order to assist the purchaser of the business with the dilution of fixed costs, after which the purchaser would be able to sell PAG and PAG-based lubricants on its own account.

The Commission's investigation found that, with the accompanying intellectual property rights and the commitment to purchase its output, the divested business would be viable and that the remedy effectively removed the entire overlap in the area of hydroxy monomers, therefore sufficiently resolving all identified competition concerns.

Case COMP/M.5978 *GDF Suez/International Power*

On January 26, 2011, the European Commission cleared GDF's acquisition of sole control over International Power ("IP"), subject to commitments. Despite the Commission's well-publicized attempts to create a pan-European energy market, Commission merger decisions continue to define antitrust markets in the electricity sector along national lines.

The transaction gave rise to overlaps in electricity-related markets in eight European countries. The Commission largely confirmed its previous practice regarding market definition in this sector, and found that each stage of the electricity supply chain constituted a separate antitrust market, defined across national lines.

In general, the Parties' combined shares were low and, accordingly, competition concerns did not arise. However, concerns arose in relation to the ability for the merged entity to gain access to sensitive information regarding RWE Essent's capacity due to a tolling agreement between IP and RWE Essent. On the basis of this tolling agreement, the Commission considered that the merged entity could raise prices post-transaction as, based on knowledge of the production patterns and outages of the IP plant, it would be able to adapt its sales on the Belgian wholesale electricity exchange (Belpex) and price less aggressively (*i.e.*, at higher levels) than it would otherwise do. Furthermore, the merged entity would have the ability to put RWE at a competitive disadvantage as (1) the tolling agreement with RWE enabled the plant operator to control output levels, (2) revenues from this agreement were not dependent on the output levels. Accordingly, the Commission felt there was a risk that the merged entity would control RWE Essent's supply from the IP plant in a manner that would hamper its penetration into the Belgian market.

The Parties therefore proposed to divest IP's interest in the power plant in Belgium and to transfer the tolling contract with RWE to a third party. Another point of interest raised by this case is that the Commission's decision may indicate the levels of market transparency required for concerns regarding potential information exchanges to be raised, a topic that appears to be relatively prominent on the Commission's current enforcement agenda (see the Commission's revised Horizontal Guidelines).

Case COMP/M.5984 *Intel/McAfee*

On January 26, 2011, the European Commission cleared Intel's acquisition of McAfee, subject to certain interoperability commitments. The Commission's decision reflects its close scrutiny of transactions in the information, communication, and technologies sector, as well as the options available for parties to address potential antitrust concerns.

Intel is the world's largest manufacturer of central processing units ("CPUs"), the core chips used in Intel also develops platforms of digital computing technologies which combine various types of hardware and software. McAfee creates antivirus products to protect devices connected to the internet.

The Commission found that the parties were active in neighbouring and complementary markets, meaning that the effects of the transaction were measured with reference to potential anticompetitive conglomerate effects. In particular, the Commission analyzed the effects of the transaction on security solution providers (that competed with McAfee) that require access to specific information concerning CPUs (such as those produced by Intel) to be able to develop new solutions.

The Commission's main concern was that the merged entity could engage in anticompetitive exclusion through the bundling of Intel's CPUs with McAfee's security software. In particular, the Commission considered the possibility that rivals might be adversely affected by a lack of interoperability with Intel CPUs and chipsets or from a technical tying between these products and McAfee's security solutions. The Commission also identified concerns regarding the possible adverse effects on Intel's rivals if McAfee's products were no longer compatible with non-Intel CPUs and chipsets.

In order to address these concerns, Intel agreed to behavioral commitments designed to ensure that McAfee software continued to support the products of rival chipmakers. In particular, the merged entity agreed to enable other security software vendors to access the embedded functionality of Intel's CPUs on the same terms as accessed by McAfee. Intel also agreed to refrain from designing CPUs or chipsets that degrade the performance of third party security software, and from designing McAfee security software that degrades its performance when operating with a non-Intel CPU.

The Commission considered that the commitments effectively addressed the competition concerns as they ensured interoperability between the merged entity's products and those of their competitors.

STATE AID

GC – Judgments

Joined cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt v. Commission*

On March 24, 2011, the General Court decided on two appeals brought, respectively, by two German regions, Freistaat Sachsen and Sachsen-Anhalt, and by two companies, Mitteldeutsche and Flughafen Lipsia/Halle (the "airport"), seeking the partial annulment of a Commission decision declaring that certain German measures benefiting DHL and the airport constituted compatible State aid and that a series of other measures amounted to unlawful State aid and were incompatible with the common market.[6]

In 2005, DHL and the two company appellants concluded a framework agreement, following DHL's decision to move its European cargo hub to the airport, in which they undertook to build a new landing strip, which would have been financed by means of a €350 million capital increase by public stakeholders, and to guarantee its functioning 24/7, as well as to compensate DHL in case of any damage incurred for violations of the conditions of the agreement. The region also issued a "patronage" letter guaranteeing the airport's financial profitability for the agreement's duration and agreed to indemnify DHL if it were unable to use the airport according to the terms of the agreement. The agreement and the patronage letter were notified to the Commission, which, after an in-depth investigation, decided that: (1) the €350 million that Germany intended to grant to the airport for the construction of the new landing strip constituted state aid that was compatible with the common market; while (2) the unlimited guarantees contained in the framework agreement and the patronage letter constituted incompatible State aid, as they covered DHL's risks at conditions that no other private investor operating under normal market conditions would have accepted. In both cases, the appellants contested only the first finding of the decision, *i.e.*, that the capital increase constituted State aid and that it amounted to €350 million.

Concerning the contestation of the qualification of the capital increase in the airport as aid notwithstanding the Commission's finding of compatibility, the General Court considered the action inadmissible due to an insufficiently concrete and present interest on the part of the applicants in challenging the qualification of the relevant measures as state aid.

The appellants also claimed that the Commission erred in considering the capital increase as state aid, on the ground that the aid was destined to finance the expansion of the regional airport infrastructure, which is not economic in nature since no private investor would carry it out. The Court dismissed this plea and clarified that the operation of airport infrastructure does constitute an economic activity, since it entails the supply of services in exchange for compensation on the market for regional airport services, as does the construction, expansion, and operation of a landing strip, since it increases the airport's capacity and is directly linked to the operation of airport infrastructure. The Court also added that the circumstance that these activities are normally not undertaken by private operators and/or are not profitable is irrelevant for the purposes of their qualification as economic in nature.

The Court however upheld the applicants' claim that the Commission decision was partially contradictory. The decision indicated that the new landing strip would be financed with the €350 million capital increase, but also recognized that some of the costs of the infrastructure related to activities, which fell within the sphere of exercise of public functions, and therefore could not qualify as State aid under Article 107(1) TFEU (in particular activities relating to security, police, prevention and airport traffic). Despite this, the Commission held that the entire capital increase constituted State aid. The Court therefore annulled Article 1 of the decision in so far as it determined that the entire amount of €350 million constituted state aid.

Case T-3/09 *Italy v. Commission* and Case T-584/08 *Cantiere Navale De Poli S.p.A. v. Commission*

On February 3, 2011, the General Court rendered two judgments dismissing appeals brought, respectively, by Italy and Cantiere Navale De Poli S.p.A. seeking the annulment of a Commission decision that certain Italian measures amending an existing (authorized) aid scheme constituted incompatible State aid.[7]

6 Case C-48/2006, *Measures by Germany to assist DHL and Leipzig Halle Airport*, Commission decision of July 23, 2008, OJ 2008 L 346/1.

7 Case C20/08 (ex N 62/08) State aid which Italy is planning to implement through a modification of scheme N 59/04 concerning a temporary defensive mechanism for shipbuilding, Commission decision of October 21, 2008, OJ 2010 L 17/50.

In 2004, Italy notified the Commission of a State aid scheme to the shipbuilding industry for a total of €10 million according to the provisions of Regulation No. 1177/2002 concerning temporary defensive mechanisms to shipbuilding (the "Regulation").[8] The Commission found that the proposed aid scheme complied with the provisions of the Regulation and was compatible with the common market.[9] In 2008, Italy notified the Commission of its plan to allocate another €10 million to the budget for the 2004 scheme, as the €10 million initially allocated to it were not sufficient to finance all the applications for aid under the scheme received prior to the expiry of the Regulation. In the contested decision, the Commission found that Italy's plan was incompatible with the common market since the Regulation was no longer in force and could not serve as a legal basis for the assessment of the measure, which was incompatible with the common market when assessed under the general State aid rules.

On appeal, the applicants argued that the compatibility of the proposed aid measures aimed at financing aid requests submitted under the scheme while the Regulation was still in force should be assessed under the provisions of the Regulation, despite the fact that the Regulation had meanwhile expired. The General Court distinguished between: (1) the rules governing the competence of the EU institutions, where the legal basis empowering the institution to adopt a measure must be in force at the time when the measure is adopted; and (2) the substantive rules, which, from their entry into force, also apply to the future effects of matters which have arisen under previously applicable rules. The General Court therefore concluded the substantive rules to assess the compatibility of aid notified but not paid are those in force at the time when the Commission takes its decision, because only then do the effects of the planned aid materialize. For the same reason, in the case of aid unlawfully paid without prior notification, the applicable substantive rules are those in force at the time when the aid is actually paid.

Accordingly, the General Court found that the Commission could not be criticised for not applying the Regulation when assessing the 2008 amendment to the 2004 aid scheme since the aid in question had been notified but not paid, meaning that its effects would not materialize before the adoption, after the expiry of the Regulation, of the contested decision.

FINING POLICY

ECJ – Judgments

Case C-352/09 P *ThyssenKrupp Nirosta v. Commission*

On March 29, 2011, the Court of Justice confirmed the General Court's dismissal[10] of ThyssenKrupp's appeal against a 2006 Commission decision fining ThyssenKrupp. (The 2006 Commission decision had re-adopted an earlier 1998 Commission decision that had been annulled by the General Court in 2001 and the Court of Justice in 2005 for breach of the appellant's rights of defense).

In 1997, ThyssenKrupp had confirmed, at the Commission's request, that it assumed liability for the conduct of Thyssen Stahl, which had infringed Article 65(1) of the European Coal and Steel Community Treaty by participating in a price-fixing cartel between 1993 and 1994. The Court rejected ThyssenKrupp's argument that the General Court had erred in finding that the Commission could impose a fine on the appellant after the expiry of the ECSC Treaty on July 23, 2002, for an infringement of the ECSC Treaty taking place before its expiry. In response to the appellant's arguments, the Court held that the Commission had jurisdiction to ensure the uniform application of the rules deriving from the ECSC Treaty which continue to produce effects even after the expiry of that Treaty, and that holding otherwise would be contrary to the objectives and coherence of the Treaties and to the continuity of the legal order of the European Union. The Court added that the substantive provisions of the ECSC Treaty should be applied by the Commission, even after the expiry of the ECSC Treaty, since, at the material time, these provisions were in force and provided a clear legal basis for the penalty imposed, so that the principles of legal certainty and of protection of legitimate expectations, as well as the principle *nulla poena sine lege*, had been respected. The Court also explained that the Commission's power was rightly based on Article 23 of Regulation No 1/2003, given that penalties must be based on a legal basis in force at the time when they are adopted and procedural rules are generally held to apply as from their entry into force.

8 Council Regulation (EC) No. 1177/2002 of June 27, 2002 concerning a temporary defensive mechanism to shipbuilding, OJ 2002 L 172/1.

9 Commission decision of May 19, 2004 on aid scheme N 59/2004 relating to a defensive temporary mechanism for shipbuilding, OJ 2005 C 100/27.

10 Case T-24/07, *ThyssenKrupp Stainless v. Commission*, Judgment of July 1, 2009.

ThyssenKrupp also argued that the General Court had wrongly considered its 2001 assessment regarding the lawfulness of the finding of liability based on the appellant's 1997 statement to be *res judicata*. The Court found that the General Court had indeed erred in law given that the lawfulness of the transfer of liability by the appellant's 1997 statement had not been raised before the General Court in 2001, nor before the Court of Justice in 2005, so that such assessment was an *obiter dictum* and could not therefore be *res judicata*. However, contrary to ThyssenKrupp's submissions, the Court held that liability for the infringement had nonetheless been transferred to the appellant by way of its 1997 statement, which was no longer revocable at the stage of the hearing before the General Court in 2008. Consequently, the Court of Justice rejected the second ground of appeal in its entirety.

The Court also rejected ThyssenKrupp's other grounds of appeal alleging *inter alia* a breach by the General Court of the "principle of precision" (concerning the legal basis of the contested decision and of the transfer of liability), the rules on limitation periods, and the principles relating to the calculation of the fine.

Case C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg SA, ArcelorMittal International SA and ArcelorMittal Belval & Differdange SA v. Commission*

On March 29, 2011, the European Court of Justice also dismissed ArcelorMittal's and the Commission's appeals against the General Court's judgment of March 31, 2009,[11] which had partly annulled the Commission's decision fining ArcelorMittal for fixing prices in the steel beams market contrary to Article 65(1) of the European Coal and Steel Community Treaty.[12]

Concerning the alleged lack of legal basis for the Commission's decision, the Court confirmed that the Commission could impose a fine on the basis of Article 65(1) and (5) of the ECSC Treaty in conjunction with Articles 7(1) and 23(2)(a) of Regulation 1/2003, even though the ECSC Treaty expired on July 23, 2002, for conduct that took place before the expiry. It confirmed the General Court's finding that the Community treaties (including the ECSC Treaty) established a single legal order, pursuing a common objective of maintaining a system of free competition.

Concerning the alleged wrongful attribution of a subsidiary's violation to its parent, the Court stated that the conduct of a subsidiary may be attributed to the parent company where, although having a separate legal personality, that subsidiary does not determine independently its own conduct on the market, but essentially carries out the parent company's instructions. The Court also found that ArcelorMittal had failed to demonstrate to the requisite legal standard that the alleged excessive duration of the proceedings had made it difficult for ArcelorMittal to defend itself, meaning that its rights of defence had not been violated.

The Court rejected the Commission's appeal in which it argued that the General Court had incorrectly decided that the suspension of the limitation period did not apply to ProfilARBED and TradeARBED, meaning that these two companies could no longer be fined.[13] By way of background, the Commission had adopted a decision fining ARBED for TradeARBED's conduct in 1994, against which ARBED appealed successfully. The Commission initiated new proceedings on the very same subject matter of the initial decision in 2003 and adopted a decision in 2006 fining ARBED, as well as TradeARBED and ProfilARBED for breaching Article 65(1) ECSC Treaty. Pursuant to Article 25(1) of Regulation 1/2003, the Commission's power to impose fines for infringements of the provisions of competition law is, in principle, subject to a limitation period of five years, subject, however, to suspension if the case is meanwhile being progressed.

In this case, the Commission (erroneously) found that the limitation period had been suspended for all parties, pending ARBED's appeal against the first decision. The Court confirmed that a Commission decision becomes final with respect to those undertakings that have not appealed against it, meaning that the prescription period starts running from that point. Consequently, an action brought by a particular company against a Commission decision cannot have any suspensive effect on the 5-year prescription period with respect to companies (in this case, ProfilARBED and TradeARBED) that have not appealed against that decision.

11 Case T-405/06, *ArcelorMittal Luxembourg SA v. Commission*, judgment of March 31, 2009.

12 Comp/F.38.907, *Steel beams*, Commission Decision of November 8, 2006.

13 TradeARBED SA was active in distribution of ARBED's steel products, and ProfilARBED SA carried out ARBED's economic and industrial activities in the beams sector. They were both wholly-owned subsidiaries of ARBED.

GC – Judgments

Case T-33/08*, Cetarsa v. Commission*

On February 3, 2011 the General Court reduced the fine imposed by the Commission on Cetarsa from €3,631,000 to €3,147,300 million in response to the appeal of Compañía Española de Tabaco en Rama, SA ("Cetarsa") against the European Commission's decision that fined Cetarsa for agreeing with processors of raw tobacco in Spain from 1996 to 2001 on (maximum) average delivery prices for each variety and grade of raw tobacco, and on allocating quotas.[14] The Commission also fined three agricultural unions for, *inter alia*, fixing price brackets per quality grade for raw tobacco.

Cetarsa was successful in its argument that the Commission should have reduced the fine by more than 25% of its fine on the basis of the 1996 Leniency Notice. The Court reasoned that the Commission has a wide margin of appreciation in calculating leniency reductions and may take account of several factors, noting that an undertaking's fine may be reduced if it provides the Commission with useful information before a statement of objections is received, or if it does not substantially contest the facts on which the Commission bases its objections after receiving such a statement. With respect to the second possibility, the Commission had decided not to grant Cetarsa an extra reduction, arguing that Cetarsa had stated that the processors' cartel potentially anticompetitive effects were neutralized by other factors. However, the Court found that the documents to which the Commission referred did not contain such statements and thus granted Cetarsa an extra reduction of 10%.

The Court rejected all of Cetarsa's remaining arguments. Concerning the argument that the Commission had violated the principle of equal treatment by imposing only a symbolic fine on the participants in the second cartel, the Court responded that the cartel between the processors merited a different treatment given that it was secret (the negotiations with respect to the second cartel had taken place in the public domain) and involved price fixing as well as the allocation of quotas.

Concerning the argument that the Commission had violated the principle of proportionality in assessing the seriousness of the breach, the Court recalled the Commission's wide margin of appreciation in setting fines, and the range of factors that it may take into account in assessing the seriousness of a violation. The Court added that the factors relied upon by Cetarsa on appeal, such as the relatively small geographic market and the role of Spanish regulation, had all been taken into account in the calculation of the fine by the Commission. Cetarsa also argued that the Commission had duration of the infringement was incorrectly set by the Commission, as it had mistakenly taken into account a particular meeting between the processors and the representatives. The Court however upheld the assessment of the Commission that this meeting had to be considered part of the infringement.

The Court also underlined that the intensity of the infringement (*i.e.*, the fact that the cartel might have been implemented more intensely at certain times compared to others) is irrelevant when assessing the duration (contrary to the argument of Cetarsa).

Finally, with respect to the different treatment of the cartel participants, the Court found that the Commission had rightly argued that Cetarsa was by far the largest processor, and therefore rightly received the highest fine. There was also no reason to compare the applicant with Deltafina, an Italian tobacco processor, since these companies played a completely different role on the market.

Cases T-110/07, T-117/07, T-121/07, and T-122/07-T-124/07 *Siemens AG, Areva and Others, and Siemens AG Österreich and Others v. Commission*

On March 3, 2011, the General Court partially annulled the Commission's decision to impose fines on a number of companies involved in the gas insulated switchgear ("GIS") cartel in so far as the Commission had committed errors in the calculation of certain of the fines. In its 2007 decision,[15] the Commission had imposed fines totalling €750,712,500 on 20 companies for their participation in a cartel on the market for GIS between 1988 and 2004. The anti-competitive practices entailed, *inter alia*, coordination on a worldwide scale for the award of GIS projects, market sharing through allocation of quotas, and maintenance of market shares. The largest fine, €396,562,500, was imposed on Siemens AG.

Concerning Alstom and Areva, the General Court considered that the 50% uplift imposed on those companies for the role they played as "European secretary" to the cartel failed to take account of the fact that they fulfilled this role for a far shorter time (four years compared to 14 years) than Siemens, which was subjected to an identical fine increase. The General Court held that there was a "substantial difference" between the parties' levels of involvement and thus that the Commission's decision breached the principle of equal treatment.

14 Case COMP/C.38.238/B.2, *Raw Tobacco – Spain*, Commission Decision of October 20, 2004.

15 Case COMP/F/38.899 *Gas insulated switchgear*, Commission decision of January 24, 2007.

The General Court therefore reduced the uplift applied to Areva and Alstom to 35%, and that applied to Swiss subsidiary Areva T&D AG to 20%.

In the Siemens Österreich case, which involved an appeal by three Siemens subsidiaries, the General Court found that the Commission had committed an error in the calculation of the duration of the infringement. The General Court held that the Commission did not demonstrate to the requisite legal standard that Siemens' participation in the infringement restarted on April 1, 2002. It held that the evidence in the case file was not sufficient to demonstrate that VA Tech, a Siemens subsidiary, had returned to the cartel before June 2002.

In addition, the General Court rejected the applicants' argument concerning the calculation of the starting amount of the fine under the 1998 Fining Guidelines. The applicants contested the Commission's calculation of the starting amount of their fine by arguing that the companies were not part of the same group between 1998 and 2001, and that the Commission should therefore have used the individual turnover of each of these companies. This would have placed the companies in a lower band resulting in a lower starting amount of the fine.[16] In rejecting the applicants' claims, the General Court reasoned that:

(1) For the purposes of EU competition law, different companies belonging to the same group form a single undertaking. As a result, the individual fines imposed on the various companies that are part of that undertaking must be calculated on the basis of the turnover of the undertaking and not of the individual companies, except in exceptional circumstances.

(2) The Commission's practice of taking account, for the purposes of calculating fines, of the turnover of undertakings (and, therefore, where necessary, the cumulative turnover of all the companies which make up an undertaking) has always been consistent, should be familiar to economic operators, and has been implicitly accepted in the case law.

(3) The deterrence of fines is one of the factors by reference to which the gravity of infringements must be determined and, in order to be able to measure the dissuasive effect of a fine in respect of an undertaking which participated in an infringement, account needs to be taken of the situation as it stood at the end of the infringement, and not the situation as it may have stood at an earlier point in time.

(4) It would be impractical and completely excessive, in the light of the principle of good administration and the requirements of procedural economy, to require the Commission to take account of the evolution of the turnovers of the undertakings at issue throughout the entire duration of the cartel.

(5) In any event, the applicants were held liable only for the period during which they participated in the cartel, which means that the penalty imposed on them corresponds to their individual contribution to the infringement.

Finally, the appeal by parent company, Siemens AG, which raised a range of procedural and substantive objections to the Commission decision, was rejected in its entirety. In particular, Siemens argued that the Commission had not adequately proven the single and continuous nature of the conduct and that there had been two separate cartels (one lasting from 1988 to 1999 and the other lasting from 2002 to 2004) and therefore that the earlier cartel was time-barred by the time of the Commission's inspections in May 2004. In rejecting this argument, the General Court found that the cartel in which Siemens participated from 2002 was, in essence, the same cartel in which it participated until 1999. Siemens also argued that it had not been the "leader" of the cartel since its role as "European secretary" had been purely administrative, and thus that the Commission had erred in increasing the fine imposed on Siemens by 50%. The General Court rejected this argument, finding that Siemens, in its role as "secretary," had rendered a considerable service to the cartel and contributed in a special way to its proper functioning, and therefore had been properly classified as a "leader" of the cartel.

16 Under the 1998 Fining Guidelines (and no longer applicable under the 2006 Fining Guidelines), the Commission divided the various undertakings into different bands (based on their turnover in the relevant market) to take account of the different effective economic capacity to cause damage to competition and each band received a different fixed starting amount.

Cases T-375-379/06, T-381-382/06, and T-384-386/06 *Viega and others v. Commission.*

On March 24, 2011, the General Court handed down its judgments in ten appeals against the European Commission decision of September 20, 2006, fining 30 companies €315 million for colluding to fix the price of copper fittings between 1998 and 2004.

Concerning IBP's appeal, although the General Court found that the Commission erred in finding the existence of an aggravating circumstance consisting of the provision of misleading information, the Court deemed that this should not lead to a reduction in the amount of the fine.

Concerning the appeals of Kaimer, Sanha Kaimer, Sanha Italia, Tomkins and Pegler, the Court reduced the fines imposed because it found that their participation in the infringement was less than that determined by the Commission. The Court further reduced the fine imposed on Pegler, as it found that the Commission had erroneously applied a multiplier for deterrence when calculating its fine, and on Tomkins, because the Court determined that it should be held liable only in its capacity as parent company of Pegler.

The Court also annulled the fines imposed on Aquatis and Simplex, for which Aalberts had been held jointly and severally liable. This appeal was brought by Aalberts, Comap (formerly Aquatis, which was sold to Aalberts in January 2002), and Simplex (which in 2002 was integrated into the Aalberts group). Given that Aquatis and Simplex were members of the Aalberts group from June 25, 2003 to April 1, 2004, Aquatis and Simplex were held jointly and severally liable with Aalberts for that period.

Concerning Simplex, the General Court found that the Commission did not have sufficient evidence of an infringement during the period at issue as the Commission relied exclusively on events occurring in 2004 when finding an infringement during 2003 and that there was no documentary proof that Simplex had frequent telephone conversations with its representatives, contrary to the Commission's conclusion. As a result, the Court concluded that Simplex's participation in the infringement of Article 101 during the period between June 25, 2003 and April 1, 2004 had not been proven to the requisite legal standard and that the relevant part of the Commission's decision should be annulled.

With regards to Aquatis, the Court decided that Aquatis participated only in trade association meetings and that its participation in the meetings was not sufficient in itself to show that Aquatis participated in the infringement unless it knew or must have known that its conduct was part of an overall plan that included all the constituent elements of the cartel, which was not the case. In particular, the Court found that the discussion at the trade meetings were not pan-European in scope and that Aquatis could not therefore have foreseen that they were part of a wider arrangement. It also found that the Commission had not demonstrated that Aquatis was aware of the anti-competitive activities of the other undertakings when it took part in certain meetings or that it could reasonably have foreseen those activities.

The Court concluded that the Commission had erred in taking the view that Aquatis and Simplex had participated in the cartel during the relevant period, and therefore annulled the Commission's decision and cancelled the fines imposed on the two undertakings as well as on Aalberts, which was no longer liable as the parent of the two undertakings.

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