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EC Competition Report

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I. Vertical Restraints

I.I ECJ - Advocate General Opinion

Cases C-2/01 P and C-3/01 – Bayer.

On May 22, Advocate General Tizzano advised the European Court of Justice to reject the appeal by the Commission and the German federal association of pharmaceuticals importers of the Court of First Instance's judgment in *Bayer v. Commission.*[1]

The Advocate General's opinion examines the notion of an 'agreement' under Article 81 EC in the context of an alleged export ban aimed at restricting parallel trade in Bayer's cardiovascular drug, Adalat, from France and Spain to the United Kingdom. The Advocate General confirmed the Court of First Instance's holding that Bayer had engaged in purely unilateral behavior falling outside the scope of Article 81 EC. The Advocate General also confirmed that it is for the Commission to prove a violation of Article 81 EC, and that establishing a prima facie case is insufficient to shift the burden of proof to the defendant.

Between 1989 and 1993, the low prices of Adalat in Spain and France resulted in massive exports of the product to the United Kingdom, with the consequence that sales of Adalat by Bayer's British subsidiary almost halved during that period. Bayer consequently capped its sales to individual wholesalers at the levels sold to them prior to the significant growth in orders for export; Bayer did not fulfill orders exceeding those caps, but did not suggest or control the final destination of the products sold.

[1] Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure and Commission v. Bayer* opinion of May 22, 2003, not yet reported.

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On January 10, 1996, the Commission imposed a fine on Bayer for restricting parallel trade in Adalat. The Commission found that Bayer had (i) imposed an export ban on its wholesalers, (ii) made supplies of the product conditional on compliance with the alleged export ban, (iii) applied a policy of threats and sanctions against exporting wholesalers, and (iv) supported this policy by systematically monitoring the final destination of the packets of Adalat supplied.[2]

On appeal by Bayer, the Court of First Instance examined this evidence, and on October 26, 2000, held that the available evidence did not support the Commission's conclusions.[3] On the contrary, the Court of First Instance held that the evidence demonstrated that Bayer's policy had consisted of unilaterally limiting supplies to each of its wholesalers, and that such conduct must be regarded as unilateral because it did not involve express or tacit cooperation from wholesalers. Under such circumstances, Bayer's conduct could not be prohibited under Article 81 EC because Article 81 EC only prohibits anti-competitive agreements and concerted practices, and does not prohibit unilateral actions.

Before the Court, the appellants raised two principal arguments. First, they argued that the Court of First Instance's understanding of an 'agreement' under Article 81 EC was too narrow. Second, the appellants argued that the Court of First Instance's concept of an 'agreement' conflicted with the Court's prior case law. The Commission further argued that the Court of First Instance's restrictive interpretation would contribute to the foreclosure of national markets, thereby jeopardizing the Commission's competition policy objectives.

As to the proper scope of an 'agreement' under Article 81 EC, the Advocate General concluded that an export prohibition could not be regarded as an 'agreement' where, in order to prevent or limit parallel trade, a manufacturer establishes a quota system under which the manufacturer supplies wholesalers in certain Member States only with those quantities of the product that the manufacturer considers necessary to satisfy traditional domestic needs, provided the manufacturer does not:

- require, in any way whatsoever, that the wholesalers should refrain from exporting, or that they should adopt any particular behavior concerning the ultimate destination of the products supplied, or that they should respect a certain way of ordering the product;
- systematically monitor the ultimate destination of the products supplied;
- apply or threaten sanctions against wholesalers exporting the products;
- condition deliveries on export prohibitions; or
- try to obtain any kind of agreement from wholesalers on the implementation of the manufacturer's policy intended to reduce parallel trade.[4]

The Advocate General also noted that certain additional circumstances were relevant to this conclusion, including the following: (i) continuous commercial relations had existed for a long time between the manufacturer and the wholesalers, which were not governed by a written contract or established distribution system, but which took the form of a series of sales contracts concerning the product quantities ordered each time; (ii) following the introduction of the quota system and knowing its objective, wholesalers continued to purchase from the manufacturer, negotiating each time the quantities to be purchased; and (iii) to continue to export, wholesalers tried to circumvent the quota system by trying to source as much of the product as possible.

As to the relationship with the Court's prior case law, the Advocate General considered the two lines of cases cited by the appellants to support their allegation that the Court of First Instance had misapplied the law: (i) *Sandoz*, which concerned an explicit export ban formulated in invoices to wholesalers but not enforced;[5] and (ii) *AEG*, *Ford*

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2 Commission decision 96/478 of January 10, 1996 OJ 1996 L 201/1.

3 Case T-41/96 *Bayer v. Commission* 2000 ECR II-3383.

4 These facts were established by the Court of First Instance in its judgment. The Court can only review issues of law and not of fact. The Advocate General thus rejected the appellants' challenge to the facts as inadmissible, and rejected the appellants' claim that the Court of First Instance had adulterated the evidence as unfounded.

5 Case C-277/87 *Sandoz prodotti farmaceutici v. Commission* 1990 ECR I-45.

and *BMW*, which all concerned seemingly unilateral conduct in the context of selective distribution systems.[6]

Sandoz concerned sales to wholesalers accompanied by an invoice bearing the words "export prohibited." The Advocate General distinguished *Sandoz* on the grounds that Sandoz had expressed its wish concerning the conduct of wholesalers with respect to the desired final destination of the products ordered. Sandoz clearly invited or required wholesalers to cooperate by refraining from exporting the products ordered. According to the Advocate General, the Court could consider that wholesalers had tacitly accepted Sandoz's invitation or request to refrain from exporting by continuing to purchase from Sandoz regularly and without protesting.

By contrast, the Advocate General considered that the Commission had failed to prove that Bayer had requested or imposed any sort of behavior on wholesalers concerning the ultimate destination of the products ordered; Bayer had simply developed a strategy that enabled it to achieve autonomously the objective of reducing or eliminating parallel trade, without needing any cooperation from wholesalers. The notion of an agreement under Article 81 EC, as developed by the Court's case law, could not be extended to cover the circumstances in *Bayer*, where wholesalers continued to purchase from a manufacturer who attempted to eliminate their ability to export, yet without requesting wholesalers to undertake any particular course of conduct. If the concept of an agreement were extended to cover such circumstances, the Advocate General noted that this would lead to the absurd situation that an agreement could otherwise be concluded through the tacit acceptance of a proposal that was never formulated (even implicitly).

The Advocate General also considered that *AEG, Ford* and *BMW* did not support the view that the unilateral measures in question constituted an agreement under Article 81 EC. The cases all concern seemingly unilateral measures taken by the manufacturer in the context of an existing selective distribution system. The issue was not whether these measures in themselves were sufficient to constitute an agreement between the manufacturer and its distributors, but rather whether the legality under Article 81 EC of the distribution system should be determined in light of the manufacturer's actual behavior in implementing the agreements.

As to the burden of proof, the Advocate General rejected the appellants' view that it should be sufficient for the Commission to make a *prima facie* case under Article 81 EC concerning the existence of an agreement to shift the burden to Bayer to prove the contrary. In the Advocate General's view, the Commission must prove the infringing behavior it alleges with sufficient evidence. The Advocate General distinguished the *Anic* case cited by the appellants, on the grounds that the Commission had sufficiently demonstrated the existence of agreements restricting competition, and that the Court shifted the burden of proof only with respect to the defense of one of the undertakings that participated at a meeting with competitors but had allegedly not agreed to the restrictive practices.

It is difficult to forecast whether the Court will follow the opinion of the Advocate General. On the one hand, both the Court of First Instance and the Advocate General have both taken the same view, suggested that the Court may well follow in the same way; on the other hand, those attending the Oral Hearing before the Court felt that the Advocate General sympathized with the Court of First Instance's views, whereas the Court did not seem keen on the precedent set by the Court of First Instance.

If the Court focuses on Bayer's unilateral imposition of caps on sales to its wholesalers and absence of control or express suggestion concerning the final destination of the products sold, the Court may well confirm the Court of First Instance's judgment. In this case, the Court's judgment would represent a clarification of the boundaries of Article 81 EC that would likely be welcomed by many.

However, the Court may instead choose to focus on another significant aspect of the facts that seems to have been overlooked by the Court of First Instance and the Advocate General, namely, the reduction in the quantities sold by Bayer in Spain and France to the levels sold prior to the massive surge in exports. The Court might well conclude that this unilateral reduction forms part of Bayer's continuous commercial relations with its wholesalers, and that it should not therefore fall outside the scope of Article 81 EC.

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[6] Case 107/82 *AEG v. Commission* 1983 ECR 3151; Cases 25/84 and 26/84 *Ford and Ford Europe v. Commission* 1985 ECR 2725; Case C-70/93 *Bayerische Motorwerke* 1995 ECR I-3439.

In distinguishing the *AEG*, *Ford* and *BMW* cases, Advocate General Tizzano ascribed significant importance to the fact that they concerned the legality of selective distribution agreements. Nevertheless, the Court could rely on the reasoning of these cases, such as *Ford*, where Ford's decision to stop supplying Germany with right-hand drive vehicles was not regarded as a unilateral act falling outside the scope of Article 81 EC, as it formed part of the contractual relations between Ford and its dealers. In that case, the Court noted that admission to the Ford dealer network implied acceptance by the contracting parties of the policy pursued by Ford with regard to the models to be delivered in Germany. Similarly, the Court could take the view that the maintenance of contractual relations with Bayer implied acceptance on the part of wholesalers of the quantities of the product that Bayer was prepared to sell to them. Whether such acceptance occurs within or outside the scope of a selective distribution system is arguably irrelevant.

Alternatively, the Court might focus on the Advocate General's distinction of *Sandoz*, and consider that Bayer's reduction in quantities sent sufficient signals to wholesalers concerning the desired final destination of the products that wholesalers should be deemed to have tacitly accepted Bayer's tacit suggestion to refrain from exporting by continuing to purchase from Bayer regularly and without protesting.

If the Court annuls the Court of First Instance's judgment on the grounds described above, manufacturers' freedom to deal with their customers would of course be severely curtailed. This would likely give rise to lengthy debates and litigation on the sort of signals that should or might be perceived from manufacturers' conduct. On balance, such a situation seems significantly less attractive than the one established by the Court of First Instance's judgment and confirmed by the Advocate General.

2. HORIZONTAL AGREEMENTS

2.1 ECJ - ADVOCATE GENERAL OPINION

Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 – AOK Bundesverband and Others.

On May 23, Advocate General Jacobs rendered an opinion concerning the status under EC competition law of German sickness funds and the legality of pricing mechanisms applicable to pharmaceuticals that these funds finance.[7]

Under German law, most employees are required to belong to a statutory health insurance system. For certain products, the sickness funds set a maximum fixed amount for which they are liable, with the patient bearing any cost above that amount. The maximum fixed amounts are usually decided in a two-stage process. In the first stage, representatives of the associations of sickness funds and doctors decide which products will be subject to a maximum fixed amount; this selection is then approved by the Ministry of Health. In the second stage, the associations of sickness funds determine the maximum fixed amounts, following certain criteria laid down by law.

In the main proceedings, pharmaceutical companies sought to challenge the second stage decisions of the associations of sickness funds altering the maximum fixed amount payable for their products. The German court asked the European Court of Justice whether the sickness funds are subject to EC competition law, whether the decisions to set maximum fixed amounts falls within the scope of Article 81 EC, and whether such decisions could be justified as being necessary for the provision of a service of general economic interest.

The Advocate General advised that the sickness funds are undertakings within the meaning of EC competition law and that their decisions setting maximum fixed amounts fall within the scope of Article 81 EC, but only if the funds are not obliged by the applicable regulations to take such decisions. In addition, the setting of maximum amounts might be found to be necessary and proportionate to secure the financial stability of the sickness funds, and thus necessary for the funds to ensure the provision of a service of general economic interest.

The Advocate General considered that the degree of competition existing between the sickness funds, and between them and private insurers, demonstrates that their activity is economic in nature and that the sickness funds must therefore be considered as undertakings. The Advocate General added that decisions setting maximum fixed amounts fall within the sphere of the sickness funds' economic

[7] Joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* opinion of May 23, 2003, not yet published.

activity of providing health insurance. Finally, the Advocate General considered that the setting of fixed maximum amounts in principle falls within the scope of Article 81 EC, as the decision-making body consists exclusively of representatives of the funds, who are not acting independently and in the general interest, but have a clear interest in jointly setting the maximum fixed amounts as low as possible. Such conduct has the object and effect of restricting competition.

However, the Advocate General noted that Article 81 EC would not apply if the national court were to determine that national legislation requires anti-competitive conduct or creates a legal framework which eliminates any possibility of competition between undertakings. In this case, the Advocate General observed that the sickness funds were unable to avoid setting fixed amounts and that they were not entirely free under the applicable regulations to choose the precise level of the fixed amount. The Advocate General therefore suggested that the national court examine whether the sickness funds had used any remaining discretion to generate an appreciably greater restriction on competition than would have resulted from any other possible decision under the applicable regulations.

The Advocate General added that, in any event, the national court might find the conduct of the sickness funds to be justified as being necessary and proportionate to ensure the provision of a service of general economic interest by securing the financial stability of the sickness funds.

2.2 COMMISSION DECISION

Commission settlement with Gasunie in the Marathon case.

On April 16, the Commission decided to close its probe into the suspected refusal by Dutch gas company Gasunie to grant access to its pipeline network to the Norwegian subsidiary of US oil and gas producer Marathon in the 1990s.[8]

Gasunie's refusal was part of an alleged joint refusal to grant access to continental European gas pipelines in the 1990s by a group of five European gas companies. The case against Thyssengas was settled in 2001 after it promised to improve its third party access regime facilitating the use of Thyssengas' pipelines by third parties. These improvements related to transparency, balancing, short-term trading and congestion management. Similarly, Gasunie has undertaken (i) to increase transparency as regards access to its network, (ii) to improve its management of the capacity available, and (iii) to accelerate its handling of access requests.

In order to improve the transparency of its access regime, Gasunie will publish on its website—in absolute figures—the contracted transport capacity at all entry and all major exit points of its gas network; Gasunie will also inform about the capacity still available. This commitment relates not only to cross-border points, but also to domestic/national entry/exit points, and will make it easier for shippers to obtain information about available transmission capacity.

As regards balancing, Gasunie will assist shippers with a flexible supply source, to avoid situations of imbalance that can occur if the input and withdrawal of gas into the system are not identical, or if they deviate from the forecasted volumes. Gasunie will introduce a so-called online balancing system to avoid situations where suppliers/shippers are charged very high prices for the gas supplied by Gasunie due to an unexpected increase/decrease in consumption by one of their customers.

Finally, Gasunie has undertaken to improve its handling of access requests by introducing online screen-based booking procedures, which will lead to the elimination of lengthy response times. Online bookings are particularly relevant for short term trading. In addition to these main commitments, Gasunie pledged to offer the possibility of linking other pipelines to its own pipeline system.

The *Marathon* case is the latest of a series of cases concerning the gas sector resolved by the Commission in the past three years, as summarized below.

The *GFU* case concerned the joint marketing regime for Norwegian gas. The settlement reached with the Norwegian companies concerned led to individual marketing by the companies present on the Norwegian continental shelf, and the reservation by Statoil and Norsk Hydro of 15.2 billion cubic meters of gas for new customers over a period of four years.

The *Corrib* case concerned the application by three gas producers (Enterprise Oil, Statoil, Marathon) to jointly market their gas produced at the new Corrib gas field in Ireland for five years. The case was

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8 Commission Press Release IP/03/547 of April 16, 2003.

closed following discussions with the companies, which led them to withdraw the notification and to market their gas separately.

The *Endesa/GasNatural* case concerned a 'use restriction' clause in a gas supply contract between the Spanish gas company GasNatural and the Spanish electricity company Endesa, which prevented Endesa from using the gas for purposes other than power production. The case was closed following the deletion of the restriction from the contract.

The *EdF Trading/WINGAS* case concerned an anti-competitive clause in two gas supply contracts between UK-based gas supplier EdF Trading and German gas company WINGAS, which allowed WINGAS to reduce the volumes bought from EdF Trading—a so-called 'reduction clause'—if the latter were to start selling gas to competitors of WINGAS in certain parts of Germany. The case was closed following the deletion/amendment of that clause, thereby facilitating potential market entry of EdF Trading in Germany.

The *Nigeria LNG* case is part of the on-going investigation into so-called 'territorial sales restriction' clauses contained in a number of contracts between non-EU gas producers and European gas companies. The case concerned a gas supply contract of Nigeria LNG (NLNG), which prevented the European importer from reselling the gas outside a given Member State. The case was closed following the deletion of the clause from the contract and the commitment of NLNG not to introduce territorial and use restrictions into its future gas supply contracts. NLNG also undertook not to make use of so called 'profit splitting mechanism' obliging the buyer to share certain parts of the profit when selling outside an agreed territory, which created an impediment to parallel exports.

The *Synergen* case concerned the construction of a 400 MW gas-fired power plant in Ireland, called Synergen, a joint venture between the incumbent Irish electricity company ESB and the Norwegian gas supplier Statoil, a potential new entrant into the Irish power market. The joint venture was cleared after ESB committed to continue electricity auctions in the range of 400 MW until entry into the Irish market of a new independent power producer with a power plant of 300 MW capacity minimum. In this case, the Commission's competition department also cleared a 15-year exclusive gas supply contract, because the contract ensured the long-term presence of Statoil on the Irish gas market dominated until then by the incumbent Irish gas supplier BGE.

3. ABUSE OF MARKET POWER

3.1 ECJ - JUDGMENT

Case C-462/99 – Connect Austria.

On May 22, the European Court of Justice replied to certain questions relating to the application of Article 86 in conjunction with Article 82 EC, referred to it by an Austrian court in the context of a dispute between Connect Austria Gesellschaft für Telekommunikation GmbH (Connect Austria) and the national telecoms regulatory authority, Telekom-Control-Kommission.[9]

Since 1996, Mobilkom, in which the state is a majority shareholder, has held a license to provide digital mobile telecommunications services according to the GSM (Global System for Mobile Communication) 900 standard. In 1997, the first license to provide digital mobile telecommunications services according to the DCS (Digital Cellular System) 1800 standard was granted to Connect Austria. In 1998, the regulatory authority granted an additional license to Mobilkom, as an extension to its GSM 900 license, permitting it to offer digital mobile services in the frequency band reserved for the DCS 1800 standard. This additional licence was granted to Mobilkom without any additional charge.

Connect Austria argued that the grant of the additional license to Mobilkom violated of Article 86 and Article 82 EC, since Mobilkom was a public undertaking within the meaning of Article 86(1) EC that enjoyed exclusive rights, as it was the sole undertaking entitled to operate an analogue mobile telecommunications network. According to Connect Austria, the additional licence would strengthen Mobilkom's dominant position, as Mobilkom would become the sole operator in Austria able to offer the full range of mobile telecommunications services (analogue and digital GSM 900, and digital DCS 1800).

Mobilkom, maintained that the allocation to it of additional frequencies could not result in an abuse of a dominant position, as both GSM 900 and DCS

[9] Case C-462/99 *Connect Austria Gesellschaft für Telekommunication v. Telekom-Control-Kommission and Mobilkom Austria* judgment of May 22, 2003, not yet published.

1800 systems form part of the same product market, and there could be no extension of a dominant position to a neighboring market.

The Court did not accept Mobilkom's analysis. On the question of the appropriate market definition for mobile telecommunications services, the Court noted that this was a matter for the national court, but suggested three possibilities: (i) three distinct markets (analogue services, digital GSM 900 services, and digital DCS 1800 services); (ii) two distinct markets (analogue services, and digital services at both the GSM 900 and DCS 1800 standards); or (iii) only one market for mobile telecommunications services as a whole. However, the Court found that, irrespective of how the market is defined, Mobilkom was a public undertaking holding a dominant position.

Moreover, contrary to Mobilkom's argument, the Court did not consider the definition of the market to be significant to the finding of an abuse. This was because Mobilkom received a competitive advantage by being allocated additional frequencies in the DCS 1800 band without having to pay a separate fee, whereas a new entrant wishing to provide services according to the DCS 1800 standard would have to pay a fee. That advantage allowed Mobilkom either to extend its dominant position in a market for digital DCS 1800 services, or to reinforce its dominant position in either a broad market for all mobile telecommunications services, or in a narrower market for digital mobile telecommunications services.

The Court took the view that the grant of the additional licence might breach Article 86 and Article 82 EC, if the measure creates a situation in which a public undertaking cannot avoid abusing its dominant position.[10] Relevant in this regard was the fact that the additional licence may lead Mobilkom to offer reduced rates, in particular to DCS 1800 subscribers, or carry out intensive publicity campaigns, in conditions with which Connect Austria would find it difficult to compete.

Nevertheless, the Court did not rule out the possibility that an economic analysis might reveal that the fee paid by Mobilkom in 1996 for the GSM 900 licence, including the subsequent extension to DCS 1800, was equivalent, in economic terms, to the fee paid by competitors for the DCS 1800 licence (Mobilkom paid ATS 4 billion in 1996, whereas Connect Austria paid in 1997 only ATS 2.3 billion for the DCS 1800 licence). To find out whether this was the case, the national court would have to determine the economic value of the licences concerned, taking account of (i) the size of the different frequency clusters allocated; (ii) the time when each of the operators concerned entered the market; and (iii) the importance of being able to present a full range of mobile telecommunications systems.

3.2 Commission Decision

Deutsche Telekom.

On May 21, the Commission fined Deutsche Telekom €12.6 million as a result of DT's abuse of its dominant position through price or margin squeezing.[11] Price squeezing occurs when a company, which is dominant in an upstream market for a raw material or a facility, competes in the downstream market with companies that require access to that raw material or facility. In this circumstance, the dominant company can charge very high prices for the raw material or the use of the facility, while charging low prices to end-users in the downstream market. Competitors in the downstream market, however, cannot compete with those low prices, since they have to pay a high price for purchasing the raw material or using the facility.

According to the Commission, DT holds a dominant position on both the upstream market for wholesale access to the local loop in Germany, and on the downstream market for retail access to the local loop in Germany. As DT is the only German company with a nation-wide telecommunications network, DT holds a dominant position on the wholesale access market. In retail access, DT has around 95% market share, with the remaining 5% divided up between a large number of competitors.

In order to identify whether DT price squeezed its competitors, the Commission compared prices for upstream access to the local loops with a bundle of different types of retail offerings, namely analogue, ISDN, and ADSL connections. The Commission found that for the period from 1998 to 2001, DT charged its competitors more at the wholesale level than it charged its subscribers for access at the retail level. As of 2002, while prices for wholesale access were lower than retail subscription prices,

10 Case C-18/88 *GB-INNO-BM* 1991 ECR I-5941.

11 Commission Press Release IP/03/717 of May 21, 2003.

the difference was still not sufficient to cover DT's own downstream product-specific costs for the supply of the end-user services in question.

The reference to DT's own cost when examining whether a price squeeze occurred is interesting, since it deviates from the rule applied by the Court of First Instance in the *Industrie des poudres sphériques* case.[12] In that case, when evaluating the margin that the dominant undertaking must leave for its competitors in the downstream market, the Court of First Instance ignored the dominant firm's own costs, and referred instead to the costs of an 'efficient competitor.'

The Commission's decision is, however, consistent with its approach in *Napier Brown-British Sugar*,[13] where the Commission stated that an abuse exists if a dominant company maintains a margin (between prices charged for raw material and prices charged in the downstream market) that is insufficient to reflect that dominant firm's own 'cost of transformation.'

This approach is also in line with the recent *Chronopost* case (concerning state aid), in which the European Court of Justice had to examine whether the fee paid by Chronopost to its parent company La Poste covered the costs of the services it received.[14] In that case, while the Court of First Instance relied on the price that a private operator would charge for similar services, the Court considered that the correct reference is to the cost of the dominant company, La Poste. It should be noted, however, that a central element of the Court's reasoning was that La Poste's postal network was created as a result of a public service obligation, which was not imposed on a private company, and that it was therefore impossible to compare the situation of La Poste with that of a private company not operating in a reserved sector.

4. MERGERS AND ACQUISITIONS

4.1 CFI - JUDGMENT

Cases T-114/02 and T-119/02 – BaByliss v. Commission and Philips v. Commission.

On April 3, the Court of First Instance largely confirmed the Commission's decision to approve the merger between SEB and Moulinex, thereby rejecting most of the arguments raised in the appeals by BaByliss and Philips.[15]

In January 2002, the Commission authorized the merger, subject to commitments in nine countries (Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway), and without commitments in five countries (Spain, Italy, Finland, the United Kingdom and Ireland). For France, the Commission referred the case to the French authorities to review the transaction's effects on competition in France.[16]

The Court upheld the Commission's clearance in the markets subject to commitments, but annulled the Commission's clearance without commitments with respect to the other five countries. The Court also confirmed the Commission's decision to refer the case to the French competition authorities to assess the transaction's effects in France.

The right to appeal a referral decision. The Court held that the decision to refer the case to national competition authorities could be appealed. The referral decision individually and directly affects the legal situation of the applicant, as it deprives the applicant of the opportunity to have the Commission review the lawfulness of the concentration under the Merger Control Regulation. The applicant also loses the opportunity to challenge the decision before the Court as a result of the referral. The Court also confirmed that judicial review of a referral decision must assess the legality of the measure at the time of its adoption, not taking into account subsequent circumstances. As a result, it was irrelevant for the referral's legality that the French competition authorities approved the merger without commitments and based their decision on the failing firm defense which had been explicitly excluded by the Commission. The Court further acknowledged that Article 9(3) of the Merger Control Regulation confers a broad discretion upon the Commission concerning referrals, and the Court's judicial review is limited to estab-

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12 Case T-5/97 2000 ECR II-03755, para. 180.

13 OJ 1988 L 284/41.

14 Case 83/01 *Chronopost*, judgment of July 3, 2003, not yet reported.

15 Cases T-114/02 and T-119/02 *BaByliss v. Commission* and *Royal Philips Electronics v. Commission* judgments of April 3, 2003, not yet published.

16 Case COMP/M.2621 *SEB/Moulinex*; see also EC Competition Report January-March 2002, page 2.

lishing whether the Commission committed a manifest error of assessment.

Time limits within which undertakings must be submitted. The parties offered initial undertakings within the time limits provided in the Merger Control Regulation (three weeks after notification), but the Commission considered these insufficient. The parties therefore submitted revised undertakings after the expiry of time limits (five weeks after notification), which the Commission eventually accepted. The Court held that the time limits provided for the submission of undertakings by the notifying parties in the Merger Control Regulation are only mandatory for the notifying parties but not for the Commission. Even though the Commission need not examine commitments that have been submitted after the expiry of the time limits of the Merger Control Regulation, the Commission is entitled to examine such late commitments.

Duty to open a second phase investigation and the suitability of trademark licenses as remedies. The applicant argued that the Commission should not have accepted the license agreements as remedies in the first phase, because these were more complex to assess than divestitures; instead, the applicant argued, the Commission should have opened a second phase investigation. According to the Court, neither the Merger Control Regulation nor the Commission's Notice on remedies provide rules concerning the category of undertakings which may or must be accepted for Phase I or Phase II procedures.[17] Furthermore, the Court held that a license agreement was suitable as a remedy, especially considering the importance of the trademarks in the current case.[18]

Product range effect. The Court held that the Commission committed a manifest error of assessment when concluding that there were no serious competition concerns in Spain, Italy, Finland, the United Kingdom and Ireland. In essence, the Court found that the Commission had not properly examined whether the transaction would have raised competition concerns on these markets based on the product range effect.

The Commission examined the new entity's additional power derived from its range of strong trademarks for different product categories in a number of markets. The Court did not generally reject the possibility of relying on the product range effect theory, but emphasized that the validity of this theory needs to be supported by economic evidence for each individual case. It also clarified that the Commission's assessment of the product range effect theory must include all markets with high post-merger market shares, regardless of whether they result from an overlap in the parties' products.

The Commission is currently carrying out a second phase investigation into the competitive impact of the re-notified merger between SEB and Moulinex with respect to Spain, Italy, Finland, the United Kingdom and Ireland.

4.2 COMMISSION DECISION

Newscorp/Telepiù.

On April 2, the Commission authorized the acquisition of the Italian pay-television company, Telepiù, from Vivendi Universal, by Australian media group Newscorp, subject to undertakings.[19] As part of the transaction, Telepiù will be merged with Stream, a joint venture between Newscorp and Telecom Italia, and the only other pay-TV company in Italy. The Commission determined that this unified satellite pay-TV platform, known as Sky Italia, would strengthen Telepiù's existing dominance and create a quasi-monopoly in the Italian pay-TV market. The finding that pay-TV faces some limited competition from cable TV led the Commission to conclude that the merger would result in a quasi-monopoly instead of a monopoly.

Substantially the same transaction was cleared in 2001 by the Italian competition authorities. In this earlier transaction, Vivendi proposed to acquire Stream and merge it with its subsidiary Telepiù. The transaction in which Stream was the target (as opposed to Telepiù) did not meet the EC notification thresholds and was therefore scrutinized by Italian competition authorities. The Italian competition authorities cleared the acquisition subject to extensive conditions; Vivendi, however, did not

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17 Commission Notice on remedies acceptable under Council Regulation 4064/89 and under Council Regulation 447/98 OJ 2001 C 68/3.

18 See also Case T-102/96 *Gencor/Commission* 1999 ECR II-753, where the Court held that trademark licenses, even though behavioral in nature, should not for this reason alone be excluded as a sufficient remedy.

19 Case COMP/M.2876 *Newscorp/Telepiù.*

proceed with the acquisition. The parties restructured the transaction and notified Newscorp's acquisition of Telepiù to the Commission in October 2002. Contrary to the earlier transaction, Telecom Italia will hold a minority stake in the new entity.

The prior clearance at the national level influenced the Commission's assessment, and in light of the impending modernization of the enforcement provisions of the Merger Control Regulation, it would have been difficult for the Commission to deviate from the earlier decision taken by the Italian competition authorities.

The Commission defined the relevant market as the supply of pay-TV services, confirming that pay-TV and free-to-air TV belong to distinct product markets. Notwithstanding the narrow market definition, the Commission took the view that free-to-air TV is able to constrain the behavior of the merged entity to some extent. This approach partly explains the readiness of the Commission to approve the merger, notwithstanding the fact that the transaction would result in a quasi-monopoly and raised competition concerns by hindering both intra-platform and inter-platform competition.

Newscorp argued that the merger should have been approved based on the 'failing firm defense', as Stream would unavoidably exit the market in the event that the merger was blocked. The failing firm defense was first used by the Commission in *Kali und Salz*[20] and further developed in *BASF/Eurodiol/Pantochim.*[21] Under this defense, a transaction may be approved as a 'rescue merger' if, as a result of the merger, the competitive structure of the market does not deteriorate more than would have been the case in the absence of the merger. The failing firm defense applies only if the following criteria are met: (i) the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking; (ii) there is no less anti-competitive purchase; and (iii) the assets to be acquired would inevitably exit the market if not taken over by another undertaking.

The Commission considered that these criteria were not met in this case. However, the Commission determined that the risk of Stream's exiting the market was a factor that could be taken into account when assessing the compatibility of the merger with the common market. In this regard, authorizing the merger subject to appropriate conditions was considered to be more beneficial to consumers that the likely closure of Stream. The decision may therefore be read to suggest that the Commission is prepared to take into account the financial reality of the industry in question and compare the conditions of competition after the prospective closure of a business with the situation where the prospective merger or acquisition is allowed to proceed, even where the criteria for the failing firm defense are not met.

To alleviate competition concerns and to ensure that the Italian market for pay-TV remains open, the Commission imposed both structural and behavioral undertakings. The undertakings require access to be granted to Sky Italia's platform, and reduce the duration of Sky Italia's exclusive direct-to-home and other broadcasting rights. The undertakings also require that Sky Italia's premium channels be made available to other pay-TV platforms. As regards structural remedies, Newscorp undertook to divest Telepiù's digital and analogue terrestrial broadcasting activities. To ensure effective implementation of the commitments, it was agreed that the Italian Communications Authority would oversee their implementation.

The Commission expressed some concern about the minority shareholding that Telecom Italia will hold in Sky Italia. According to the Commission, Telecom Italia's involvement would have created an incentive for it not to compete with the combined platform, both by choosing not to enter the pay-TV market, and by cooperating with the combined platform. The Commission also expressed fears of a possible strengthening of Telecom Italia's dominant position through the potential vertical combination of Sky Italia's pay-TV rights and Telecom Italia's telecommunications infrastructure. Pursuing these concerns would, however, have required the Commission to expand the scope of the Merger Control Regulation to cover situations where the concentration creates or strengthens a dominant position of a third party. The Commission decided not to take this radical step, possibly for fear of being overturned by the Court. Instead, the Commission abandoned these concerns, on the grounds that the evidence gathered was insufficient to show cause for concern.

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[20] Case IV/M.308 *Kali+Salz/MDK/Treuhand*; Cases C-68/94 and 30/95 *France v. Commission* 1998 ECR I-1375.

[21] Case COMP/M.2314 *BASF/Eurodiol/Pantochim.*

5. JOINT VENTURES

5.1 COMMISSION DECISION

DaimlerChrysler/Deutsche Telekom/JV.
On April 30, the Commission authorized the acquisition of joint control by DaimlerChrysler Services AG and Deutsche Telekom AG of the newly created joint venture Toll Collect GmbH.[22] Toll Collect will establish and operate a system for the collection of distance-based road tolls that the German Government will impose on heavy trucks for the use of German motorways. The toll collection system will operate through onboard units installed in trucks; these onboard units may also be used as a platform to provide telematics services (localization services and text services), provided that the German Government approves the use of the Toll Collect system for the supply of such services.

The Toll Collect onboard units will be available free of charge to truck owners. As these same onboard units can be used for telematics services without any further technical adaptations, it is very unlikely that any truck owner would choose to buy a separate, costly telematics unit provided by another supplier. Instead, truck owners are likely to use exclusively the combined device provided by Toll Collect.

As DaimlerChrysler is the biggest German truck manufacturer and one of the most important suppliers of telematics systems for transport and logistics undertakings, it could easily acquire a gatekeeper function by preventing access by third-party providers to the Toll Collect system. This led the Commission to conclude that the joint venture could lead to a dominant position of DaimlerChrysler on the rapidly growing market for telematics systems for transport and logistics businesses in Germany.

To alleviate the Commission's concerns, the parties offered significant commitments. First, an independent Telematics Gateway company will be formed, over which the parties will not be allowed to exercise decisive influence. This company will operate a central interface through which telematics services can be provided to all trucks equipped with Toll Collect onboard units, and all providers of telematics services must obtain non-discriminatory access to the Telematics Gateway. The joint venture itself is further required to provide telematics services only via Telematics Gateway.

However, the parties may deviate from these commitments if it is deemed necessary to guarantee the security of the operation of the toll collection system. In addition, the Commission emphasized that the toll collection function of the Toll Collect system is considered to have priority over telematics services. This may lead to a compulsory re-allocation of the capacity (momentarily free for the supply of telematics services) within the Toll Collect system, if the German Government later requires the joint venture to expand the toll collection function of the Toll Collect system.

The parties have also undertaken to develop a Global Positioning System interface for the onboard units to connect third-party peripherals to the Toll Collect system, and the parties will develop a toll collection module that can be integrated into third-party telematics devices. Finally, DaimlerChrysler undertakes not to commence providing telematics services before it has received approval by the Commission, which will be granted only after the commitments have been put in place and a level playing field has been established.

The Commission has expressly stated that its authorization of the joint venture does not prejudice a decision on the compatibility of the German toll system with EC law. The Commission may therefore separately decide to investigate whether the German toll system and the tax relief granted to German transport and logistics undertakings violate EC provisions.

6. STATE AID

6.1 ECJ - JUDGMENT

Cases C-83/01 P, C-93/01 P and C-94/01 P – Chronopost.
On July 3, the European Court of Justice upheld an appeal brought by La Poste, Chronopost (the express mail subsidiary of the French postal operator La Poste) and France against a judgment of the Court of First Instance.[23] The case concerns the

[22] Case COMP/M.2903 *DaimlerChrysler/Deutsche Telekom/JV*.

[23] Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and others v. Ufex and others* judgment of July 3, 2003, not yet reported.

service fee that Chronopost pays to La Poste in consideration for access to La Poste's postal network, and the proper method of determining whether that fee was compatible with state aid rules.

In 1998, the Commission held that La Poste's logistical services did not amount to state aid, because the fee paid by Chronopost covered the costs of these services, plus a mark-up remunerating equity capital investment.[24] The Court of First Instance annulled this decision, holding that the Commission had failed to take into account the fact that La Poste enjoyed a monopoly in the non-express mail sector.[25] According to the Court of First Instance, this may have allowed La Poste to provide its logistical services at a lower cost than that of a private company without monopoly protection. The Court of First Instance therefore stated that the proper test for assessing Chronopost's fee was whether the fee equaled the price that a private operator not enjoying a reserved monopoly would charge for the services in question.

The Court disagreed with the Court of First Instance's reasoning. La Poste's postal network was established because of La Poste's public service obligation; as a result of the characteristics of the service that La Poste must be able to ensure, the creation and maintenance of its network are not in line with a purely commercial approach. The network would thus never have been created by a private undertaking. As a result, the Court concluded that it is impossible to compare the situation of La Poste with that of a private company not operating in a reserved sector.

The Court held that the proper test to assess the compatibility with state aid rules of the fee paid by Chronopost is to examine whether the fee covers all the additional, variable costs incurred in providing the logistical assistance, an appropriate contribution to the fixed costs arising from use of the postal network, and an adequate return on the capital investment, insofar as it is used for Chronopost's competitive activity, provided that there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion.

Cases C-328/99 and C-399/00 – Italy and SIM 2 Multimedia v Commission.

On May 8, 2003 the European Court of Justice partially annulled a Commission decision concerning the Italian company Seleco, and its subsidiary Multimedia, and held that Multimedia was not liable to repay state aid granted to its parent company Seleco.[26]

Seleco had received state aid from various public entities during the 1990s, and the Commission initiated proceedings against Seleco in 1994. Seleco hived off its most valuable assets to its subsidiary, Multimedia, in 1996; this subsidiary was subsequently sold to third parties, and in 1997, Seleco was declared bankrupt. By decision of 1999, the Commission required the Italian Government to recover the state aid from Seleco, and Multimedia insofar as it was not recoverable from Seleco.

On appeal, the Commission argued that Multimedia should be considered as a recipient of the aid because it had received its assets from Seleco. However, the Court found that Multimedia's purchase price corresponded to an independent expert's assessment of the value of Multimedia's assets before its sale. The Court also found that while the Commission had acknowledged that the transfer price was one of the elements that had to be taken into account, the Commission failed to take into account the purchase price. The Commission had also failed to consider the consequences that its order may have on the purchasers of Multimedia. The Court therefore concluded that the Commission's decision was vitiated by an error of reasoning with respect to Multimedia's liability, and annulled the decision insofar as it rendered Multimedia liable for the state aid granted to Seleco.

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[24] *SFMI – Chronopost*, OJ 1998 L 164/37.

[25] Case T-613/97 *Ufex* 2000 ECR II-4055.

[26] Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission,* judgment of May 8, 2003, not yet reported.

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