HORIZONTAL AGREEMENTS

ECJ Judgments

Schenker & Co. AG and Others (Case C-681/11)

On June 18, 2013, the ECJ issued its judgment following a reference for a preliminary ruling from the Austrian Supreme Court. The Austrian Competition Authority brought proceedings against several freight forwarding undertakings for, *inter alia*, a breach of Article 101(1) TFEU. The undertakings concerned had been engaged in price agreements for many years under the auspices of the Spediteurs-Sammelladungs-Konferenz ("SSK"), an interest group that was part of an association that represented the collective interests of freight forwarding agents and of logistics service providers with a forwarding license.

The SSK was established on May 30, 1994, subject to approval of the Kartellgericht, the competent national competition authority/court. On February 2, 1996, the Kartellgericht declared that the SSK was a so-called "minor cartel" under Austrian law, and could therefore be implemented without approval. The SSK also sought legal advice which confirmed that the SSK constituted a minor cartel not subject to approval.

After the Commission raided the premises of the undertakings concerned on October 11, 2007, the SSK and its overarching association engaged in discussions regarding the application of competition law to the SSK on November 29. 2007. It was decided to immediately dissolve the SSK.

The Higher Regional Court in Vienna had held, on the application of the Federal Competition Authority, that the undertakings involved in the SSK did not infringe Article 101(1) TFEU, due to an absence of fault. It took into account, *inter alia,* the February 2, 1996 order of the Kartellgericht that the SSK was a minor cartel, and the fact that the undertakings had sought legal advice. It furthermore held that it is for the Commission alone to find infringements without imposing a fine (as the Federal Competition Authority had requested).

On appeal, after the Commission submitted written observations on the case, the Austrian Supreme Court decided to stay the proceedings and ask the ECJ to clarify whether an undertaking can be punished for a breach of Article 101(1) TFEU where it erroneously assumed that its conduct was lawful. The Austrian Supreme Court requested that the ECJ explain in particular how specialized legal advice or a decision of a national authority could affect this assessment.

The ECJ held that an infringement has been committed intentionally or negligently where the undertaking concerned cannot be unaware of the anticompetitive nature of its conduct. National competition authorities may exceptionally decide not to impose a fine even though Article 101(1) TFEU has been infringed intentionally or negligently, e.g., where the principle of protection of legitimate expectations has been violated. However, "a person may not plead breach of [this principle] unless he has been given precise assurances by the competent authority . . . It follows that legal advice given by a lawyer cannot, in any event, form the basis of a legitimate expectation on the part of an undertaking that its conduct does not infringe Article 101 TFEU or will not give rise to the imposition of a fine[.]" The ECJ further explained that, because NCAs "do not have the power to adopt a negative decision, that is to say, a decision concluding that there is no infringement of Article 101 TFEU . . . they cannot cause undertakings to entertain a legitimate expectation that their conduct does not infringe that provision."[1]

The ECJ also confirmed that NCAs "may by way of exception confine themselves to finding . . . infringement

[1] *Schenker & Co. AG and Others* (Case C-681/11), judgment of June 18, 2013, not yet published, paras. 42-43.

without imposing a fine where the undertaking concerned has participated in a national leniency programme."[2]

[2] *Ibid*., para. 50.

INTELLECTUAL PROPERTY AND LICENSING

General Court Judgments

Members of the International Confederation of Societies of Authors and Composers (CISAC) v. Commission (Cases T-392/08, T-398/08, T-401/08, T-411/08, T-413-422/08, T-425/08, T-428/08, T-432-434/08, T-442/08 and T-451/08)

On April 12, 2013, the General Court delivered a series of parallel judgments to partly annul the Commission decision of July 16, 2008[3] addressed to 24 collecting societies ("CSs") located in the European Economic Area ("EEA") – all members of the International Confederation of Societies of Authors and Composers ("CISAC") – and to CISAC itself concerning the exploitation of musical copyright over the internet, by satellite, and by cable retransmission.[4]

The General Court upheld several aspects of the Commission's decision. The General Court allowed the Commission's prohibition on the so-called "membership clauses" that restrict the ability of authors of musical works to choose the CS that they wish to join. The clause foreclosed a CS from signing on an author who is already affiliated with another CS or is a national of a state in which another CS is operating. The General Court also upheld the prohibition on "exclusivity clauses," which give each CS, in the Member State in which it is established, absolute territorial protection against other CSs.

In the same decision, the Commission found concerted practices among numerous CSs in violation of former Article 81 EC [now Article 101 TFEU].[5] The Commission, however, imposed no fine.[6] The concerted practices at issue involved reciprocal representation agreements ("RRAs") between CSs. These RRAs were based on a non-binding model contract drawn up by CISAC covering all forms of copyright exploitations, including online forms. Under such RRAs, each party gave the other the right to license for any public performance musical works of its members in the licensee's country. According to the Commission, the CSs applied the RRA model contract in such a way as to limit each licensor's CS's right to grant licenses of its repertoire in the territory of the other CS.

The Commission did not object to the existence and use of standard RRAs, or questioned the need for cooperation between the CSs. The Commission also did not object to the territorial limitations of the RRAs. It took issue only with including such limitations in all RRAs, which it regarded as a concerted practice.

CISAC and some CSs appealed the Commission's decision, arguing that the Commission did not satisfy the required standard of proof with respect to the concerted practices regarding the setting of national territorial limitations concerning the mandate included in the RRAs.

The General Court confirmed the Commission has the burden of proof with respect to each element of the infringement. Based on the presumption of innocence as enshrined in Article 6 of the European Convention on Human Rights ("ECHR"), the infringement cannot be considered proven if doubts exist. According to the General Court, this principle, which always has been applied with respect to cases involving fines, also had to be applied in the present case, although no fine has been imposed. This is because the statement of objections envisaged imposing a fine, and also because a decision of the Commission can have an important reputational impact on the undertaking concerned.

In this context, the General Court examined the evidence on which the Commission had based its decision. The

3 *CISAC* (COMP/C2/38.698), Commission decision C (2008) 3435 of July 16, 2008.

4 Most of the judgments seem to be in substantially similar terms (apart from some procedural questions). The Spanish Society had not appealed in time against the Commission's decision, and BUMA and SABAM had not appealed at all. The Swedish Society's appeal was dismissed, as it had not made the arguments concerning lack of evidence in time.

5 *Supra* note 3, paras. 222 and 223.

6 For further information with respect to the Commission decision, please see the EC Competition Report of July-September 2008.

Commission regarded the historical links between the exclusivity clause and the territorial limitations, as well as agreements between the CSs, as sufficient formal evidence to prove the existence of a concerted practice. The General Court found that the evidence adduced by the Commission was not sufficient to prove infringement because the elements on which the Commission based its conclusion had become obsolete. More precisely, the Commission referred to the Sydney Agreement[7] concluded between the CSs to show that that agreement did not constitute an appropriate response to the Commission's objections regarding the concerted practice relating to the national territorial limitations. The Sydney Agreement became obsolete as regards the multi-territorial scope of licenses relating to exploitation via satellite due to the adoption and transposition of the Directive 93/83.[8]

The General Court went on to consider whether the parallel agreements could only be the result of a concerted practice and ruled that the applicants' alternative explanations were sufficiently convincing and, accordingly, that the Commission's conclusion could not stand. The CSs had argued that they needed to be able to effectively monitor in their domestic territory and ensure that the royalties due to copyright owners were not reduced and that there was a single licensing body in each Member State. The Commission concluded that an authorized user's broadcasts could be monitored remotely, but that did not solve the problem of unauthorized users. The Commission did not explain how CSs would help each other, e.g., with granting multinational licenses, while at the same time remaining competitors. The CSs in a given Member State would have little incentive to pay the costs of detecting unauthorized broadcasting if the user could get a license from a different CS. The General Court concluded that the Commission had not explained how unauthorized use would be prevented if there were competition between CSs. Furthermore, the Commission could not explain how the market should work in light of the decision itself.

7 Through the so-called "Sydney Agreement," the CSs, in 1987, inserted into the model contract a provision providing that the CS established in the country from which the signals carrying the programs went to the satellite was authorized to grant licenses covering the entire footprint of the satellite, where necessary after having consulted or obtained the consent of the other CS concerned.

8 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 1993 L 248/15.

UNILATERAL CONDUCT

Commission Decisions

Microsoft – Tying (Case AT.39530)

On March 6, 2013, the Commission adopted a decision under Article 23 of Regulation 1/2003, fining Microsoft for failure to comply with Article 9 commitments entered into following the Commission's 2009 Internet Explorer investigation.

In January 2009, the Commission issued a Statement of Objections ("SO") to Microsoft with respect to a complaint brought by the Norwegian browser software developer, Opera. The SO set out the preliminary conclusion that Microsoft had abused a dominant position in the market for client PC operating systems by tying its own web browser, Internet Explorer, to its Windows operating system. These practices excluded competition in the Internet browser market and reinforced Microsoft's dominant position in the primary market for client PC operating systems because browsers offered an alternative, web-based platform for third party applications that could partly replace the underlying client PC operating system.

The Commission's concerns were resolved by way of a Commitment Decision[9] under Article 9 of Regulation 1/2003,[10] adopted in December 2009. The decision required Microsoft to eliminate the technical and commercial distribution tie between Internet Explorer and Windows. The decision also required Microsoft to introduce a "browser choice screen," a menu showing alternative browsers to Internet Explorer, with links to download the required software. The browser choice screen had to be shown to all EEA users of Windows XP, Windows Vista, Windows 7 (and future versions of Windows) that had Internet Explorer set as their default browser. The Commission hoped that the browser choice screen would enhance competition in browsers, leading to more widespread use of browsers that run on multiple operating system platforms (not just Windows). The decision required Microsoft to make the browser choice screen available from March 2010 (thirteen weeks after the adoption of the Commitment Decision) until mid-December 2014.

In June 2012, the Commission received information from a developer concerning an alleged irregularity with regard to the roll-out of the browser choice screen with Windows 7. According to this information, the browser choice screen had not been displayed to certain EEA users of PCs running Windows 7. In July, Microsoft acknowledged that the browser choice screen had not been displayed to EEA users purchasing PCs with Windows 7 Service Pack 1 pre-installed and who had Internet Explorer set as the default browser. Further correspondence between the Commission and Microsoft culminated in the Commission issuing the first-ever SO in relation to an alleged breach of an Article 9 decision. The SO formally charged Microsoft with having violated its 2009 commitments by failing to deliver the browser choice screen to the affected users. Microsoft acknowledged the failure, stating in a letter to the Commission: "There is no ambiguity in the relevant Commitment language. There is no question as to how to apply that language to the facts. There is no important matter of principle at stake. There is, rather, a clear obligation, fully understood by all the relevant people at Microsoft through the entire chain of management, and an error in executing on our obligation."[11]

On March 6, 2013, the Commission adopted an infringement decision under Article 23(2)(c) of Regulation 1/2003, formally finding that Microsoft had breached the Article 9 decision. The Commission found that around 15 million EEA users had been affected by Microsoft's infringement.

9 *Microsoft – Tying* (Case COMP/C-3/39.530), Commission decision of December 16, 2009.

10 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

11 *Microsoft – Tying* (Case AT.39530), Commission decision of March 6, 2013, para. 26.

Fines for breaches of a commitment decision are imposed pursuant to 23(2)(c) of Regulation 1/2003, whereas the legal basis for the Commission's general fining guidelines for antitrust infringements (published in 2006)[12] is article 23(2)(a). Although the guidelines were therefore not directly applicable, the Commission's methodology for calculating the fine imposed on Microsoft took into account the same elements set out in the guidelines, i.e., gravity, duration, deterrence, and mitigation. The Commission made the following observations:

Although Microsoft's error was attributable to inadvertent technical and human errors, the company had sufficient technical expertise and familiarity with competition law proceedings (including proceedings before the Commission and Courts) to have implemented more effective processes that would have avoided such an error.

Failure to comply with a commitment decision was, in principle, a serious breach of EU law because it undermined the effectiveness of the Article 9 mechanism. In this specific case, effective implementation of the browser choice screen was a key element of the remedy. Given the seriousness of the breach, it was not relevant that Internet Explorer's market share had declined during the period in which the browser choice screen had not been shown to some users.

The duration of Microsoft's failure to comply, 14 months, represented a "significant" part of the overall duration of the commitments (4¾ years).[13]

Undertakings bound by an Article 9 decision are obliged to adopt swift action to remedy any breach of the commitments. Microsoft's prompt response to correct its error, once made aware of it, therefore could not be a mitigating factor. Nor did the novelty of the infringement (i.e., breach of a commitment decision), Microsoft's *ex post* efforts to avoid future errors, or Microsoft's offer to extend the duration of the commitments, warrant a fine reduction.

[12] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, OJ 2006 C 210/2.

[13] *Supra* note 11, para. 65.

The Commission fined Microsoft €561 million, around 1% of Microsoft's worldwide turnover in the preceding business year.

MERGERS AND ACQUISITIONS

General Court Judgments

Spar Österreichische Warenhandels AG v. Commission (Case T-405/08)

On June 7, 2013, the General Court upheld the Commission's[14] conditional phase I approval of Rewe Group's ("Rewe") acquisition of the Austrian retail chain Adeg Österreich Handels AG ("Adeg"). The Commission concluded that the overlaps between the merging parties in the Austrian retail and wholesale markets for everyday consumer goods would likely lead to higher prices in certain areas in Austria. The Commission conditioned its clearance on Rewe's commitment to divest Adeg-owned stores in the affected areas and to permit independent merchants that form the Adeg retail network to affiliate themselves with other retail chains. Spar Österreichische Warenhandels AG ("Spar"), a competitor of the merging parties, challenged the Commission's decision, arguing that (i) the Commission should have launched an in-depth investigation; (ii) the commitments were not sufficient to remove the competitive concerns raised by the merger; and (iii) the Commission violated Spar's rights to be heard and involved in the procedure. Spar claimed that the Commission disregarded the concentrated nature of the market and underestimated the competitive constraint exercised by Adeg pre-transaction. The General Court dismissed Spar's appeal. The General Court confirmed that it has jurisdiction to review the Commission's economic analysis only with respect to procedural errors and the Commission's duty to provide reasons for its decisions. The General Court acknowledged that the Commission has a margin of discretion in its analysis of markets, is not bound to use specific tools or sets of information, and can take into consideration all available data (including those submitted by the parties). The General Court also ruled that the Commission is not obliged to follow its previous decisional practice if the case under consideration is distinguishable based on its context and structure.

The General Court rejected Spar's claims that it should have been involved in the merger review process. The General Court explained that, in the context of a conditional approval of a merger in Phase I (adopted pursuant to Article 6(2) of the Merger Regulation),[15] the Merger Regulation does not give third parties a right to be heard or to receive or comment on proposed commitments.

Second-phase Decisions With Undertakings

Johnson & Johnson/Synthes (Case COMP/M.6266)

On April 18, 2012, the Commission cleared Johnson and Johnson's ("J&J") acquisition of Synthes, Inc, ("Synthes"), subject to J&J's commitment to divest its entire trauma business in the EEA.[16]

J&J manufactures and markets consumer products, pharmaceuticals, medical devices, and diagnostics equipment. Synthes is active in the supply of a wide range of surgical devices and biomaterials. The Commission's investigation focused on the following overlap markets, some of which it further subsegmented into sub-markets: (i) trauma devices, (ii) spine devices, (iii) shoulder replacement devices, (iv) devices for facial and skull fractures, and (v) surgical power tools. In line with its decisional practice, the Commission defined national geographic markets for each of these markets.

Following its Phase II investigation, the Commission concluded that the transaction would not give rise to competition concerns in the markets for spine devices, shoulder replacement devices, devices for facial and skull fractures, and surgical power tools. The Commission's conclusions were based largely on its finding that, in each of these markets, the merged entity would continue to face strong competition post-transaction.

[14] *REWE/ADEG* (Case COMP/M.5047), Commission decision of June 23, 2008.

[15] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2004 L 24/1 (the "Merger Regulation").

[16] European Economic Area.

The Commission did, however, conclude that the transaction would raise competition concerns in the market for trauma devices. Trauma devices are used to treat bone fractures throughout the upper (including hand and wrist) and lower (including foot and ankle) extremities and the pelvis. The Commission found that, post-transaction, the merged entity would have high market shares in several trauma device sub-markets: (i) plating systems; (ii) intramedullary ("IM") nails; (iii) compression hip screws; (iv) IM hip screws; (v) cannulated screws; (vi) ancillaries; and (vii) external fixation devices.

The Commission also concluded that the trauma device markets were characterized by significant barriers to entry, including the importance of a strong brand and the ability to provide continuous training to surgeons in the use of the entrant's devices. The Commission noted that Synthes maintained a particularly strong position with respect to training due to its long-standing cooperation agreement with AOF, a Swiss non-profit organization that provides training for surgeons in the use of trauma devices, spine devices, and devices for facial fractures. The Commission found that the transaction would significantly strengthen Synthes's already unrivalled training capabilities (flowing from its cooperation with AOF), further reducing any potential for new entry.

The Commission concluded that the R&D costs associated with entering a trauma devices market represented a more moderate barrier to entry, which was nevertheless significant because of Synthes' R&D cooperation with AOF. Furthermore, the Commission was of the view that the trauma device markets were mature, with limited scope for potential competition from companies active in the neighboring markets.

For the reasons set out above, the Commission concluded that the transaction would significantly impede effective competition in certain national markets for plating systems and cannulated screws. However, the Commission found that competition concerns did not arise in the following trauma devices markets: IM nails and compression hip screws (in each case, because the parties would continue to face strong competitors), IM hip screws (because the parties would have a high combined market share only in Bulgaria, which is a bidding market, meaning that market shares do not provide an accurate view of market power), ancillaries (because hospitals would switch if faced with increase in price), and external fixation (because J&J's sales in this market were *de minimis*).

The Commission concluded that the transaction would not give rise to conglomerate effects in any of the trauma markets. Although some third parties suggested that the merged entity could bundle trauma devices with other orthopedic devices (such as joint reconstruction or prostheses), the Commission's market test indicated that these products are not frequently offered together and that, in any event, other suppliers would be able to offer similar packages. The Commission also dismissed concerns that Synthes's R&D and training arrangements with AOF could be extended to other fields, noting that such extensions had not proved successful in the past.

To address the Commission's concerns, J&J offered to divest its entire EEA trauma business, including business lines and geographies as to which the Commission did not identify any competition concerns. Unlike in other cases, in which the Commission accepted remedies packages broader than strictly necessary to remedy competition law concerns (e.g., *Universal Music Group/BMG Publishing*),[17] the Commission did not explain why a more limited remedies package would have been insufficient.

The hearing officer's report on the case revealed that, during its investigation, the Commission had committed a number of errors in its analysis of market shares, accepted erroneous data provided by a respondent to the market investigation, and used an incorrect formula for its market share reconstruction exercise. On realizing these errors, the Commission dropped its concerns related to the market for spinal devices.

[17] *Universal Music Group/BMG Publishing* (Case COMP/M.4404), Commission decision of May 22, 2007.

First-phase Decisions Without Undertakings

Rosneft/TNK-BP (Case COMP/M.6801)

On March 8, 2013, the Commission unconditionally cleared the acquisition of sole control of TNK-BP Limited ("TNK-BP") by OJSC Oil Company Rosneft ("Rosneft"). The acquisition brought together Russia's largest (Rosneft) and third largest (TNK-BP) oil producers. Both Rosneft and TNK-BP are active in the upstream markets for the exploration, development, production, and sale of crude oil and natural gas, as well as in the downstream markets for the supply of refined products. Rosneft is majority owned by the Russian state.

The Commission reviewed the transaction as a single concentration, even though Rosneft acquired the interests in TNK-BP from different entities pursuant to two separate agreements that were not legally cross-conditioned. The Commission concluded that these agreements constituted a series of transactions in securities whereby control was acquired over one undertaking within a reasonably short period of time. The Commission noted that the Russian Federation had "major powers" to involve itself in Rosneft's strategic decision-making and conducted its competitive assessment on a "worst case scenario" basis, aggregating the merging parties' activities in the oil and gas sector with those of all other Russian state-owned entities ("SOEs").

The Commission's analysis focused on three horizontally affected markets: (i) the EEA market for the development, production, and sale of natural gas; (ii) the development, production, and sale of crude oil; and (iii) the production and supply of heavy fuel oil. The Commission found that the transaction would not affect the EEA market for the development, production, and sale of natural gas, because Gazprom, another Russian state-owned company, would continue to hold a legal monopoly over the export of natural gas from Russia. In examining the transaction's impact on the markets for the development, production, and sale of crude oil, the Commission focused on the narrowest possible geographic market definition – the supply of crude oil to specific exit points of the Druzhba pipeline. (Ultimately, the Commission left open the precise product and geographic market definition.) Although the merged entity would account for a majority of the total crude oil supplied through the Druzhba pipeline in Germany and Poland, the Commission determined that the transaction would not lessen competition in this "market" because customers would be capable of switching both to other suppliers and to other modes of supply of crude oil. Finally, the Commission found that the transaction gave rise to no competition concerns with respect to the market for the production and supply of heavy fuel oils on the basis that the merged entity would have only a limited share of this market (5-10%).

The Commission noted that the proposed transaction would give rise to various vertical relationships related to the merged entity's and other Russian SOEs' activities in the development, production, and sale of crude oil and natural gas, the production and supply of refined products, the supply of natural gas, and the transportation of crude oil and refined products. However, the Commission found that these vertical relationships did not raise competition law concerns in part because alternative sources of supply would remain.

Bertelsmann/Pearson/Penguin Random House (Case COMP/M.6789)

On April 4, 2013, the Commission unconditionally cleared the merger of the English-language trade publishing businesses of Bertelsmann SE & Co. KGaA ("Bertelsmann") and Pearson Plc ("Pearson"). Bertelsmann is an international media company whose core divisions encompass television broadcasting, trade publishing, magazine publishing, and music rights management. Pearson is active in publishing educational materials, business information, and trade publishing. The transaction would create a new entity, Penguin Random House, which would be a full-function joint venture combining the trade publishing businesses of Bertelsmann (Random House) and Pearson (Penguin).

In analyzing the transaction, the Commission distinguished between the upstream market in which publishers compete to acquire the rights to publish authors' titles from the downstream markets in which the authors' titles are sold.

The Commission considered whether the upstream market for the acquisition of publishing rights could be segmented according to original writing language, book category, and format. With respect to format, the Commission's market test revealed "strong indications" that publishing rights for print books and e-books belong to the same product market. Ultimately, the Commission left open the exact segmentation of the rights acquisition market and reached only one firm conclusion, namely that there is no separate market for the acquisition of rights to publish titles in pocket book format or via book clubs. The Commission also left open the precise geographic market definition, but noted that the majority of respondents to the market test indicated that the geographic scope of the market for the acquisition of publishing rights is at least EEA-wide in scope, if not worldwide.

The Commission determined that the merged entity's market share of 20-30% would not give it a sufficiently strong position in the overall market for the acquisition of publishing rights, or in any potential sub-market, to give rise to competition concerns. The Commission noted that the merged entity would face vigorous competition from large and medium publishers with respect to the quality of contracts offered to authors (e.g., the level of advances offered). The Commission concluded that the transaction was unlikely to result in coordinated effects because the market was not sufficiently transparent.

With respect to the downstream market for sales of books to dealers, the Commission considered whether the sale of print books, e-books, and audiobooks to dealers belong to the same market. The responses to the Commission's market test indicated that consumers would be unlikely to view print books as substitutable with e-books, and that the majority of publishers found that print books and e-books differ in terms of sales channel, pricing at wholesale level, pricing at retail level, and promotion of specific titles. The Commission's market test also indicated a lack of substitutability between audiobooks and either print books or e-books. The Commission ultimately left this question open.

The Commission also considered whether the market for the sale of books to dealers should be sub-segmented by sales channel and book category. Ultimately, although the majority of the respondents to the Commission's market test were in favor of such a segmentation, the Commission left the question open. The Commission found there was no need to define a separate market for bestsellers. The Commission also found that the geographic market for the sale of books to dealers is, at most, EEA-wide in scope, and that the United Kingdom and Ireland on the one hand and the rest of the EEA on the other hand potentially belong to separate geographic markets.

With regard to print books, the Commission found that, while the transaction would create a market leader, the merged entity's market share would still be fairly low (at 20-30%), and the merged entity would continue to face strong competition from small, medium, and large publishers. Accordingly, the Commission found that the merged entity was unlikely to be able to raise prices for any particular sales channel (e.g., by reducing discounts) or for bestsellers (the parties' recent high market shares for print bestsellers were said to be distorted by the unprecedented success of the "Fifty Shades" trilogy). The market investigation indicated that large and sophisticated print book customers enjoy "a certain degree of countervailing buyer power that they do exercise."[18] The Commission found that the print books market was characterized by appreciable barriers to entry, such as generating brand presence and a sufficiently large scale to attract retail customers, but noted a number of successful recent entrants, including Head of Zeus, Igloo, and Nosy Crow.

With regard to e-books, the Commission found that the merged entity's market shares would be sufficiently low as not to give rise to competition concerns. The market investigation confirmed that barriers to entry were lower for

[18] *Bertelsmann/Pearson/Penguin Random House* (Case COMP/M.6789), Commission decision of April 4, 2013, para. 245.

e-books than for print books. One respondent stated that e-book publication does not entail any of the significant printing and storage costs that are associated with print book publishing. However, a majority of competitors responding to the market investigation did not consider self-publishing a viable alternative route for authors to access the market due to the issue of discoverability and the need for professional marketing. The Commission found that, similar to large print book customers, large and sophisticated e-book retailers enjoy a degree of buyer power, which they exercise by threatening to: (i) stop purchasing certain products; (ii) sponsor expansion of other publishers; (iii) make titles undiscoverable on the relevant e-book retailer's website; or (iv) withdraw the "buy" button on the relevant e-book retailer's website for a publisher's e-books. The Commission stated that all publishers who responded to the relevant question in the market test indicated that Amazon was, by a significant margin, their most important sales platform for English-language e-books.

The Commission found that the transaction was unlikely to lead to coordinated effects. Although the majority of competitors were aware of and/or used software to monitor e-book sales, online sales of print books, and/or physical and/or digital audio books, the market test yielded mixed results as regards pricing transparency. The Commission also noted that the commitments entered into by the four publishers in the e-books antitrust investigation removed a key coordination mechanism (namely the retail price most favored nation clauses).

Having identified no competition concerns, the Commission cleared the transaction without conditions. The decision represents the Commission's most detailed assessment of the publishing industry since *Lagardere/Natexis/VUP*.[19] However, given that, in the present decision, the Commission reached very few firm conclusions with respect to market definition, the *Lagardere* decision maintains substantial precedential value. One feature of the present decision that was not present in *Lagardere* is a discussion on the substitutability of e-books and print books. In the present decision, the Commission demonstrates a willingness to view e-books and print books as belonging to (i) the same market for the acquisition of publishing rights and (ii) two distinct markets for sales to dealers. This approach may have significant implications for any future consolidation among larger publishers. A particularly noteworthy aspect of the decision is that the Commission used Amazon's sales figures as a proxy for overall e-book market shares, on the basis that "[Amazon] account[s] for approximately [90-100%] of all e-books sales in the United Kingdom and Ireland."[20] This is a striking recognition of Amazon's dominance in e-books sales, yet the Commission makes only passing mention of Amazon's buyer power in the context of sales of e-books to dealers and no mention at all of Amazon in the context of buyer power in the case of print books sales to dealers.

Liberty Global/Virgin Media (Case COMP/M.6880)

On April 15, 2013, the Commission approved Liberty Global, Inc.'s ("Liberty Global") acquisition of Virgin Media, Inc. ("Virgin Media"). The parties are cable operators; Virgin Media operates the second largest cable network in the United Kingdom.

In analyzing the transaction, the Commission focused on the wholesale supply of pay TV channels. The principal horizontal overlap existed on the demand (buying) side of the wholesale market for pay TV channels in the linguistically homogeneous area comprising the United Kingdom and Ireland. The Commission considered whether Virgin Media's presence in the retail TV market in the United Kingdom and Liberty Global's presence in the retail TV market in Ireland would increase the merged entity's buying power in the upstream market for acquiring TV channels and audio-visual content. Third parties raised concerns that the merged entity would leverage its increased geographic footprint to negotiate with pay TV channel broadcasters for rights to broadcast in multiple

[19] *Lagardere/Natexis/VUP* (Case COMP/M.2978), Commission decision of January 7, 2004.

[20] *Supra* note 18, para. 193.

countries, thereby procuring more favorable terms or even exclusive access to TV channels. They argued that this would seriously disadvantage the merged entity's competitors (and would, in effect, amount to bundling or tying on the buying side). Ultimately, the Commission dismissed these concerns on the grounds that: (i) negotiations between content providers/TV channel broadcasters and retail suppliers of TV channels usually are conducted on a national basis; (ii) the majority of TV channel broadcasters are active in a single country; and (iii) multi-territorial negotiations can only be pursued with a limited number of large international groups (BSkyB, Disney, Viacom, Time Warner), which are large and sophisticated sellers capable of preventing the merged entity from engaging in anticompetitive behavior. The Commission concluded that, even were the merged entity to procure particularly beneficial terms from certain TV channel broadcasters with limited negotiating power, these broadcasters would not have "must-have" channels and therefore would not provide an important input to the merged entity's competitors.

As regards vertical relationships between the merging parties, the Commission examined Liberty Global's presence in the wholesale supply of pay TV channels and Virgin Media's presence in the retail supply of pay TV channels. During the investigation, third parties claimed that post-transaction, the merged entity would have the ability and incentive to: (i) deny the competing retail pay TV providers access to Liberty Global's pay TV channels (input foreclosure); and (ii) deny the competing TV channel broadcasters access to Virgin Media's pay TV platform (customer foreclosure). The Commission dismissed concerns relating to input foreclosure on the basis that Liberty Global did not have "must-have" channels and had a relatively low market share in the wholesale supply of pay TV channels (below 10% overall and below 30% in the "factual" and "lifestyle" channel segments). The Commission also dismissed concerns relating to customer foreclosure, finding that the merged entity would have only 20-30% of pay TV subscribers (compared to 66% of subscribers to BSkyB, its main competitor) and would have an incentive to maintain a diverse channel portfolio, which is key to competing effectively in the retail pay TV market.

Deutsche Bahn/Veolia Transport Central Europe (Case COMP/M.6818)

On April 30, 2013, the Commission unconditionally cleared the acquisition of sole control of Veolia Transport Central Europe GmbH ("Veolia") by the state-owned German transport operator Deutsche Bahn AG ("DB"). Both DB and Veolia operate passenger bus and rail transport services in the EEA, but focus on different geographies. Veolia is primarily active in the provision of passenger bus services in the Czech Republic, Poland, and Slovakia, while DB has a limited presence in these countries. The Commission's analysis focused on these countries because the parties' activities did not overlap in any other jurisdiction.

The Commission assessed the transaction in the light of the applicable regulatory framework and in particular Regulation 1370/2007,[21] which provides that, under certain conditions, a local authority may award public passenger transportation services contracts to third-party operators over which the authority exercises control. Pursuant to this regulation, the compensation of the service provider can be calculated on a gross revenue or net financial effect basis. When the compensation is provided on a gross revenue basis, the authority remunerates the operator for providing the service, while the authority receives the revenue and carries the revenue risk.

For the Czech Republic and Slovakia, the Commission defined two relevant markets: the market for the award of contracts to operate public transport bus services (concessionary bus services) and the market for the provision of commercial long-distance bus services. The Commission left the geographic market definition open for concessionary bus services and assessed the impact of the transaction on this market on both national and regional levels. With respect to the market for the provision of

[21] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ 2007 L 315/1.

commercial long-distance bus services, the Commission adopted an "origin and destination" approach and assessed individual point-to-point routes.

The Commission noted that the authorities awarding concessionary bus contracts in both the Czech Republic and Slovakia provide compensation on a gross revenue basis. Therefore, concessionary bus operators have very little influence over the basic parameters of competition for passengers, such as timetables, fares, and comfort. Instead, the awarding authority determines all these features. The Commission therefore concluded that competition in the market for concessionary bus services takes place only during bidding for the award of concessionary contracts. In contrast, long distance bus service operators are free to compete at the level of providing services to passengers (i.e., they compete *within* the market); such operators are not required to obtain concessions from, and therefore be governed by, public transport authorities.

In relation to concessionary bus services, the Commission found that the merged entity would continue to face an appreciable number of credible competitors in all hypothetical geographic markets. The Commission also noted that the local authorities wield significant buying power, being the only purchasers of public services contracts for concessionary bus lines. Finally, the Commission emphasized that, because the local authorities set the prices, the frequency, and the timetables, the merged entity would not be in a position to change its services post-transaction.

In relation to commercial long-distance bus services, the Commission found that the combined entity would face robust competition in each origin-to-destination market identified in the Czech Republic and Slovakia.

In Poland, DB offers only rail services, whereas Veolia offers only bus services. Therefore, the Commission did not assess these markets individually. The Commission examined the effects of the transaction in two hypothetical markets: a combined market for the award of rail and bus concessions (i.e., competition *for* the market) and second on a hypothetical combined market for rail and bus flows (i.e., competition *in* the market). While it left the market definition open, the Commission concluded that the transaction would not give rise to competition concerns in either market. The Commission identified no competition concerns in the hypothetical market for the award of rail and bus concessions, noting that several credible competitors would remain active in the relevant locations. The Commission also found no competition concerns in the hypothetical market for rail and bus flows, citing the existence of strict regulation of prices, low barriers to entry, and the large number of potential competitors.

Intercontinental Exchange/NYSE Euronext (Case COMP/M.6873)

On June 24, 2013, the Commission unconditionally cleared the acquisition of NYSE Euronext ("NYX") by Intercontinental Exchange ("ICE"). (The Commission blocked Deutsche Börse's attempted merger with NYX in February of 2012, concluding that the merger would have created a dominant or near-monopoly position in a number of markets[22]) ICE operates futures exchanges, over the counter derivatives ("OTC") trading platforms, and clearing houses for futures and derivatives. ICE is primarily active in the United States and Canada, with only a limited presence in Europe. NYX operates derivatives and securities exchanges in the United States and Europe, and provides cash listing and trading services, as well as derivatives clearing and trading services.

The Commission found few overlaps between the parties' operations and concluded that the transaction did not give rise to any affected markets.

In its decision, the Commission examined three broad segments: (i) derivative trading and clearing; (ii) bond trading; and (iii) technology services. With respect to market definition, the Commission generally did not deviate from its approach in *Deutsche Börse/NYSE Euronext*,

[22] *Deutsche Börse/NYSE Euronext* (Case COMP/M.6166), Commission decision of February 1, 2012.

identifying markets within these segments according to asset class (e.g., equities, equity indices) and execution environment (on-exchange or OTC). However, in this case, the Commission also defined certain product markets based on contract type (futures, options, swaps); in *Deutsche Börse/NYSE Euronext*, the Commission left open the question of defining markets on this basis. The Commission determined that that U.S. equity index options on the one hand, and U.S. equity index futures and options on futures on the other hand, belong to two separate product markets. The Commission's conclusion was based on the fact that equity options are not subject to the same regulatory and IP licensing regimes as equity futures and options on futures. The Commission found that each product market it identified was at least EEA-wide (and potentially global) in scope, but ultimately left the geographic market definition open.

In assessing the impact of the transaction on competition within the overall derivatives trading and clearing segment, the Commission found that the parties' activities overlapped only with respect to foreign exchange derivatives. However, even this market was not an "affected market" in light of the parties' low combined shares. Accordingly, the Commission found that the transaction would not reduce competition. The Commission also found that the transaction was unlikely to negatively impact potential competition, noting that each of the markets for the clearing and trading of U.S. equity derivatives, OTC-traded derivatives, and soft and agricultural commodity derivatives is characterized by vibrant competition and low barriers to entry.

The Commission also concluded that the transaction would not give rise to foreclosure concerns in the technology services segment. ICE provides a front-end trade execution technology service called WebICE, which allows access to ICE's markets. Some respondents to the Commission's market investigation expressed concerns regarding possible customer foreclosure of independent software vendors with respect to NYX's platforms were the merged entity to extend the front-end trade execution technology to NYX's platforms, while not granting independent software vendors connectivity to NYX's platforms. The Commission found that the merged entity would seek to maximize distribution for and access to its markets and would have no incentive to restrict itself to one trade execution technology service (which was, at the time of the transaction, used by only 5% of the market).

First-phase Decisions With Undertakings

FrieslandCampina/Zijerveld & Veldhuyzen and Den Hollander (Case COMP/M.6722)

On April 12, 2013, the Commission conditionally cleared the acquisition of two Dutch companies, Zijerveld & Veldhuyzen ("Z&V") and Den Hollander Food B.V. ("Hollander"), by FrieslandCampina Nederland Holding B.V. ("FC"), the largest Dutch dairy cooperative. Z&V is a specialized cheese wholesaler while Hollander is a cheese packaging services provider.

The Commission found that the transaction gave rise to competition concerns in the market for the production of semi-hard goat cheese and the market for the sale of semi-hard goat cheese to wholesalers in the Netherlands, given that, in these markets, the merged entity's market shares would range from 60% to 70%. The Commission found that horizontal overlaps at the production level even though only FC was active in the production of semi-hard goat cheese. Z&V, one of the acquired companies, had an exclusive supply agreement with Amalthea, a producer of semi-hard goat cheese. Z&V could renew the agreement annually. In light of the possibility for renewal and the exclusive nature of the agreement, the Commission attributed Amalthea's semi-hard goat cheese production capacity to Z&V. Amalthea also produced semi-hard goat cheese for FC under a toll manufacturing agreement. As a result, the transaction brought together, on the one hand, FC's own production capacity and Amalthea's production capacity used by FC, and, on the other hand, Amalthea's production capacity dedicated to Z&V.

The Commission also found that the transaction gave rise to input foreclosure concerns. The Commission noted that the merged entity would not only have between 60-70% of the upstream markets (production and sale to wholesalers), but also 60-70% of the downstream market (sale to retailers). The Commission took the view that the merged entity would have the ability and incentive to leverage its strong upstream position to gain greater share downstream and restrict supply of semi-hard goat cheese to rival wholesalers. The Commission found that the attractiveness and viability of such a foreclosure strategy would be enhanced by the restricted supply of raw goat milk in the Netherlands, the limited expansion capabilities of competing producers, and the expected increase in the demand for semi-hard goat cheese.

To address the Commission's concerns, the parties offered the following commitments: (i) Z&V would transfer to a third party the semi-hard goat cheese volumes it had previously sourced from Amalthea; (ii) FC would terminate its toll manufacturing relationship with Amalthea; and (iii) FC would offer for resale annually a set amount of raw goat milk for the production of semi-hard goat cheese (so that potential competitors could obtain the inputs necessary to enter the semi-hard goat cheese markets). The Commission found that the parties' commitments resolved all competition concerns and cleared the transaction.

STATE AID

ECJ Judgments

Libert and Others v. Gouvernement flamand (Joined Cases C-197/11 and C-203/11)

On May 8, 2013, the ECJ issued a preliminary ruling in the context of two sets of proceedings brought against the Flemish Government. These proceedings concerned, *inter alia*, the compatibility with EU state aid law of a Flemish Decree that established a system of tax incentives and subsidy mechanisms.

The Flemish Decree set up fiscal measures designed to compensate for a "social obligation" imposed on developers and other persons who subdivide areas of land into plots, which requires that a part of each building project be used for the development of social housing units. These measures consisted of: (i) a reduced rate of VAT on the sale of housing and a reduced stamp duty for the purchase of building land; (ii) a purchase guarantee regarding the housing developed; and (iii) infrastructure subsidies. Other measures aimed at reactivating the use of land and buildings and consisted of a tax reduction applicable to natural persons who concluded a renovation agreement, and a reduction of the tax base for stamp duty.

The Flemish system of tax incentives and subsidy mechanisms was analyzed in light of Articles 107 and 108 TFEU, read in conjunction with Commission Decision 2005/842/EC.[23] In particular, the referring court asked whether such a system must be classified as state aid, subject to the obligation to notify the European Commission.

The ECJ's analysis focused on whether these fiscal measures were liable to affect trade between Member States and whether they conferred an advantage on the recipient of the aid.

As regards the effect on trade between Member States, the ECJ confirmed its broad approach enshrined in previous case law. The ECJ held that it could not be ruled out that the measures established by the Flemish Decree would strengthen the position of beneficiary undertakings compared with other undertakings competing in intra-Community trade. In addition, the ECJ concluded that the advantage conferred on the recipient undertakings could make it more difficult for undertakings established in other Member States to penetrate the Belgian market and could make it easier for the Belgian undertakings in question to penetrate other markets.

As regards the potential to confer an advantage, the ECJ noted that all measures which, whatever their form, are likely directly or indirectly to favor certain undertakings or entail the granting of an economic advantage that the recipient undertaking would not have obtained under normal market conditions constitute state aid.

The ECJ then assessed whether the fiscal measures designed to compensate for the abovementioned "social obligation" complied with the *Altmark*[24] criteria and would therefore not be considered as state aid. The first *Altmark* criterion requires that the undertaking receiving compensation actually have clearly defined public service obligations. The ECJ concluded that this criterion was met, in light of the wide discretion enjoyed by Member States in this area.

The second *Altmark* criterion requires that the parameters on the basis of which the compensation was calculated be established in advance. The ECJ concluded that this criterion was not met because the Flemish Decree did not make it possible to identify such parameters in a sufficiently objective and transparent manner.

The ECJ did not establish whether the other *Altmark* criteria were met, because doing so would have required a re-appraisal of the facts in the main proceedings. It is established case law that, even if the ECJ had before it the

[23] Commission Decision 2005/842/EC of November 28, 2005, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, C(2005) 2673 (the "SGEI Decision").

[24] *Altmark Trans* (Case C-280/00) 2003 ECR I-7747.

information necessary to enable it to make such an appraisal, which was deemed not to be the case in these proceedings, the ECJ would have no jurisdiction to rule on the facts in an individual case or to apply the rules of EU law, which it has interpreted to national measures or situations. This is because those questions are matters for the exclusive jurisdiction of the referring national court.

In light of the above, the ECJ concluded that the fiscal measures at issue could constitute state aid within the meaning of Article 107(1) TFEU. It added that, in light of its interpretation of EU law contained in the present judgment, it was for the referring court to determine whether, in the specific circumstances of the case, the conditions relating to the existence of state aid were met and, if so, to ascertain whether the SGEI Decision was applicable to those measures aimed at compensating for the "social obligation."

Doux Élevage SNC and Coopérative agricole UKL-ARREE v. Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement de territoire and Comité interprofessionnel de la dinde française (CIDEF) (Case C-677/11)

On May 30, 2013, the ECJ concluded that action by a national authority rendering compulsory a contribution imposed by an intertrade organization to finance its own activities does not constitute state aid.

The question arose in the context of proceedings between Doux Élevage SNC, the agricultural cooperative UKL-ARREE, active in turkey farming and production, and the French authorities. The Comité Interprofessionnel de la Dinde Française ("CIDEF"), an agricultural intertrade organization, adopted an agreement policy requiring members of the trades represented therein to contribute to CIDEF's publicity activities, promotional activities, external relations activities, quality assurance activities, research activities and activities in defense of the sector's interests. The competent national ministers repeatedly prolonged this agreement and later tacitly extended the contribution requirement to all traders in the industry. Doux Élevage and UKL-ARREE brought an action of annulment against this extension, claiming that it constitutes state aid and should have been notified to the European Commission according to Article 108(3) TFEU.

The ECJ enumerated the prerequisites for a measure to constitute state aid under Article 107(1) TFEU. The first condition, which was the key issue in this case, is that there must be an intervention by the state or through state resources. This means that only advantages granted directly or indirectly through state resources and imputable to the state can constitute state aid. It follows that aid granted by a public or private body designated or established by the state can also be deemed state aid.

With reference to its decision in *Pearle*,[25] the ECJ held that the measure did not involve any transfer of state resources: The contributions did not go through state budget or another public body, and the state did not relinquish any resources that would otherwise have been part of the state's budget. The ECJ explained that "[t]he contributions remain[ed] private in nature throughout their lifecycle."[26]

The ECJ further found that the financial means did not constantly remain under public control, and were therefore not available to the competent national authorities.[27] The state could not use the contributions and the intertrade organization itself (not the state) decided how to use the resources.

In light of the above, the ECJ concluded that the advantage was not imputable to the state and did therefore not constitute state aid.

[25] *Pearle and Others* (Case C-345/02) 2002 ECR I-7139.

[26] Doux Élevage SNC and Coopérative agricole UKL-ARREE v. Ministère de l'Agriculture, de l'Alimentation, de la Pêche, de la Ruralité et de l'Aménagement du territoire, Comité interprofessionnel de la dinde française (CIDEF) (Case C-677/11), judgment of May 30, 2013, not yet published, para. 32.

[27] *See France v. Commission* (Case C-482/99) 2002 ECR I-4397.

The ECJ's decision clarified that, in analyzing whether a measure involves a transfer of state resources, the entire lifecycle of a sum needs to be considered. It further emphasized the importance of examining to what use the contributions are put and can possibly be put, i.e., who decides on the objectives and influences this decision.

Ryanair Ltd v. Commission (Case C-287/12 P)

On June 13, 2013, the ECJ affirmed the General Court's decision[28] upholding a Commission decision[29] that the sale of Alitalia did not constitute state aid to Alitalia's purchasers, insofar as it was guaranteed that the assets were sold at market price.

At the end of 2006, the Italian state decided to sell its stake in Alitalia. In an effort to generate interest from more potential buyers, in mid-2008, the Italian authorities adopted a number of measures, including the rehabilitation of undertakings in the essential public services sector through disposal of their assets to purchasers able to guarantee continuity of service in the medium term. The rehabilitation measure thus provided for a prompt sale of insolvent company hence effectively skipping the restructuring attempt under the previous legal regime, which would add a lengthy and potentially deal-breaking stage in the negotiation with potential buyers. However, this option was subject to the requirement that an independent expert verify that assets are sold at market price. In September 2008, Compagnia Aerea Italiana SpA submitted a preliminary bid to acquire certain assets of Alitalia. In the meantime, Alitalia was placed in extraordinary administration, a special bankruptcy procedure that triggered the possibility of rehabilitating Alitalia by a prompt sale. In October 2008, Ryanair lodged a complaint with the European Commission concerning the measures relating to the sale of assets of Alitalia.

Thereafter, Italian authorities notified the Commission of the procedure for the sale of Alitalia's assets, in essence requesting the Commission's confirmation that the extraordinary administration procedure did not involve state aid.

The Commission concluded that the notified measure did not constitute state aid to the purchasers, provided that it was guaranteed that the assets would be sold at market price. Ryanair appealed the Commission's decision to the General Court, arguing that the Commission did not apply the "market economy investor principle"[30] because it failed to consider that continuity of service was an important obligation involving costs, and therefore liable to reduce the price of offers. The General Court upheld the Commission's decision, and Ryanair appealed to the ECJ.

The ECJ stressed that Ryanair did not dispute two important findings of the General Court, namely that: (1) in the context of the assessment of bids by the independent expert, the main criterion was the bidding price, with the continuity of service being of secondary importance; and (2) the continuity of service obligation did not necessarily imply the imposition of a public service obligation on the winning bidder. The ECJ noted that Ryanair simply argued that the General Court should have held that the continuity of service was a major obligation and a selection criterion.

In any event, the ECJ concluded that the sale of Alitalia's assets did not constitute state aid, because it was guaranteed (via independent valuation expert) that the assets would be sold at market price. No evidence was adduced to the contrary, i.e., that the need to ensure continuity of air transport service in the medium term resulted in a reduction of the price of Alitalia's assets below the market price.

28 *Ryanair Ltd v. Commission* (Case T-123/09), judgment of March 28, 2012, not yet published.

29 Commission decision C(2008) 6745 of November 12, 2008 (State Aid N 510/2008), OJ 2009 C 46/2.

30 According to the market economy investor principle, the credit approved or the investment undertaken should be considered as state aid in the meaning of Article 107(1) TFEU if the (monetary) compensation a state receives in exchange is lower than what a private investor would have requested under such circumstances.

FINING POLICY

ECJ Judgments

Italian Raw Tobacco (Case C-652/11)

On April 11, 2013, the European Court of Justice ("ECJ") upheld Mindo Srl's ("Mindo") appeal challenging the General Court judgment that affirmed its liability for participation in the Italian raw tobacco cartel.[31] The General Court refused to adjudicate the action, concluding that Mindo had failed to demonstrate a vested interest in the proceedings before it.[32]

Mindo is an Italian company active in the processing of raw tobacco. It is a successor to Dimon Italia Srl, which, between 1995 and 2002, participated in a cartel in the Italian raw tobacco market. In October 2005, the European Commission ("Commission") imposed a €10 million fine on Alliance One International Inc. ("AOI") (a company within Mindo's corporate group) and made Mindo jointly and severally liable for €3.99 million.

In February 2006, AOI paid the fine in full. Mindo subsequently entered liquidation and then appealed the Commission's decision to the General Court, seeking partial annulment of the Commission's decision and/or a fine reduction. The Commission argued that Mindo had no interest in bringing the appeal because AOI had paid the fine in full and had not claimed a contribution from Mindo. The General Court agreed with the Commission that Mindo had not demonstrated its "vested and present interest" in pursuing proceedings and dismissed the appeal.[33]

On appeal to the ECJ, Mindo argued that the General Court had erred in law by holding that Mindo had no interest in bringing the action. By paying the fine in full, AOI became Mindo's creditor. This gave AOI a right to bring an action for recovery against Mindo, and the limitation period had not yet expired. Mindo argued that it had the necessary interest in appealing the Commission's decision because an annulment or alteration of the Commission decision would benefit Mindo. Mindo also alleged an infringement of AOI's and Mindo's right to a fair trial.

The Commission contended that there was an "undisclosed agreement"[34] between Mindo and AOI, according to which AOI would bear the liability for Mindo's anticompetitive conduct.

The ECJ held that the General Court judgment was vitiated by an "insufficiency of reasoning":[35]

- First, the General Court could not simply rely on the fact that AOI had paid Mindo's debt and had not yet made a claim against Mindo. The General Court failed to explain *why* that payment did not allow AOI to bring a claim against Mindo. This failure to address a central part of Mindo's line of argument constituted a breach of duty to state sufficient reasons.
- Second, the General Court erred in holding that Mindo had failed to establish that AOI was still capable of recovering its claim. (Mindo's liquidation was no obstacle because Mindo's arrangements with its creditors allowed it to restructure its debt and continue its activities.)
- Third, the General Court failed to examine a letter in which AOI – in answer to written questions from the General Court – had stated that it intended to bring an action for recovery against Mindo, that its action for recovery was not time-barred, and that it preferred to await the outcome of the present litigation before bringing such an action.

Accordingly, and without examining the second ground of appeal, the ECJ set aside the General Court's judgment and referred the case back to the General Court.

31 *Mindo Srl v. Commission* (Case C-652/11 P), judgment of April 11, 2013, not yet published.

32 *Mindo Srl v. Commission* (Case T-19/06) 2011 ECR II-6795.

33 *Ibid*., para. 77.

34 *Supra* note 31, para. 27.

35 *Ibid*., para. 31.

Eni SpA v. Commission (Case C-508/11 P) and Versalis SpA v. Commission (Case C-511/11 P) ("Synthetic Rubber")

On May 8, 2013 and June 13, 2013, the ECJ dismissed the appeals by Eni SpA ("Eni") and Versalis SpA ("Versalis"), respectively, against the General Court's judgments of July 13, 2011[36] that largely upheld the Commission's decision of November 29, 2006[37] imposing fines on the two companies for their involvement in a synthetic rubber cartel. The Commission found Eni jointly and severally liable with its wholly-owned subsidiary Versalis.

Eni and Versalis lodged separate appeals with the General Court, seeking to annul the Commission's decision or to have the fine annulled or reduced. The General Court upheld the Commission's finding of infringement and concluded that the Commission did not err in imputing liability to Eni for infringements committed by its subsidiary. The General Court recalled the rebuttable presumption that a parent company with a 100% shareholding in its subsidiary exercises a decisive influence over that subsidiary's conduct and can be found liable for infringements committed by that subsidiary. The General Court also confirmed that even though two Eni subsidiaries were involved in the infringement (Versalis and Syndial SpA), the principle of personal responsibility did not preclude imposing liability solely on one of the subsidiaries (Versalis). However, the General Court annulled the decision insofar as it found an aggravating circumstance of repeated infringement and consequently reduced the fine to €181.5 million. Eni and Versalis appealed the General Court's judgment, and the Commission cross-appealed the fine reduction.

First, Eni contended that, before imputing Versalis's infringement to Eni, the Commission should have proven that Eni actually exercised decisive influence over Versalis. Eni argued that it had no such influence and was merely a technical and financial coordinator. The ECJ rejected Eni's arguments. The ECJ explained that the conduct of a subsidiary may be imputed to the parent company where the subsidiary does not determine its business independently but follows instructions given by the parent company. Where the parent company holds all or almost all of the capital of the subsidiary, a rebuttable presumption arises that the parent company exercises actual decisive influence over its subsidiary. In particular, a company that coordinates financial investments within a group of companies is in a position to ensure that they run as one, which indicates the exercise of a decisive influence. To rebut that presumption, the parent company must show that the subsidiary can act with complete autonomy on both operational and financial levels. The ECJ emphasized that the presumption complies with the general principles of EU law, including the principles of the presumption of innocence, legal certainty, and the rights of the defense.

Second, Eni argued that, in light of the principles of limited liability and separate legal personality, an infringement by a subsidiary may only be imputed to the parent company in exceptional circumstances, where abuse of the principle of limited liability has been proven. The ECJ disagreed, referring to the established case law defining an undertaking as an economic unit, even if in law that unit consists of several legal or natural persons. When such an economic unit breaches competition rules, it falls to that economic unit as such to answer for the infringement according to the principle of personal responsibility. In a similar vein, Versalis argued that the Commission may impute liability to one subsidiary for the breach committed by another subsidiary only where the deterrent effect of the fine would otherwise risk being distorted (for example, if the latter subsidiary does not exist anymore). The ECJ dismissed these arguments, holding that the fact that the entity that committed the infringement still exists does not preclude imposing a penalty on the entity to which its economic activities were transferred, where both entities are under the same parent company's control.

[36] *Eni SpA v. Commission* (Case T-39/07) 2011 ECR II-4457; *Polimeri Europa SpA v. Commission* (Case T-59/07) 2011 ECR II-4457.

[37] *Butadiene Rubber and Emulsion Styrene Butadiene Rubber Industry* (Case COMP/F/38.638), Commission decision of November 29, 2006, OJ 2008 C 7/11.

Third, Eni submitted that, in determining the seriousness of the infringement and the basic amount of the fine, the Commission had erred in disregarding the actual impact of the infringement on the market. The ECJ observed that there is no exhaustive list of factors to be taken into account when determining the seriousness of an infringement. More specifically, the infringement's actual impact on the market is not a decisive factor in determining the level of the fine.

Versalis raised two arguments concerning the calculation of the fine. First, it contended that the General Court erred in departing from the case law linking an increase in turnover and an increase in the fine multiplier. In response, the ECJ explained that the fixing of an appropriate fine is not the result of a simple arithmetical calculation based on turnover. In light of the deterrence purpose of the multiplier, the Commission has discretion to tailor the penalty according to the conduct and characteristics of the undertakings concerned to ensure the full efficiency of competition rules. Second, Versalis claimed that the General Court should have taken into account the Commission's failure to indicate all the factors leading to the determination of the multiplier for the companies controlled by Eni. The ECJ disagreed, observing that the Commission is not required to restrict its assessment to factors relating only to the specific situation of the undertaking concerned; neither is it required to take account of factors other than the overall turnover and the relative size of the undertakings concerned.

The Commission argued that the General Court had erred in annulling for "lack of reasoning" the Commission's finding of aggravating circumstances based on Eni's repeated infringement. The Commission argued that the General Court should have given it the opportunity to clarify its reasons by issuing written questions. The ECJ noted that the Commission had sufficient opportunity to explain its position to the General Court because Eni had challenged the finding at issue in its appeal to the General Court. In any case, the Commission was required to give sufficient reasons when the contested decision was adopted.

Parker ITR Srl and Parker-Hannifin Corp. v. Commission (Case T-146/09)

On May 17, 2013, the General Court partially annulled the Commission's decision in the marine hose cartel case.[38] The General Court lowered the fine imposed by the Commission on one of the cartel participants, Parker ITR Srl ("Parker ITR"), from €25,610,000 to €6,400,000. Parker ITR's parent company Parker-Hannifin Corp. ("Parker-Hannifin"), was found jointly and severally liable for €6,300,000 of this amount (down from €8,320,000). The General Court concluded that the Commission had erroneously attributed liability to Parker ITR for the period before January 1, 2002.

In its decision, the Commission had established that the marine hoses cartel began at least on April 1, 1986 (although it may have dated from as far back as the early 1970s), and ended on May 2, 2007.[39] Parker ITR was held liable for the entire period, while Parker-Hannifin was held liable for the period from January 31, 2002 (the date on which it acquired Parker ITR's predecessor company) through May 2, 2007. Parker ITR and Parker-Hannifin appealed the Commission's decision to the General Court, raising several arguments, including the following four key points.

First, the appellants claimed that the Commission had erroneously attributed liability for the infringement to Parker ITR for the period before January 1, 2002. The appellants claimed that, in doing so, the Commission had "infringed the principle of personal liability, engaged in an abuse of procedure and infringed the principle of non-discrimination and the obligation to state reasons."[40] In particular, the appellants explained that, Parker ITR simply cannot be held liable for the period before January 1, 2002 because it was not the owner of the assets that committed the

[38] Marine Hose (Case COMP/39.406), Commission decision of January 28, 2009.

[39] The period from May 13, 1997 until June 11, 1999 was not taken into account in the calculation of the fine due to a lack of evidence.

[40] *Parker ITR Srl and Parker-Hannifin Corp v Commission* (Case T-146/09), judgment of May 17, 2013, not yet published, para. 44.

infringement during that time (and Parker-Hannifin did not become the owner of such assets until January 31, 2002).

The General Court agreed with the appellants. It set out the ownership history of Parker ITR as follows: A company called Pirelli Treg SpA, belonging to the Pirelli group, established the marine hose business now owned by Parker ITR in 1966. A company called ITR SpA (resulting from the merger of Pirelli Treg SpA with Itala, another subsidiary of the Pirelli group) took over that business in December 1990. ITR was acquired by Saiag SpA in 1993. After commencing negotiations with Parker-Hannifin regarding the possible sale of several businesses, including the marine hose business, ITR created a new subsidiary called ITR Rubber Srl ("ITR Rubber") on June 27, 2001. Following several internal reorganization steps, the relevant ITR businesses, including the marine hose business, were transferred to ITR Rubber effective as of January 1, 2002. (ITR Rubber was formed specifically for the purposes of the contemplated transaction with Parker-Hannifin and had no economic activities at all before that date.) Following the transfers, on January 31, 2002, Parker-Hannifin acquired ITR Rubber and later renamed it Parker ITR.

In the original cartel proceedings, the Commission did not penalize ITR and Saiag because it concluded that the infringement was time-barred with respect to them. Instead, the Commission relied on the principle of economic continuity[41] to attribute responsibility to Parker ITR and its current parent company Parker-Hannifin for the entire duration of the infringement.

The General Court explained that the principle of personal liability[42] essentially trumps the principle of economic continuity "in cases where . . . an undertaking involved in the cartel, namely Saiag and its subsidiary ITR, transfers a part of its business to an independent third party and there is no structural link between the transferor and the transferee – that is to say, in the present case, between Saiag or ITR and Parker-Hannifin."[43] Accordingly, the General Court rejected the Commission's argument that ITR's and Saiag's responsibility was transferred to ITR Rubber pursuant to the principle of economic continuity. In the General Court's view, the Commission could find Saiag and ITR responsible for the infringement until January 1, 2002, and then, "as the case may be, find that infringement was time-barred, as the settled case-law permits it to do."[44] However, the Commission "could not . . . hold ITR Rubber responsible for the period prior to 1 January 2002, the date on which the assets involved in the cartel were transferred to it."[45]

The General Court also rejected the Commission's argument that it has discretion to choose the person responsible for the infringement in "cases of economic continuity" and "more generally, as regards parent companies and their subsidiaries."[46] In particular, while it is possible to attribute a subsidiary's illegal conduct to its parent based on the parent's control over the subsidiary, case law does not permit the Commission to hold one subsidiary responsible for the unlawful conduct of another subsidiary within the same group.[47] (The General Court clarified that responsibility for an infringement could be attributed to a legal person "other than that which committed it" only under the principle of economic continuity, which, the General Court found, could not apply in this case.)[48]

41 According to this principle, the Commission may penalize "a legal person other than the person who committed the infringement, notwithstanding any legal structure intended, within one and the same undertaking, artificially to prevent the penalising of infringements of competition law which have been committed by one or more of the legal persons of which it consists," *supra* note 40, para. 95.

42 According to this principle, "a punishable act can be attributed only to its author" and "no punishment may be imposed other than on the guilty party," *supra* note 40, para. 85. There may be an exception if a sale takes place abusively (i.e., "with the intention of avoiding the antitrust law penalties," *supra* note 40, para.96), but there was no evidence suggesting that such conduct had occurred in this case.

43 *Supra* note 40, para.116.

44 *Ibid.*, para.118.

45 *Ibid.*, para.119.

46 *Ibid.*, para.122.

47 *Ibid.*, para.124.

48 *Ibid.*, para.127.

The General Court also found that neither Parker ITR nor Parker Hannifin could have been the cartel leader before January 31, 2002. Consequently, the General Court reduced the fine imposed on Parker ITR by more than €19 million (a 75% reduction), and the fine imposed on Parker-Hannifin by almost €2 million (a 24% reduction).[49]

Second, the applicants claimed that the conduct of Mr. P., who ran the marine hose business (both before and after Parker-Hannifin acquired ITR Rubber) was not properly attributable to Parker ITR or Parker-Hannifin, because Mr. P. "hid the truth, by devising a fraudulent scheme designed to allow him . . . to benefit from the illegal gains arising from the cartel"; did not allow any interference by Parker-Hannifin; and acted only for his own personal benefit, harming both parker ITR and Parker-Hannifin.[50] The applicants argued that, following the U.S. approach, employers should not be held responsible for the illegal conduct of their employees "carried out with the intention of benefiting persons other than [the] employer."[51] The General Court explained that, under settled case law, any action by a person authorized to act on behalf of the company suffices to attribute the person's infringement to that company. The General Court concluded that Parker ITR had expressly conferred on Mr. P. the power to act on behalf of the company, and that the Parker group had never lodged any complaint or taken any other steps against Mr. P. It also pointed out that Parker-Hannifin benefited from "the price fixing and the market sharing between the various members of the cartel," in a way that it would not have absent "an agreement between them."[52] Accordingly, the General Court rejected this argument.

Third, the applicants argued that the Commission had erroneously held Parker-Hannifin jointly and severally liable as Parker ITR's parent. The General Court explained that, the fact that Parker-Hannifin held 100% of Parker ITR's shares gave rise to a rebuttable presumption that Parker Hannifin could – and did – exercise decisive influence over Parker ITR.[53] The General Court reasoned that, although the applicants were not required to submit "direct and irrefutable evidence" of Parker ITR's independent behavior, they had to submit "a body of precise and consistent evidence" that Parker-Hannifin was legally or economically prevented from exercising control over Parker ITR.[54] The applicants did not meet this burden. Accordingly, the General Court rejected this argument.

Fourth, the applicants claimed that the Commission had erred in calculating the fine. Specifically, the applicants argued that only their actual sales of product delivered in the EEA ought to have been considered in ascertaining the sales for the purposes of setting the fine. They claimed that the Commission had erroneously inflated the figure by including sales invoiced to all companies established in the EEA. The applicants explained that, regardless of the legal location of their customers, "[t]he sale of goods delivered outside the EEA cannot 'affect trade['] . . . in the EEA."[55] The General Court rejected the argument. The General Court explained that the Fining Guidelines[56] do not preclude the Commission from using the sales invoiced in the EEA to calculate the value of each undertaking's sales within the EEA for the purposes of determining the relevant cartel fines.[57] The General Court dismissed as irrelevant the applicants' reliance on the Commission's Jurisdictional Notice,[58] explaining that: "[a]ssessing the effects of a concentration on the market is not comparable to determining the amount of a fine to be imposed on an

[49] *Ibid.*, paras. 255-257. The final fine imposed on Parker ITR by the General Court amounted to €6.4 million, of which Parker-Hannifin was held jointly and severally liable for €6.3 million.

[50] *Supra* note 40, para.148.

[51] *Ibid*.

[52] *Ibid.*, para.158.

[53] *Ibid.*, para.175.

[54] *Ibid.*, para.184.

[55] *Ibid.,* para. 200.

[56] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.

[57] *Supra* note 40, para. 210

[58] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertaking, OJ [2008] C95/1.

undertaking as a result of an infringement of Article [101 TFEU] . . . "[59] The General Court further held that the Commission had not given the applicants any assurances that the data regarding the sales invoiced in the EEA would *not* serve as the basis to determine the fine, and so the principle of legitimate expectation was not infringed. The General Court, accordingly, dismissed this argument as well.

Finally, the General Court held that the Commission did not err in rejecting the applicants' request for a reduction of the fine for cooperation on the basis of the Commission's Leniency Notice,[60] given that the information that the applicants had provided was subject to "limitation" (i.e., the Commission would have been time-barred from pursuing its case as to the period to which the information pertained) and, in any event, and the information provided was too insubstantial to prove an infringement.[61]

Methacrylates Cartel (Case C-70/12)

On May 30, 2013, the ECJ dismissed the appeal by Quinn Barlo Ltd, Quinn Plastics NV, and Quinn Plastics GmbH (together "Quinn")[62] against the General Court's judgment partially overturning the Commission's decision to fine several undertakings, including Quinn, €344,562,500 for participating in the acrylic glass (methacrylates) cartel.[63]

The General Court previously ruled that the Commission had erred in holding Quinn liable for the entire period of the continuous infringement, due to the absence of collusive behavior during a 16 month period, and reduced the fine imposed by the Commission by €725,000 to €8,250,000.[64] The General Court also found that Quinn was liable solely in relation to one polymethyl-methacrylate product instead of the three alleged by the Commission.

Quinn appealed the General Court's judgment to the ECJ. Quinn alleged, *inter alia*, that: (1) the General Court had disregarded the presumption of innocence by extending the duration of the first period of its participation in the cartel beyond the date of the second cartel meeting it attended; (2) the General Court breached Quinn's legitimate expectations and/or the principle of equal treatment because it maintained an increase of 10% of the starting amount of the fine after having reduced the period of the infringement, which did not follow the Commission's 1998 Fining Guidelines;[65] and (3) the General Court failed to use its unlimited jurisdiction to reduce the fine further once it found that the Commission had erred in holding Quinn liable for the entire cartel period.

The ECJ dismissed Quinn's appeal. It held that the General Court did not err in assessing the duration of the infringement. The ECJ reasoned that, for Article 101(1) TFEU to apply to agreements that have ceased to be in force, it is sufficient that the agreements produce effects beyond the date on which the unlawful contacts formally end.

In relation to Quinn's legitimate expectations, the ECJ noted that it was not bound by the Fining Guidelines and was entitled to substitute its own appraisal for the Commission's, as well as increase the fine imposed. The ECJ explained that the Fining Guidelines bind only the Commission, while the EU courts "consider case by case the situations before them, taking account of all the matters of fact and of law relating to those situations."[66]

The ECJ also dismissed Quinn's "equal treatment" plea. The ECJ noted that the exercise of its unlimited jurisdiction in respect of the determination of fines cannot result in discrimination between undertakings that participated in a

59 *Supra* note 40, para. 213.

60 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ [2006], C298/11.

61 *Supra* note 40, para. 240.

62 *Quinn Barlo Ltd and Others v. Commission* (Case C-70/12), judgment of May 30, 2013, not yet published.

63 *Methacrylate* (Case COMP/F/38.645), Commission decision of May 31, 2006.

64 *Quinn Barlo and Others v. Commission* (Case T-208/06), judgment of November 30, 2011, not yet published.

65 Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ 1998 C 9/3.

66 *Supra* note 62, para. 53.

cartel. The ECJ further explained that any departure by the General Court from the Commission's method of fine calculation in relation to one such undertaking must be supported by reasons "compatible with the principle of equal treatment."[67] The ECJ found that the General Court had clearly outlined why it considered it was reasonable not to apply the 1998 Fining Guidelines.

Regarding the proportionality of the fine, the ECJ explained that, it would only find that the General Court erred in law where the level of the penalty imposed was excessive to the point of being disproportionate. It noted that, even assuming that the 25% reduction that the Commission granted the appellants did not precisely reflect the relative importance of the turnover attributable to the two polymethyl-methacrylate products for which their liability was not established, the amount of the fine still adequately reflected the gravity of the infringement committed as it, *inter alia*, entailed "taking part in meetings of a cartel which covered the whole of the EEA."[68]

Commission v. Aalberts Industries and Others (Case C-287/11 P)

On July 4, 2013, the ECJ dismissed the Commission's appeal against the General Court's judgment annulling the fine imposed on Aalberts Industries NV ("Aalberts") for its involvement in the copper fittings cartel.[69] The Commission had found Aalberts jointly and severally liable with its subsidiaries Aquatis France SAS ("Aquatis") and Simplex Armaturen + Fittings GmbH & Co. KG ("Simplex"). It imposed a fine of €100.8 million on Aalberts, €55.15 million of which was imposed jointly and severally with Aquatis and Simplex. Aquatis and Simplex were found jointly and severally liable for the additional €2.04 million.[70]

The General Court held that the anticompetitive nature of the events alleged against Simplex (namely, attending meetings of the French trade association "FNAS" between June 25, 2003 and January 20, 2004, and contacts at a trade fair in Essen on March 18, 2004) had not been proved to the requisite legal standard. The General Court also found that it had not been established that Aquatis was aware of the fact that it had joined a cartel. The General Court therefore annulled the Commission's decision, not only with regard to Aquatis and Simplex, but also with regard to Aalberts, to whom liability was imputed for the activities of its subsidiaries.

On appeal to the ECJ, the Commission advanced three arguments. First, it argued that the General Court erred by carrying out a separate and individual examination of the participation of Aquatis and Simplex, as opposed to assessing Aalberts as a single undertaking involved in a continuous infringement. Second, the Commission claimed that the General Court committed a manifest error by annulling in full the decision as regards Aquatis, even though it had confirmed Aquatis's participation in cartel activities in the French market. Third, the Commission contended that the General Court did not give sufficient reasons for annulment of the fine of €2.04 million imposed on Aquatis and Simplex.

As to the first ground, the ECJ found that the General Court had committed an error of law in carrying out an individual and separate examination of Simplex and Aquatis. The error disregarded the very premise on which the Commission's decision was based: that Aalberts, Aquatis, and Simplex formed a single economic entity and therefore constituted a single undertaking for the purposes of Article 101 TFEU. However, this did not justify setting aside the General Court's judgment because the operative part of the judgment was well founded on other legal grounds:

- The cartel had operated in two stages. The inquiry regarding Aalberts related only to the second stage. Aquatis and Simplex were involved in the first stage, but at that stage they were under the control of IMI, not Aalberts.

[67] *Ibid*.

[68] *Ibid*., para. 59.

[69] *Aalberts Industries and Others v. Commission* (Case T-385/06) 2011 ECR II-1223.

[70] *Fittings* (Case COMP/F-1/38.121), Commission decision of September 20, 2006, OJ 2007 L 283/63.

- Accordingly, to impute liability to Aalberts, it was necessary to assess whether Aquatis or Simplex rejoined the cartel in the second stage. The General Court correctly examined all the incriminating evidence that could have proved whether the subsidiaries had rejoined the cartel. The General Court found that there was insufficient evidence that Aquatis or Simplex had rejoined the cartel in the second stage.
- The ECJ concluded that the operative part of the General Court's reasoning was correct and refused to carry out "a fresh assessment of the facts."[71] Consequently, the ECJ rejected the Commission's first argument.

As to the second ground (the decision should not have been annulled in full), the ECJ found that it had not been established that Aquatis had participated in a single, complex and continuous infringement. In particular, Aquatis had not been involved in the anticompetitive bilateral contacts or contacts at a trade fair. Although Aquatis had participated in FNAS meetings during which price coordination occurred, Aquatis was not aware that it had joined a cartel. According to established case law, it must be shown that "the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants of the cartel, and that it was aware of the conduct planned or put into effect by other undertakings in pursuit of those same objectives, or that it could reasonably have foreseen it, and that it was prepared to take the risk."[72] The factual findings of the General Court excluded this possibility. The ECJ rejected the Commission's argument that the General Court could have partially annulled the Commission's decision, by severing the FNAS meetings from the single and continuous infringement, because the legal elements required to partially annul the decision had not been met.[73]

[71] *Commission v. Aalberts Industries and Others* (Case C-287/11 P), para. 48.

[72] *Ibid.*, para. 63.

[73] *See Commission v. Verhuizingen Coppens* (Case T-210/08) 2011 ECR II-3713, para. 38.

As to the third ground, the ECJ found that the General Court had properly explained the reasons for annulling the fine of €2.04 million imposed on Aquatis and Simplex. The ECJ noted that the fine of €100.8 million imposed on Aalberts was an important factor in the calculation of the €2.04 million fine. The annulment of the €100.8 million fine necessarily made the calculation of the €2.04 million fine incorrect. This justified its annulment.

As all three grounds of appeal were rejected, the appeal was dismissed in its entirety.

International Removal Services Cartel (Case 440/11 P)

On July 11, 2013, the ECJ upheld the Commission's appeal seeking to reinstate a €270,000 fine against Portielje for its involvement in the international removal services cartel.[74] The Commission had originally imposed fines of over €32.7 million on an international door-to-door removal services cartel operating in Belgium.[75] On appeal, the General Court determined that the Commission had erred in imputing Gosselin's liability to its parent foundation, Portielje, and annulled the Commission's decision, including the fine imposed on Portielje.[76]

The Commission appealed on two grounds. First, the Commission submitted that the General Court erred in law in its interpretation of the concept of an "undertaking" for the purposes of Article 101 TFEU. The Commission contended that, for an infringement to be imputed to a specific legal person, it is not necessary to demonstrate that that person has the legal capacity of an undertaking. Second, the Commission argued that General Court had committed an error of law by finding that Portielje had adduced evidence capable of rebutting the presumption that it had exercised decisive influence over its subsidiary Gosselin.

[74] *Commission v. Stichting Administratiekantoor Portielje* (Case C-440/11 P), judgment of July 11, 2013, not yet published.

[75] *International Removal Services* (Case COMP/38.543), Commission decision of March 11, 2008; as amended by Commission decision C (2009) 5810 final of July 24, 2009.

[76] Gosselin Group and Stichting Administratiekantoor Portielje v. Commission (Joined Cases T-208/08 and T-209/08) 2011 ECR II-3639.

The ECJ concluded that the first ground was well-founded. It agreed with the Commission's argument that it was irrelevant whether Portielje was itself economically active and therefore individually constituted an undertaking. Instead, to determine liability, the General Court should have focused its analysis on the actual exercise by the holding entity of decisive influence over the infringing entity.

As to the second ground, the ECJ noted that, in line with settled case law, to assess whether the infringer decides upon its market conduct independently, it is necessary to consider the "economic, organizational and legal links"[77] between the entities in question and not merely rely upon the fact that the holding entity does not adopt management decisions in accordance with corporate law, as the General Court had done here. Accordingly, the ECJ agreed with the Commission's position and annulled the General Court's judgment in relation to Portielje.

The ECJ may, where an appeal is well-founded and the decision of the General Court is set aside, deliver final judgment on the matter under consideration where it is possible to do so. The ECJ affirmed that it was able to do so in this instance and assessed each of the arguments put forward by Portielje in its action for annulment before the General Court.

The ECJ dismissed all grounds of appeal, including claims that Portielje was misclassified as an undertaking, claims that it did not exercise decisive influence over Gosselin, and claims of violation of the equal treatment principle. In particular, the ECJ noted that, between January and September 2002, Portielje controlled practically all of Gosselin's share capital. Therefore, the Commission was entitled to presume that Portielje actually exercised decisive influence over Gosselin's commercial policy (a presumption that was not rebutted), and that Portielke and Gosselin formed a single undertaking for the purposes of Article 101 TFEU. Having rejected all of Portielje's pleas, the ECJ dismissed the action in its entirety.

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77 *Supra* note 74, para. 38.

POLICY AND PROCEDURE

Agreement between European Union and Switzerland on cooperation in the field of competition law enforcement

On May 17, 2013, the European Union signed an agreement with Switzerland (each a "Party" and, collectively, the "Parties") on cooperation in the field of competition law enforcement (the "Competition Law Agreement").[78] The EU is party to four bilateral cooperation agreements with the US, Canada, Japan and South Korea that provide for cooperation in the area of competition policy, but exclude the exchange of information obtained through the formal investigative process without the specific consent of the company that provided the information. The lack of a similar agreement between the EU and Switzerland has limited the cooperation between the Parties in prior competition law investigations. The purpose of the Competition Law Agreement is to enhance the cooperation and coordination between the two competition authorities (the European Commission and the Swiss Competition Commission) and lessen the risk of conflict in the application of the respective systems of competition law. The Competition Law Agreement provides for a system of written notifications to inform the other competition authority of the initiation of proceedings which may affect its interests.

Although most of the provisions are quite standard for a cooperation agreement, the Competition Law Agreement goes further than the Commission's prior cooperation agreements as regards the sharing of information. Specifically, under the terms of the Competition Law Agreement, either competition authority may, on request of the other competition authority and without the consent of the provider of the information, transmit for use as evidence information obtained by investigative process, including information obtained according to Regulation No. 1/2003 through requests for information and inspections conducted by or on behalf of the Commission. Neither competition authority is required to discuss or transmit information if it would be incompatible with "important interests" or unduly burdensome. Information obtained as part of a leniency or settlement procedure is expressly excluded from the scope of this provision and can only be transmitted to the other competition authority with the express written consent of the undertaking concerned. Further, information cannot be discussed, requested or transmitted if the use of such information would be prohibited under the respective procedural rights and laws of the Parties for their enforcement activities, including the right against self-incrimination and the legal professional privilege.

The information discussed or transmitted can only be used for the enforcement of the receiving Party's competition laws for the same or related conduct or transaction. If the information is provided in response to a written request by a competition authority, the information may only be used by the requesting authority for the purpose defined in the request. A competition authority may use such information only subject to terms and conditions imposed by the competition authority providing the information authority. Information obtained under the Competition Law Agreement is to be kept confidential and the Parties will, in particular, oppose any application by a third-party or other authority for disclosure. Disclosure may be made for the purpose of obtaining court orders as part of the enforcement process, informing other parties against whom such information may be used, appeals, and permitting the proper exercise of the right of access to documents.

The Competition Law Agreement will become effective only after approval by the European Parliament and by the Swiss Federal Assembly. The former approval process is expected to take approximately six months, while the latter is not expected until late 2013 or, more likely, 2014.

Donau Chemie (Case C-536/11)

On June 6, 2013, the ECJ ruled that EU law precludes a provision of national competition law that permits third parties wishing to bring civil damages claims against cartel

[78] Commission Press Release IP/13/444, "European Union and Switzerland sign Cooperation Agreement in Competition Matters," May 17, 2013.

participants to access national competition proceeding files with cartel participants' consent.[79]

On March 26, 2010, the Oberlandesgericht Wien, acting in its capacity as a cartel court (the "Cartel Court"), fined seven companies for their participation in a cartel in the Austrian market for the wholesale distribution of printing chemicals in breach of Article 101 TFEU. Once the decision became final, Verband Druck & Medientechnik, an association representing the interests of undertakings in the printing sector (the "Printing Association"), sought access the Cartel Court's file to quantify the damage it suffered as a result of the cartel, in preparation for an action for damages. Under the Austrian rule at issue (the "Consent Rule") third parties cannot access court files of public law competition proceedings without the consent of all parties to the proceedings, which the Printing Association did not obtain.

Following the judgment in *Pfleiderer*,[80] in which the ECJ held that national courts must balance the interests of protecting leniency documents with those of ensuring that damages actions can be brought, the Cartel Court asked the ECJ to determine whether the absolute ban contained in the Consent Rule was compatible with EU law, and in particular with the principle of effectiveness. According to the principle of effectiveness, domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law. Specifically, in the area of competition law, domestic law must not jeopardize the effective application of Article 101 TFEU, particularly the obligation of Member States to permit actions for damages for competition law violations before national courts.

The ECJ first confirmed the importance of the balancing exercise set out in *Pfleiderer*, which is necessarily fact-specific. The court explained that a rigid rule prohibiting access to documents from a competition proceeding's files would breach the principle of effectiveness, in particular when only access to such documents could enable private claimants to establish their claim for damages. However, the ECJ also made clear that a national law granting access to such documents as a matter of course and without a showing of need would be broader than necessary to protect the rights of private claimants and could lead to the infringement of other rights conferred by EU law, such as professional secrecy, business secrecy or the protection of personal data. Finally, it would undermine the effectiveness of competition policy by deterring cartelists from cooperating with competition authorities.

The ECJ accordingly concluded that EU law requires balancing and weighing of the relative interests involved. National law may not do away with this balancing and permit potential private plaintiffs to access documents forming part of the file relating to national competition proceedings, including access to documents made available under a leniency program, subject solely to the consent of all the parties to those proceedings.

While the ECJ did not give much guidance on the application of the *Pfleiderer* balancing exercise, the Commission has put forward several legislative proposals (discussed immediately below) and further clarification can be expected as the legislative process advances.

Draft measures proposed by the Commission to facilitate private actions for damages

On June 11, 2013, the Commission proposed a set of measures to facilitate private actions for damages. The Commission proposes to facilitate private actions for damages resulting from breaches of competition law through a draft directive (the "Damages Directive")[81] and guidance for national courts on quantifying harm resulting from such infringements (the "Practical Guide").[82] The

[79] *Bundeswettbewerbsbehörde v. Donau Chemie AG* (Case C-536/11), judgment of June 6, 2013, not yet published.

[80] *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09), judgment of June 11, 2011.

[81] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European union, COM(2013) 404, June 11, 2013.

[82] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the

Commission proposes to facilitate private actions for damages resulting from breaches of EU law generally through a recommendation for collective redress mechanisms to be put in place in the Member States (the "Recommendation").[83]

The draft Damages Directive addresses several issues of national law and procedure that have previously made it difficult to seek compensation for competition law infringements. First, the Damages Directive contains provisions on the disclosure of evidence contained within the Commission's or a national competition authority's ("NCA") file relating to the proceedings for breaches of EU competition law. To protect the Commission's and NCAs' public enforcement efforts, in particular the leniency and settlement procedures and related documents, while simultaneously facilitating private parties' ability to bring claims in national courts, the Commission is proposing a system of disclosure controlled by national court judges. Disclosure will only be ordered when a claimant has put forward reasonable evidence demonstrating the necessity and proportionality of the requested disclosure. General requests pertaining to the entirety of a competition authority's case file are expressly excluded as disproportionate. The Damages Directive envisages absolute protection for leniency corporate statements and settlement submissions, and temporary protection for information prepared during a competition authority's investigation (e.g., a party's replies to the authority's request for information, or the authority's statement of objections); disclosure of these documents can only be ordered after proceedings are closed.

Second, the Damages Directive confirms the rule of joint and several liability for joint infringements of competition law. However, it proposes that the liability of companies that have been granted immunity from fines under a leniency program to their direct and indirect purchasers (or providers) be limited to the damage that their direct and indirect purchasers cannot recover from other joint infringers. The Damages Directive also foresees recognition of the so-called "umbrella effect": it provides that, if an infringement caused harm to parties other than the direct or indirect purchasers or suppliers of the infringing undertakings, an immunity recipient may be held liable only for its share of the harm suffered. How the immunity recipient's share of the harm suffered is determined (e.g., turnover, market share, role in the cartel, etc.) is left to the discretion of the Member States.

Third, the Damages Directive expressly recognizes the existence of the "passing-on" defense. Namely, if the claimant has passed on all or part of the overcharge resulting from the infringement to its own customers, the defendant is not liable to the claimant for some or all of the losses caused by the defendant's anticompetitive activity. However, the passing-on defense is not available if the overcharge is passed on to persons who cannot claim compensation. The Damages Directive also establishes a rebuttable presumption of passing-on in favor of indirect purchasers in certain defined circumstances. To benefit from the passing-on presumption (i.e., the presumption that the overcharge was in fact passed on), the indirect purchaser must show that: (i) the defendant committed a competition law infringement; (ii) the infringement resulted in an overcharge to the direct purchaser; and (iii) the indirect purchaser bought goods or services from the direct purchaser that were the subject of the infringement.

Finally, the Damages Directive proposes a rebuttable presumption that cartel infringements cause harm. While this presumption would reduce the overall evidentiary burden on claimants, claimants would still have to prove other significant evidentiary elements of their claim – i.e.,

Functioning of the European Union, C(2013) 3440, June 11, 2014; *and* Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, June 11, 2013.

[83] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3, 11.6.2013; *and* Commission communication "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401/2, June 11, 2013.

either that they purchased products affected by the cartelist's activities or the quantum of their loss.

In addition to these principal areas, the Damages Directive contains several ancillary provisions, including streamlining limitation periods and establishing that NCAs' infringement findings are binding on national courts.

The Practical Guide is intended to assist national courts (and parties) in the complex task of quantifying the harm caused by competition infringements. The analysis starts with examining the claimant's position in the counterfactual (i.e., but for the infringement). The Practical Guide sets out the different methods and techniques for modeling this counterfactual scenario. It also explains the types of harm that typically result from anticompetitive conduct, i.e., cartels typically cause a rise in prices for direct and indirect customers resulting from the overcharge, as well as the so-called "volume effect" of lost profits for intermediate purchasers resulting in reduction of sales due to the higher price of the product.

The Recommendation is intended to complement the Damages Directive in relation to competition law infringements and applies more broadly to all breaches of EU law. The Recommendation applies to both injunctive and compensatory collective redress. It sets out a number of common principles and procedural safeguards to facilitate such actions, including designating representative entities to bring actions and providing for a timely consideration of questions of admissibility.

The Recommendation also contains specific suggestions with regard to the two forms of actions for redress. For injunctive collective redress, it encourages expedited proceedings and appropriate sanctions to ensure compliance with injunctive orders. For compensatory collective redress, it establishes an opt-in principle for the constitution of the claimant party: it should be composed only of persons claiming to have been harmed who gave their express consent to be included as part of the claimant party.

Additionally, the Commission recommends prohibiting punitive damages in cases of compensatory collective redress and only permitting tying third-party funding of litigation to the amount of the settlement obtained if the funding arrangement is regulated by a public authority. The Commission also recommends that Member States set in place mechanisms to encourage bringing follow-on actions after the conclusion of proceedings by public authorities in the same matter rather than parallel proceedings.

The Damages Directive will next be discussed by the European Parliament and the EU Council of Ministers according to the ordinary legislative procedure.

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