HORIZONTAL AGREEMENTS

ECJ Advocate General Opinions

***Toshiba Corporation v. Commission* (Case-373/14 P), opinion of AG Wathelet**

On June 25, 2015, Advocate General ("AG") Wathelet advised the Court of Justice to dismiss an appeal brought by Toshiba Corporation ("Toshiba") against the General Court's judgment of May 21, 2014,[1] upholding the Commission's decision of October 7, 2009 in the power transformers cartel.[2]

In 2009, the Commission imposed a total of €67.6 million in fines on six power transformers manufacturers for participating in a market-sharing cartel covering the EEA and Japan between 1999 and 2003. The Commission held that the agreement constituted a restriction of competition by object. On May 21, 2014, the General Court dismissed Toshiba's appeal against the Commission decision. Toshiba appealed to the Court of Justice.

In his opinion, AG Wathelet focused on Toshiba's plea disputing the General Court's interpretation of the concept of a restriction of competition by object. Toshiba argued that the General Court should have first established the existence of potential competition between the European and Japanese manufacturers. In particular, the Commission should have considered whether the Japanese manufacturers could have viably entered the EEA market. Failing that, EU competition rules could not have been infringed and the Commission would have lacked jurisdiction.

AG Wathelet disagreed. He recalled that an agreement's effects on competition are relevant only if an analysis of its provisions, objectives, and economic and legal context does not reveal the existence of a restriction of competition by object. AG Wathelet nonetheless acknowledged that the Court of Justice's recent judgment in *Allianz Hungária*[3] had blurred the distinction between object and effect restrictions. In that case, the Court of Justice had held that additional considerations are relevant for establishing a restriction of competition by object. Such considerations include market structure and the alleged cartel participants' market power.

AG Wathelet suggested that the economic and legal context need not be considered if the agreement's anticompetitive object follows from its very nature. By contrast, the economic and legal context ought to be only considered if the agreement has features that render it atypical or complex or does not fall within one of the situations listed in Article 101 TFEU. AG Wathelet noted that the General Court therefore rightly classified the market sharing agreement, which is listed in Article 101 TFEU, as a restriction of competition by object and did not have to verify whether the Japanese producers could have entered the EEA market.

AG Wathelet also advised the Court of Justice to dismiss Toshiba's plea alleging that the General Court misinterpreted the public distancing test. When anticompetitive agreements are concluded at a meeting of competing undertakings, the Commission need only establish that the undertaking in question concerned participated in the relevant meeting to prove that it participated in the infringement. To rebut this conclusion, the undertaking must adduce evidence showing that it publicly distanced itself from the infringement. Referring to the General Court's factual findings, AG Wathelet noted that Toshiba had failed to distance itself publicly from the market sharing agreement.

Having also advised the Court of Justice to reject Toshiba's other pleas, alleging distortions of the evidence and errors

[1] *Toshiba v. Commission* (Case T‑519/09) EU:T:2014:263.

[2] *Power Transformers* (Case COMP/39.129), Commission decision of October 7, 2009.

[3] *Allianz Hungária Biztosító v. Gazdasági Versenyhivatal* (Case C-32/11) EU:C:2013:160.

in calculating the amount of the fine, AG Wathelet advised the Court of Justice to dismiss Toshiba's appeal.

AC-Treuhand v. Commission (Case C-194/14), opinion of AG Wahl

On May 21, 2015, AG Wahl advised the Court of Justice to set aside the General Court's judgment dismissing AC-Treuhand's appeal against the Commission's decision of November 11, 2009 in the heat stabilizers cartel.[4]

In 2009, the Commission imposed a total of €173.86 million in fines on 10 undertakings for participating in two cartels in relation to various plastic additives used as heat stabilizers. In particular, Swiss consultancy firm AC-Treuhand received fines totalling €348,000 for facilitating the cartels by organizing meetings between the cartel members, keeping records, and providing assistance in keeping the agreements secret. On February 6, 2014, the General Court dismissed AC-Treuhand's appeal against the Commission's decision.[5] AC-Treuhand appealed to the Court of Justice.

AC-Treuhand primarily argued that the General Court erred in holding that the prohibition against anticompetitive agreements and concerted practices applied to cartel facilitation. AC-Treuhand stressed that it was not active in heat stabilizers or in any neighbouring market and had not agreed or otherwise coordinated with the cartelists to restrict competition.

AG Wahl agreed that the General Court's interpretation of Article 101 TFEU was excessively extensive. He recalled that Article 101 TFEU is not unlimited in scope. As far as undertakings are concerned, it only prohibits agreements or concerted practices that have as their object or effect the prevention, restriction, or distortion of competition. While this does not mean that the undertaking at issue must be active in the relevant market, it must be capable of restricting competition.

Against this background, AG Wahl proposed a method for identifying restrictions of competition. According to AG Wahl, this requires showing that the undertaking in question "renounced, totally or partially, by its conduct, to exert a pressure characteristic of effective competition on the rest of the operators in the market or markets affected to the prejudice of economic efficiency and consumer welfare."[6] In this case, AC-Treuhand did not exert any competitive constraint on the other cartel members either before or after the conclusion of the two unlawful agreements. AC-Treuhand therefore could not have ceased exerting any such constraint by engaging in the litigious conduct.

AG Wahl also considered whether, in the alternative, AC-Treuhand could be regarded as an accessory to the infringements at stake. AG Wahl acknowledged that the acts of which AC-Treuhand stood accused could in principle fall within that category, but the Commission had not raised this argument. Nor did the need to distinguish between principal and accomplice result from the wording of Article 101 TFEU. AG Wahl added that such a distinction was relevant only in the criminal law context, not in administrative proceedings such as cartel investigations under EU competition law. This statement comes at a time of increasing recognition of the criminal nature of EU competition rules.

Having advised the Court of Justice to uphold the first ground of appeal, AG Wahl did not deem it necessary to examine AC-Treuhand's other grounds of appeal, alleging breaches of the principle of equal treatment and errors in setting the level of the fine and in the exercise of the General Court's unlimited jurisdiction.

General Court Judgments

FSL and Others v. Commission (Case T-655/11)

On June 16, 2015, the General Court partly upheld an appeal by FSL Holdings and its subsidiaries Firma Léon Van Parys and Pacific Fruit Company Italy (together,

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[4] *Heat Stabilizers* (Case COMP/38589), Commission decision of November 11, 2009.

[5] *AC-Treuhand v. Commission* (Case T-27/10) EU:T:2014:59.

[6] *AC-Treuhand v. Commission* (Case C-194/14 P) EU:C:2015:350, opinion of AG Wahl, para. 1.

"Pacific Fruit") against the Commission's decision of October 12, 2011[7] in the exotic fruit cartel.

In 2011, the Commission fined Pacific Fruit €8.9 million for its involvement in a price-fixing agreement with Chiquita in the import, marketing, and sale of bananas in Greece, Italy, and Portugal between 2004 and 2005. The scheme involved the exchange of information on future market conduct and coordination on future prices and price movements. The Commission held that this restricted competition by object. The Commission's conclusions were based on submissions by the leniency applicant, Chiquita, and on documents obtained from the Italian tax authority. Pacific Fruit appealed to the General Court.

Pacific Fruit argued that the evidence obtained from the Italian tax authority was inadmissible. According to Pacific Fruit, the Commission breached Pacific Fruit's rights of defence by failing to inform Pacific Fruit of this evidence before issuing the statement of objections.

The General Court disagreed. The Implementing Regulation,[8] which regulates the exchange of information between the Commission and national competition authorities, cannot be interpreted to preclude the Commission from lawfully obtaining evidence from other national authorities. The lawfulness of such transmissions is a matter for national law.

The Commission had received the evidence from the Italian tax authority on the basis of a national court order. This order authorized the use of the relevant documents for administrative purposes and did not preclude their submission to the Commission. The General Court concluded that the Commission was entitled to rely on these documents.

The General Court further recalled that suspected cartelists are entitled to an opportunity during the administrative procedure to present their views on the Commission's evidence. The administrative procedure consists of two distinct phases separated by the notification of the statement of objections. According to settled case-law, it is only during the second phase that an undertaking may invoke its rights of defence to the full extent.

This meant that the Commission was not obliged to inform Pacific Fruit of these documents before the issuance of the statement of objections and held that Pacific Fruit's rights of defence had not been breached.

Pacific Fruit also challenged the Commission's finding of a single and continuous infringement. According to Pacific Fruit, the Commission had failed to establish the continuous nature of the infringement to the requisite legal standard. Specifically, Pacific Fruit alleged, the Commission could not conclude that the infringement continued throughout 2004 and 2005 on the sole basis of three short handwritten notes (dated July and August 2004) and one internal e-mail (dated April 2005).

The General Court upheld this plea. The General Court recalled that for an infringement to be continuous between two specific dates, there must be evidence of incidents that are sufficiently proximate in time to prove that the infringement continued uninterruptedly. Specific market characteristics, such as pricing cycles, determine whether events are "sufficiently proximate."

The General Court noted that the Commission lacked evidence of anticompetitive contacts for the period between August 12, 2004 and January 19, 2005. Yet, price negotiations in the relevant market occurred on a weekly basis. The General Court therefore concluded that the Commission should have characterized the infringement as single and repeated and excluded the period of August 12, 2004 to January 19, 2005 from the duration of the infringement. The General Court accordingly reduced the fine by €2.2 million.

Having rejected Pacific Fruit's other pleas, alleging a breach of the rules governing the allocation of the burden

[7] *Exotic Fruit (Bananas)* (Case COMP/39482), Commission decision of October 12, 2011.

[8] 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.

of proof and a miscalculation of the fine, the General Court partly upheld Pacific Fruit's appeal.

FINING POLICY

ECJ Judgments

***Fresh Del Monte Produce v. Commission and Commission v. Fresh Del Monte Produce* (Joined Cases C-293/13 P and C-294/13 P)**

On June 24, 2015, the Court of Justice dismissed an appeal by Fresh Del Monte Produce ("Del Monte") and granted an appeal by the Commission against the General Court's judgment of March 14, 2013,[9] partly annulling the Commission's decision of October 15, 2008 in the banana importers cartel.[10]

In 2008, the Commission fined Del Monte and its subsidiary Internationale Fruchtimport Gesellschaft Weichert ("Weichert") €15 million for coordinating banana quotation prices in Northern Europe with other banana importers between 2000 and 2002. In particular, the Commission held that the companies' forward-looking communications about banana price-setting factors, price trends, or future quotation prices restricted competition by object.

On appeal, the General Court largely upheld the Commission's decision, but held that the Commission had miscalculated the fine against Del Monte and Weichert. The General Court reduced the fine by 10% on account of Weichert's cooperation with the Commission. The General Court also reduced the basic amount of the fine by 10% to reflect Weichert's size relative to the other banana importers and the extent of its participation in the infringement. The overall amount of the fine accordingly dropped by €6 million. Both Del Monte and the Commission appealed to the Court of Justice.

Del Monte's appeal

Del Monte argued that the General Court erred in upholding the Commission's finding that Del Monte and Weichert formed a single economic unit at the time of the infringement.

The Court of Justice rejected Del Monte's plea. The Court of Justice recalled that a parent company is liable for its subsidiary's anticompetitive conduct if it exercises decisive influence over that subsidiary. Joint control of a subsidiary by two or more parent companies does not preclude a finding of decisive influence by one more of those parent companies. The exercise of decisive influence may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the exercise of decisive influence.

In this case, the General Court had a sufficient body of evidence to establish that Del Monte exercised decisive influence over Weichert. This followed from the economic, organizational, and legal links between the two entities. These links included a partnership agreement giving Del Monte joint control over Weichert and an exclusive distribution agreement requiring Del Monte to sell and deliver bananas for resale in the European market only to Weichert.

Having also rejected Del Monte's other grounds of appeal, alleging a distortion of the evidence, an error in finding a single and continuous infringement, and a breach of the principle of in *dubio pro reo*,[11] and the rules governing the allocation of the burden of proof, the Court of Justice dismissed Del Monte's appeal.

The Commission's appeal

The Commission argued that the General Court erred in law by granting a 10% fine reduction under the 2002 Leniency Notice.[12]

[9] *Fresh Del Monte Produce v. Commission* (Case T-587/08) EU: T:2013:129.

[10] *Bananas* (Case COMP/39188), Commission decision of October 15, 2008.

[11] When in doubt, for the accused.

[12] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 45/03.

The Court of Justice upheld the plea. It recalled that a fine reduction for cooperation under the Leniency Notice is only justified where an undertaking reveals a genuine spirit of cooperation with the Commission and voluntarily provides it with information that facilitates the establishment of an infringement. The General Court, however, reduced the fine against Del Monte and Weichert on account of the evidential value of Weichert's reply to a request for information. The Court of Justice accordingly annulled the 10% reduction granted by the General Court and set the fine against Del Monte and Weichert at €9.8 million.

Having accepted the Commission's only plea, the Court of Justice upheld its appeal.

LG Display and LG Display Taiwan v. Commission **(Case C-227/14 P)**

On April 23, 2015, the Court of Justice dismissed an appeal by LG Display and its subsidiary LG Display Taiwan (together, "LG Display") against the General Court's decision of February 27, 2014,[13] largely upholding the Commission's decision of December 8, 2010[14] in the LCD panels cartel case.

In 2010, the Commission fined six LCD panels manufacturers a total of €649 million for restricting competition by object by coordinating prices and exchanging information on future production planning, capacity utilization, and other commercial conditions concerning LCD panels between October 2001 and February 2006. LG Display received partial immunity for being the first leniency applicant to provide evidence of the continuation of the cartel in 2006. It received a €215 million fine.

Further to LG Display's appeal, the General Court largely upheld the Commission's decision, but held that the Commission had failed to fully reflect LG Display's partial immunity in calculating its €215 million fine. The General Court accordingly reduced LG Display's fine by €5 million to €210 million. LG Display appealed to the Court of Justice.

LG Display argued that the General Court erred in holding that the Commission could consider LG Display's internal sales to its parent companies for the purposes of calculating the value of sales. According to LG Display, these sales were not affected by the infringement because they had been made in the context of its special contractual relationship with its parent company.

The Court of Justice disagreed. The Court of Justice noted that LG Display did not form a single economic entity with its parent companies at the time of the infringement. The sales in question therefore constituted external sales. The Court of Justice then recalled that the 2006 Fining Guidelines[15] require the Commission to calculate fines by reference to the value of the offending undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.

According to the Court of Justice, this concept is not limited to the value of sales for transactions actually affected by the infringement but extends to all sales in the relevant market, irrespective of whether they were influenced by the infringement. Any conclusion to the contrary would require the Commission to identify the individual sales affected by the cartel. Given the secret nature of cartels, this would lead to fines that unduly minimize the economic significance of cartel infringements. The Court of Justice also noted that excluding internal sales would provide vertically integrated undertakings with an unjustified advantage over other undertakings.

In this case, LG Display's LCD panels sales to its parent companies had been made in the market affected by the infringement. The General Court was therefore correct to conclude that these sales were affected by the infringement.

13 *LG Display and LG Display Taiwan v. Commission* (Case T-128/11, EU:T:2014:88).

14 LCD – Liquid Crystal Displays (Case COMP/39.309), Commission decision of December 8, 2010.

15 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No1/2003. OJ 2006 C 210/2.

LG Display also claimed that the General Court erred in upholding the Commission's decision to reject LG Display's claim to partial immunity for the year 2005. LG Display argued that the General Court had misinterpreted point 23(b) of the Commission's 2002 Leniency Notice,[16] which guarantees immunity from fines to the extent an undertaking provides evidence of facts that have a direct bearing on the gravity or duration of the suspected cartel and were previously unknown to the Commission. LG Display argued that it was the first alleged cartel member to provide evidence that multilateral meetings between cartel participants had occurred in 2005. The evidence previously provided by another cartel member only showed that bilateral contacts had continued in 2005.

The Court of Justice rejected this plea because the General Court found that that the information related to facts that were already known to the Commission. In coming to this conclusion, the General Court did not need to compare the evidential value of LG Display's information with that of the information which it had received before.

In the alternative, LG Display claimed partial immunity for the period after August 26, 2005 because the Commission had no evidence of the continuation of the cartel after that date before LG Display's leniency application. The Court of Justice summarily dismissed this claim, noting that the Commission knew about the existence of the cartel in the year 2005 from another cartel member's internal email dated January 14, 2005. This suggests that the Commission's knowledge of the continuation of a cartel at the beginning of the calendar year is sufficient to prevent other leniency applicants from obtaining partial immunity for other parts of that year.

Having rejected LG Display's two grounds of appeal, the Court of Justice dismissed the appeal in its entirety.

General Court Judgments

Timab Industries v. Commission **(Case T-456/10)**

On May 20, 2015, the General Court dismissed an appeal by CFPR and its subsidiary Timab Industries (together, "Timab") against the Commission's decision of July 20, 2010 in the animal feed phosphates cartel.[17]

In a 2010 hybrid settlement case,[18] the Commission imposed over €175 million in fines on six animal feed phosphates manufacturers for their involvement in a price-fixing and market-sharing cartel between March 1969 and February 2004. As a participant in the settlement procedure, Timab was initially advised by the Commission that it would face a fine in the range of €41-44 million for participating in the cartel between 1978 and 2004. But Timab later withdrew from the settlement process. The Commission eventually imposed €60 million on Timab for its involvement in the infringement from September 1993 to February 2004. Timab appealed the Commission's decision to the General Court.

Timab claimed that the Commission had penalized it for withdrawing from the settlement procedure by imposing a higher fine than contemplated during the settlement process. In doing so, Timab argued, the Commission had misused its powers.

The General Court disagreed, holding that the Commission merely applied the 2006 Fining Guidelines[19] in calculating both the settlement fine range and the ultimate fine. For the settlement fine range, the Commission considered an infringement duration of 27 years, the average value of sales for that period, a 17% gravity factor and entry fee, a 35% reduction for mitigating circumstances and discounts for leniency, and settlement of 35% and 10%, respectively.

[16] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ 2002 C 45/3.

[17] *Animal feed phosphates cartel* (Case COMP/38866), Commission decision of July 20, 2010.

[18] A hybrid settlement case is a case where some, but not all, suspected cartelists opt for the settlement procedure. Those who choose not to do so participate in the ordinary adversarial procedure.

[19] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/4.

The Commission applied the same methodology in calculating the ultimate fine. Specifically, the Commission took into account a duration of 12 years, the average value of sales for that period, a 17% gravity factor and entry fee, and a 5% leniency reduction. The higher level of that fine thus resulted from (i) a higher average value of sales for the relevant infringement period, (ii) the absence of a settlement discount and reductions for mitigating circumstances, and (iii) a lower leniency discount.

The General Court found that the Commission had initially contemplated a fine reduction for mitigating circumstances to reward Timab for cooperating beyond the scope of the leniency program by admitting its participation in the cartel before 1993. After withdrawing from the settlement procedure, Timab challenged its participation in the cartel for this period and argued that its leniency submissions did not include evidence of any infringements before 1993. The Commission therefore reassessed the value of Timab's cooperation and leniency application. It lowered the leniency discount and refrained from granting any reduction for mitigating circumstances. The higher level of the fine was not aimed at penalizing Timab for withdrawing from the settlement process, but reflected a correct application of the 2006 Fining Guidelines.

Timab also claimed that the Commission's decision to penalize Timab for withdrawing from the settlement process breached a number of general principles of EU law, including the right against self-incrimination.

The General Court disagreed. Having already found that the Commission had not penalized Timab for withdrawing its settlement application, the General Court recalled that cooperation with the Commission both under the Leniency Notice[20] and the Settlement Notice[21] is voluntary. The Commission cannot compel an undertaking to admit its participation in an infringement. Applying these principles to the case, the General Court found that the Commission had not attempted to influence Timab in its cooperation.

In a similar vein, Timab argued that the Commission had breached the general principle of the protection of legitimate expectations by imposing a higher fine than notified in the settlement process.

The General Court rejected this plea, recalling that an undertaking can only rely on that principle if it has received precise, unconditional, and consistent assurances from authorized and reliable sources within the EU authorities. The General Court noted that the fine range was notified to Timab under the settlement process. This procedure is entirely distinct from the traditional, adversarial procedure. As such, the fine range is precisely contingent on a successful outcome to the settlement procedure. This meant that Timab could no longer rely on the notified range following its withdrawal from the settlement procedure.

Having also rejected as unfounded Timab's other pleas, alleging errors in the calculation of the amount of the fine and in attributing the infringements to all offending undertakings without distinguishing between different forms of conduct and time periods, the General Court dismissed the appeal.

20 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/11.

21 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008 C 167/01.

MERGERS AND ACQUISITIONS

General Court Judgments

Deutsche Börse v. Commission **(Case T-175/12)**

On March 9, 2015 the General Court rejected Deutsche Börse's appeal against the Commission's decision of February 1, 2012, blocking a proposed merger between financial exchange operators Deutsche Börse and NYSE Euronext[22] on the grounds that it would have created a dominant or near-monopoly position, especially because Deutsche Börse and NYSE Euronext were each other's closest competitors in certain EU financial services markets.[23]

With respect to the admissibility of the appeal, the Commission argued that Deutsche Börse had not contested some of the findings which, in the Commission's view, were sufficient on their own to lead to a prohibition decision. The General Court dismissed the Commission's objections and held that the appeal did not need to dispute all the markets in which the Commission found competition concerns because: (i) Deutsche Börse's pleas alleged infringement of rights of defense; (ii) it was plausible that Deutsche Börse's pleas could have had an impact on the Commission's assessment of undisputed markets; and (iii) Deutsche Börse's efficiencies claims and proposed commitments were not specific to a given market and their analysis could have been different in case the claims on the explicitly contested markets were to be upheld.

On the merits, the General Court dismissed all three of Deutsche Börse's pleas, alleging errors of law and assessment regarding the analysis of the competitive constraints faced by the parties, the efficiency gains, and the proposed commitments.

Competitive constraints on the parties. Deutsche Börse put forward two types of arguments. First, it claimed that exchange traded derivatives ("ETDs") and over-the-counter ("OTC") derivatives exercise a competitive constraint on each other and therefore should not be separate markets. The General Court disagreed because this claim was based on future and uncertain legislative developments and the Commission was instead allowed to rely on responses by 13 customers to conclude that costumers who can only trade ETDs and end-users are price-inelastic to changes in ETD trading prices. The General Court also affirmed the Commission's findings that the parties significantly constrained each other in exchange-traded interest rate derivatives and single equity derivatives. The General Court noted the Commission did not err in reaching these findings without carrying out a quantitative analysis, which would not be meaningful. Furthermore, the General Court found no evidentiary support for Deutsche Börse's claims that other derivatives trading platforms exercised competitive constraints on the parties' activities in ETDs. Second, Deutsche Börse argued that the Commission disregarded customers' alleged countervailing buyer power to prevent the merged entity from increasing fees post-merger. The General Court found this argument unsupported by sufficient evidence.

Efficiencies gains. Deutsche Börse claimed that the Commission had violated its rights of defense because it was not afforded the opportunity to submit observations on the Commission's changing views on alleged efficiencies gains. Efficiencies savings were found to arise from smaller collateral requirements for customers and lower implicit trading costs due to greater liquidity. According to Deutsche Börse, before adopting the final decision, the Commission should have communicated to the parties its revised calculation of the estimated efficiencies savings. The General Court disagreed, because a statement of objections is inherently provisional and the Commission is not obliged to maintain the factual or legal assessments set

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

23 In the markets for: (i) existing and new European exchange-traded interest rate futures and options; (ii) existing and new European exchange-traded single stock futures and options; (iii) new exchange-traded European equity index futures and options; (iv) off-order book services for block-size European exchange-traded derivatives contracts; and (v) trade registration, confirmation and central counterparty clearing services for flexible versions of European equity futures and options traded over-the-counter.

forth in such document, nor to explain any difference with the final decision. The General Court noted that the evaluation of efficiencies is to be separate from that of the effects of the merger, especially considering that the Commission has the burden of proving the anticompetitive effects of the operation, while the parties have the burden of proving that efficiencies benefit consumers, are merger-specific, and are verifiable.

Proposed commitments. Deutsche Börse claimed that the Commission erroneously rejected the parties' proposal to divest parts of both Deutsche Börse's and NYSE Euronext's single-equity derivatives business due to uncertainty associated with required regulatory approvals for such divestment. The General Court found that the Commission had based its decision on other valid grounds, including the failure to comply with the Commission's requirement that the purchaser of the single-equity derivatives business is also competitive in equity-index derivatives. In any event, the General Court accepted the Commission's concerns about regulatory uncertainties, which could imply delays and lead to an increased risk about the execution and valuation of the divestment.

Deutsche Börse also challenged the Commission's rejection of the offered commitments to give independent third party access to the merged entity's clearing-house and margin pool and to grant a license to the parties' Eurex interest rate trading software. The General Court dismissed these claims on grounds that they were pure assertions without sufficient supporting evidence.

Having rejected all the pleas put forward by Deutsche Börse, the General Court dismissed the action in its entirety and upheld the Commission's decision to prohibit the proposed merger.

Commission Decisions

First-phase Decisions With Undertakings

ZF/TRW (Case COMP/M.7420)

On January 22, 2015, the Commission approved Germany-based ZF Friedrichshafen AG's ("ZF") acquisition of U.S.-based TRW Automotive Holdings Corp. ("TRW"), conditioned upon the divestment of TRW's businesses in the design, manufacturing, and sale of chassis components. ZF is a global supplier of automotive and industrial applications products, and its business focuses on powertrain and chassis technology. TRW is a global manufacturer and supplier of automotive components, focusing in particular on active and passive safety technologies.

In the markets for the manufacture and supply of automotive components, the Commission found that each individual component constitutes a separate product market; each component market is then further subdivided by weight of the vehicle, and by supply recipient type. The Commission distinguished between two vehicle types by weight: light vehicles ("LVs") under 6 tons (regular cars) and heavy commercial vehicles ("HCVs") over 6 tons (trucks). It also distinguished between two supply recipient types: original equipment manufacturers ("OEMs") and original equipment suppliers ("OESs"), and independent aftermarket ("IAM") (for replacement components). According to the Commission, the geographic market for sales to OEMs/OESs was at least EEA-wide, and the market for sales to IAMs was a least national, with a trend towards being EEA-wide as well.

The Commission noted a number of horizontal and vertical relationships between the parties' activities but focused on the horizontal overlap in chassis components. Chassis components are parts that make up a vehicle's chassis linkage and suspension. In particular, the Commission was concerned with the fact that ZF and TRW were respectively the number one and two players in the manufacture and supply of chassis components to OEMs/OESs in the EEA, for both LVs and HCVs. For all LV chassis components, the parties' combined market share would be 50–60%, with an increment of 5–10%, and for all HCV chassis components, their combined market share would be 70–80%, with an increment of 10–20%. In LV chassis components, the transaction would give rise to combined shares of 90鼈100% and an increment of 20–30% in suspension ball joints; combined shares of 30–40% and an increment of 5–10% in control arms; and combined shares of 50–60% and an increment of less than 5% in tie rods and stabilizer links. With regards to HCV chassis components, the acquisition would lead to combined shares of 70–80% and an increment of 10–20% in torque rods; combined shares of 60–70% and an increment of 5–10% in V-links; combined shares of 70–80% and an increment of 30–40% in tie rods; and combined shares of 60–70% and an increment of 10–20% in drag links.

Given the high combined market shares, the Commission and customers expressed concerns about barriers to entry and the inability of remaining competitors to counteract potential price increases in LV and HCV chassis components. The market investigation revealed that entry was unlikely because there has only two instances of entry in LV markets and none in HCV markets in the preceding five years, and no expected entry in either HCV or LV markets in the next five years. The high barriers to entry were attributed to technical know-how and the need to sustain sufficient level of product quality.

To address the Commission's concerns, ZF proposed to divest all of TRW's businesses in the research & development, design, manufacturing, and sale of chassis components. The Commission accepted the divestment commitment, without imposing an up-front buyer requirement, and concluded that the divestment would remove the entire overlap between the parties in chassis components, and allow a new competitor to enter the market.

Munksjö/Ahlstrom **(Case COMP/M.6576)**

On May 24, 2013, the Commission cleared the merger between Swedish-based Munksjö AB ("Munksjö") and the Label and Processing Business ("ALP") of Finnish Ahlstrom Corporation ("Ahlstrom"), subject to conditions. Munksjö and ALP both manufacture decor paper (including pre-impregnated paper), abrasive paper backings, and electrotechnical paper.

The Commission's investigation identified the following relevant markets: (i) heavyweight abrasive paper backings; (ii) pre-impregnated paper; and (iii) electrotechnical paper. The Commission suggested that the paper backings and pre-impregnated paper markets were at least EEA-wide, although the geographic delimitation was ultimately left open. The Commission found evidence that the electrotechnical paper market should encompass all oil-impregnated electrotechnical papers, and might be EEA-wide, global, or global (excluding China), but the Commission also left all electrotechnical paper market definitions open.

According to the Commission, the transaction did not raise concerns in the electrotechnical paper market, because, in these markets, the post-merger entity would face robust competition and significant countervailing buyer power.

The Commission, however, determined that the transaction would significantly impede competition in the heavyweight abrasive paper backing market. Post-transaction, the merged entity would enjoy a quasi-monopoly with combined shares between 80% and 100%, and no new suppliers were likely to have the ability or incentive to enter the market in the following years. The Commission concluded that customers or competitors would not be able to prevent a hypothetical price increase. Even were the relevant market to consist of all paper backing products, the significant impediment to competition would still exist.

The Commission also determined that the transaction would significantly impede competition in the pre-impregnated paper market, in the EEA, as well as globally (excluding China). The Commission found that the post-merger entity would control 70–80% of the market, and concluded that the low likelihood of market entry and the lack of significant countervailing buyer power would place the post-merger entity in a dominant position.

To address the Commission's concerns, the parties initially offered to divest Ahlstrom's paper backings and pre-impregnated paper business, which was based in its Osnabrück, Germany plant. The commitments specified that the divested business would continue to be conducted at Osnabrück, while the plant itself, along with one of the three paper machines located there, would remain in Ahlstrom's possession for non-overlapping activities. To address the Commission concerns that the purchaser would not be able to operate viably and effectively the divested business, the parties offered to divest the Osnabrück plant entirely, except for Ahlstrom's non-overlapping product business and the Osnabrück energy and water facilities, which would be jointly controlled by Ahlstrom and the purchaser. The Commission concluded that these commitments would adequately protect the independence and competitiveness of the purchased business and approved the transaction.

GlaxoSmithKline/Novartis Vaccines Business/Novartis Consumer Health Business **(COMP/M. 7276)**

On January 28, 2015, the Commission cleared the acquisition of sole control by GlaxoSmithKline plc ("GSK") of Novartis AG's ("Novartis") global human vaccines business (excluding influenza vaccines), as well as the creation of a venture, under the sole control of GSK, combining the parties' over-the-counter ("OTC") (*i.e.*, non-prescription) pharmaceutical products (the "OTC JV"). As part of the same transaction, Novartis also acquired GSK's oncology business.[24]

Vaccines

In the vaccines segment, the Commission identified separate product markets for meningococcal vaccines and diphtheria and tetanus vaccines. The meningococcal vaccines market was further segregated into (i) MenC, (ii) MenACWY, (iii) Men B, and (iv) MenC-Hib vaccines. The product market for diphtheria and tetanus vaccines was further segmented into (i) monovalent and bivalent diphtheria and tetanus vaccines, and (ii) broader combination vaccines. Consistent with prior cases involving pharmaceuticals and vaccines, the Commission delineated the relevant geographic markets as national in scope.

The Commission's investigation mainly focused on two horizontal overlaps, *i.e.*, (i) the market for MenACWY meningococcal vaccines and (ii) the market for bivalent vaccines for diphtheria and tetanus in Germany and Italy.

MenACWY meningococcal vaccines. MenACWY meningococcal vaccines provide immunization to certain serogroups against bacterial meningitis. In this segment, the transaction would have been a merger to monopoly as GSK and Novartis's combined shares amounted to c. 90–100% in most overlapping countries. To address the Commission's concerns, GSK proposed to divest its entire MenACWY business (*Nimenrix* and *Mencevax*).

Bivalent vaccines for diphtheria and tetanus. Routine immunization for diphtheria usually coincides with immunization for tetanus. Bivalent vaccines, as opposed to monovalent, require only one injection for both immunizations. In this segment, the merged entity would have had c. 60–70% share in Germany and c. 40–50% in Italy. The Commission expressed concerns that the remaining suppliers of such vaccines would be unable to constrain the merged entity. To address the Commission's concerns, GSK committed to conclude an exclusive distribution agreement of Novartis' *TD-Pur* and *Dif-Tet-All* bivalent diphtheria and tetanus vaccines business in Germany and Italy, combined with a supply agreement. The commitment did not include the existing sites where *TD-Pur* and *Dif-Tet-All* are manufactured, as these sites were also being used for the production of other vaccines which accounted for a large majority of these facilities' capacity usage.

OTC

The creation of the OTC JV resulted in overlaps in: (a) smoking cessation; (b) cold sore management; (c) cold and flu treatments; (d) allergic rhinitis treatments; (e) pain management; (f) gastrointestinal treatments; and (g) antifungals. In the Commission's view, the transaction raised competition concerns in several affected markets.

[24] *Novartis/GlaxoSmithKline Oncology Business* (Case COMP/M.7275), Commission decision of January 28, 2015.

Divestiture remedies were offered for smoking cessation products, cold sore management products, cold and flu treatments, and pain management products:

Smoking cessation products. The Commission took the view that Nicotine Replacement Therapies ("NRT"), which are OTC products including formats such as patches, gums, lozenges, orally dissolving strips, and sprays/inhalers, constituted a separate market from other products such as Nicotine addiction therapies ("NDT"), which are prescription-only. In the Commission's view, the transaction raised concerns within the market for NRT mainly because of (i) the high combined market shares (in some countries the parties had c. 80–90% combined shares); (ii) the limited number of additional competitors, and (iii) the existence of barriers to entry including brand awareness, IP rights, and the need for clinical tests. GSK agreed to divest GSK's *NiQuitin*-branded products business in the EEA and Turkey.[25]

Cold sore management. The parties overlapped in the market for topical antiviral cream for the treatment of cold sores. In the Commission's view, the transaction would have raised concerns because of the (i) high combined market shares (above c. 80–90% in some countries); (ii) importance of brand loyalty and limited impact on sales of recent entrants; and (iii) lack of innovation on the market. GSK committed to divest the assets and rights of Novartis' branded products *Fenivir*, *Pencivir*, *Vectatone* and *Vectavir* in the EEA and in Turkey.

Cold and flu treatments. The Commission identified two broad categories of OTC products treating a cold and flu: (i) multi-symptoms products, which contain more than one active ingredient and treat multiple symptoms, and (ii) single-symptoms products, which contain a single active ingredient treating a specific symptom. When defining the product market, the Commission concluded that multi-symptom products posed a competitive constraint on single-system products (although the precise scope of the definition was ultimately left open). The Commission noted that (i) the transaction would lead to a combined market share in excess of c. 40–50%; (ii) the parties had particularly strong brands which contributed to their high sales levels; (iii) the parties exerted significant competitive restraints on each other; and (iv) competitors found it difficult to expand in this segment. GSK committed to divest its *Coldrex* products and its *Nezeril* and *Nasin* nasal sprays/drops products.

Pain management. Pain management products are designed to manage symptoms of mild to moderate acute pain through systemic treatments (oral intake) and topical pain treatments (applied to the skin). The Commission raised concerns about the segment for systemic pain management in Sweden, where the parties would have enjoyed a combined market share of c. 50–60%. GSK committed to divest its *Panodil* OTC and prescription products in Sweden.

Second-phase Decisions With Undertakings

Liberty Global/Ziggo (CASE COMP/M.7000)

On October 10, 2014, the Commission conditionally approved the acquisition of sole control of Ziggo N.V. ("Ziggo") by Liberty Global plc. ("Liberty Global"), following a phase II investigation.

Liberty Global is an international cable operator, offering TV, broadband internet, fixed, and mobile telephony services in 12 European countries. Ziggo is a Dutch cable operator and its broadband cable networks cover more than 50% consumers in the Netherlands. The proposed transaction combined the two largest cable networks operating in the Netherlands, covering around 90% of the country.

In line with its previous decisions on TV and telecommunications services,[26] the Commission delineated the following relevant product markets in the Netherlands: (i) the market for licensing/acquisition of broadcasting rights

[25] The Turkish competition authority accepted to be included in the scope of the commitments and waived the parties' obligation to provide separate commitments in this jurisdiction.

[26] *News Corp/Premiere* (Case COMP/M.5121), Commission decision of August 26, 2008; *HBO/Ziggo/HBO Nederland* (Case COMP/M.6369), Commission decision of December 21, 2011.

for TV content; (ii) the wholesale market for supply and acquisition of pay TV channels (further subdivided into the market for "basic" and the market for "premium" Pay TV channels); and (iii) the retail markets for provision of TV services, fixed telephony/voice services, internet access services (further segmented into the markets for "mobile" and for "fixed broadband" internet), and mobile telecommunication services. The Commission also examined whether a separate market for the provision of "multiple play" services, *i.e.*, a bundle of usually three or more retail services, existed in the Netherlands, but ultimately left the exact market definition open.

The Commission's in-depth investigation identified concerns in the following relevant markets: (i) the wholesale supply and acquisition of premium pay TV film channels (on the supply side); and (ii) the supply and acquisition of basic and premium pay TV channels (on the acquisition side).

Supply of premium pay TV film channels. Liberty Global distributes one of the two premium pay TV film channels in the Netherlands (Film1), and Ziggo controls—jointly with HBO—the second premium pay TV film channel (HBO Nederland). The Commission was therefore concerned that the merger would have removed the competitive constraint that the two exercise on each other, allowing the merged entity to increase prices to competing retail pay TV operators, such as KPN. Neither HBO's co-controlling stake over HBO Nederland nor the potential competitive pressure exerted by providers of Video on Demand ("VOD") services—*e.g.* Netflix and RTL's Videoland—would have prevented, in the Commission's view, a price increase. In particular, the Commission considered that VOD services do not currently constitute an adequate substitute to the merged entity's linear premium pay TV channels.

Acquisition of basic and premium pay TV channels. The combined entity would have controlled 60–70% of Dutch pay TV subscriptions. The Commission was concerned that the transaction would give the merged entity increased buyer power *vis-à-vis* TV channel suppliers and so allow it to hinder the development of innovative over-the-top ("OTT") internet services. Pre-merger, TV broadcasters would have been able to oppose the insertion of such OTT restrictions in their agreements, partially because of Ziggo's competitive pressure.

In order to address the Commission's concerns, Liberty Global offered a mix of structural and behavioral commitments. The commitments included: (i) selling Liberty Global's Film1 premium Pay TV channel to a third party purchaser and entering into a carriage agreement with the purchaser for the distribution of Film1; and (ii) no longer enforcing and terminating clauses currently contained in—as well as not concluding for a period of eight years—carriage agreements that restrict broadcasters' ability to offer their channels and content via OTT services.

The Commission concluded that the commitments were suitable and sufficient to eliminate the competition concerns. However, on July 17, 2015, KPN filed an appeal before the General Court contesting the Commission's conditional approval of the acquisition of Ziggo by Liberty Global and, in particular, the remedies offered by Liberty Global.[27]

Prohibition Decisions

***UPS/TNT* (M.6570)**

On January 30, 2013, following a phase II investigation, the Commission prohibited a merger between United Parcel Service ("UPS"), headquartered in the U.S., and TNT Express ("TNT"), based in the Netherlands. As transport and logistics companies that specialize in small package delivery and freight transport, both parties operate as "integrators," meaning that they control the whole logistics chain of package delivery from origin to destination, including air transport.

The Commission defined the relevant product markets by reference to package size, speed of delivery, and origin/destination. Freight and small package delivery

[27] *KPN v. Commission (*Case T-394/15).

services (below 31.5 kg) were separate product markets because the two services do not utilize the same logistical infrastructures. The Commission also distinguished between express services (next-day delivery) and standard/deferred delivery services because of the substantial differences in logistical networks and customers' inability to switch freely between the services in the event of a price increase. Finally, domestic, international intra-EEA, and international extra EEA delivery services were placed in separate product markets because significant barriers to entry existed for providers seeking to switch from offering one such service to another. The Commission defined national geographic markets for each of the above services because providers must have a significant national network at both the country of the package's origin and destination, including sorting centers, ground and air coordinating facilities, ground delivery vehicles, and aircraft.

The Commission focused on the international intra-EEA markets for small package express delivery services. Although a range of small package delivery companies operate within the EEA (including national and local post operators, partner networks, and freight forwarders), the Commission identified only four integrators: UPS, TNT, DHL, and FedEx. According to the Commission, DHL as the market leader with a robust logistical network and extensive coverage would have been the only integrator capable of exerting a significant competitive constraint on the merged entity. The Commission found FedEx to be a weaker competitor, operating at higher costs and with inferior network coverage than the other integrators and possessing a negligible market share in the EEA (only 5–10% in most of the EEA countries affected by the proposed merger). Other operators did not operate their own air networks, and the Commission considered that they would not have been able to exert a significant competitive constraint on integrators.

The Commission found that the proposed merger would produce anticompetitive effects in the markets for international intra-EEA express package delivery services in Bulgaria, Czech Republic, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, and Sweden. In these EEA Member States, at most only three significant competitors would remain (the merged entity, DHL, and FedEx) while in some countries only the merged entity and DHL would be active. The Commission concluded that the merger would result in a price increase between 0–5% and 10–20% for international intra-EEA express package delivery services across all 29 EEA Member States. The Commission found that buyers exhibited no confirmed ability to switch to other providers or services in response to such a price increase, and significant barriers discouraged new providers from entering the market. The only verifiable, merger-specific efficiency identified by the Commission would have been cost-savings related to the merged entity's European air network after combining management and administrative overhead. However, the Commission concluded that these cost savings would be insufficient to offset the price increases expected in the affected EEA Member States.

To address the Commission's concerns, UPS offered to divest TNT's subsidiaries in 17 affected Member States to a single buyer and to allow the buyer access to its air network for a period of five years. The Commission found these commitments insufficient because UPS was unable to find a suitable up-front buyer for the divested assets. The only interested party was La Poste, a French national postal operator, through its subsidiary DPD. The Commission took the view that La Poste/DPD's business plan would not allow it to exert a significant competitive constraint on the merged entity post-transaction. In particular, La Poste had no plans to acquire its own air network after the five year period of access to UPS's air network expired. The Commission prohibited the merger as incompatible with the internal market.

STATE AID

ECJ Judgments

Commission v. MOL Magyar Olaj- és Gázipari Nyrt. (Case C-15/14 P)

On June 4, 2015, the Court of Justice upheld the General Court's judgment of November 12, 2013,[28] holding that fees, which MOL Magyar Olaj- és Gázipari Nyrt. ("MOL") paid to extend certain mining rights, did not confer a selective advantage, and thus did not constitute state aid. The Court of Justice confirmed the annulment of the Commission decision.[29]

Under the Hungarian Mining Act,[30] a concession for a "closed" area (rich in mineral raw materials) is granted following an open tender procedure, while an "open" area (less rich in mineral raw materials) may be exploited upon authorization of the Hungarian Mining Authority ("HMA") in exchange for a fee. If operators do not start the extraction within five years of the authorization, they may request an extension of up to five years. Prior to 2008, the fee for "open" area exploitation was at least 12% of the value of the quantity extracted.[31] As from January 2008, reflecting a rise in international crude oil prices, this rate increased to 30% (the "2008 Amendment").[32]

The Commission decision concerned a 2005 extension agreement between MOL and the Hungarian authorities (the "2005 Agreement"). In 2005, MOL obtained a five-year extension for 12 hydrocarbon fields. Under the terms of the 2005 Agreement, the fee was between 12.24%–12.6% and, due to the size of its operations, MOL also paid an "increased mining fee," and a one-off "special fee." The fees and factors used to calculate them were determined exclusively by the 2005 Agreement. Accordingly, MOL's extraction fees remained intact by the 2008 Amendment.

In the contested decision, the Commission found that the 2005 Agreement constituted an unlawful state aid—the 2005 Agreement and the 2008 Amendment were part of the same measure, conferring an unfair advantage on MOL by exempting it from the 2008 fee increase— and ordered its recovery. By contrast, the General Court found that the measure was not selective because it did not favor MOL *vis-à-vis* its competitors, and annulled the Commission's decision. The Commission appealed. In its analysis, the Court Of Justice focused on the selectivity condition laid down in Article 107(1) TFEU.

First, the Court of Justice agreed that the criteria for conclusion of an extension agreement were objective in nature and applicable to any potentially interested operator. Accordingly, they did not allow the Hungarian authorities to confer a selective advantage on MOL.

Second, the Court of Justice upheld the General Court's finding that the mere, limited, discretion the Hungarian authorities enjoyed in determining the rate of the extension fee was not sufficient to establish the existence of a selective advantage. Indeed, the HMA had discretion to adjust the rate so as to maintain equal treatment between operators.

Finally, the setting of rates through a negotiation between MOL and the Hungarian authorities was not sufficient for the establishment of a selective advantage either. The Hungarian authorities acted objectively and without discrimination, and thus did not favor MOL over its competitors.

[28] *MOL Magyar Olaj- és Gázipari Nyrt. v. Commission* (Case T-499/10) EU:T:2013:592.

[29] Commission Decision C (2010) 3553 of June 9, 2010 (State Aid C 1/09 (ex NN 69/08)), OJ 2011 35/55.

[30] Act XLVIII of 1993 on mining activities (*1993. évi XLVIII törvény a bányászatról*).

[31] The rate was fixed at 12% of the value of the extracted quantity for fields put into production from January 1998 onwards. For fields put into production prior to January 2008, the rate was based on the average price of natural gas purchased by the public gas service, subject to a 12% floor.

[32] Under the 2008 Amendment, the rate for fields put into production between January 1998 and December 2007 was set at 30% of the value of the quantity extracted. In fields where production began after January 2008 the rate was set at 12% for the first annual 50 kt of crude oil, 20% for productions between 50 kt and 200 kt of crude oil, and 30% for productions above 200 kt of crude oil. Additionally, the fee would increase by 3% or 6% if the price of Brent crude oil exceeded 80 or 90 U.S. dollars, respectively.

The Court of Justice concluded that the measure was not selective and dismissed the appeal in its entirety.

General Court Judgments

SACE and Sace BT v. Commission **(Case T-305/13)**

On June 25, 2015, the General Court partially annulled[33] a Commission decision[34] ordering Italy to recover state aid resulting from reinsurance and recapitalization measures granted to Sace BT S.p.A. ("Sace BT") by its parent company SACE S.p.A. ("SACE"), an Italian state-owned export-credit agency, because the quantification of the aid lacked sufficient reasoning.

In 2004 SACE established Sace BT, a short-term export credit insurance company. In 2009, SACE adopted three measures in order to provide financial support to Sace BT: an excess of loss reinsurance coverage under beneficial terms,[35] and two recapitalization measures aimed at covering Sace BT's losses (the "2009 Measures").

The Commission found that the 2009 Measures conferred unlawful state aid—because they were not granted on market terms—and ordered its recovery. SACE and Sace BT appealed to the General Court on three grounds: (i) the 2009 Measures were not imputable to the Italian state, (ii) the 2009 Measures complied with the market economy investor principle (the "MEIP"),[36] and (iii) lack of reasoning in calculating the aid amount.

The General Court rejected the applicants' first argument and concluded that the 2009 Measures were imputable to the Italian state given that (i) all members of SACE's board of directors were appointed on a proposal of the state; (ii) SACE's activities covered non-marketable risks, *i.e.*, risks not subject to normal competitive market conditions, thus pursuing public interest goals; and (iii) SACE's activities had always benefited from a state guarantee.

The General Court also confirmed the Commission's finding that the 2009 Measures were incompatible with the MEIP. Concerning the excess of loss reinsurance coverage, a rational private reinsurer would have required a significantly higher fee. The Italian state thus afforded Sace BT an advantage, corresponding to the difference between the actual fee and the fee that a private reinsurer would have charged in similar circumstances.

Based on its past decisional practice,[37] the Commission had estimated that the fee charged by a private reinsurer would have been at least 10% higher than the fee charged by SACE. However, in the General Court's view, such reasoning was insufficient: in order to determine the amount of aid, the Commission is required to carry out a diligent and impartial examination of all the objective evidence at its disposal or, at the very least, explain the reasons for using a calculation method adopted in a previous decision. Because the Commission failed to do so, the General Court annulled the paragraph of the Commission's decision quantifying the aid.

Concerning the two recapitalization measures, the Commission decision concluded that in the market circumstances at issue and in the absence of any profitability forecasts for Sace BT at the time, a rational private market operator would not have proceeded with the recapitalizations, but would have let the company go bankrupt. The Commission stressed SACE did not demonstrate that it had based the recapitalization decision on profitability considerations. The General Court held that the mere lack of evidence of a detailed profitability analysis—in the context of an economic crisis—was not sufficient to find that SACE failed to act as a rational private investor. However, given that the Member State failed to explain the factors taken into account in adopting the

33 *SACE and Sace BT v. Commission* (Case T-305/13) EU:T:2015:435.

34 Commission Decision C (2013) 1501 of March 20, 2013 (State Aid SA.23425 (11/C, ex 41/10)), OJ 2014 L 239/24.

35 Excess of loss reinsurance is a type of reinsurance intended to cover losses above certain amounts. Unlike normal reinsurance contracts, which specify a limit to the covered risks, excess of loss reinsurance protects the reinsured company from unlimited liability.

36 Under the MEIP, if a state invests in a company in terms which would be satisfactory to a private investor operating in market conditions, the investment is not regarded as state aid.

37 The Commission referred to its previous Commission Decision C (2011) 7756 of November 23, 2011 (State Aid C 28/10), OJ 2014 L 244/59.

recapitalization measures, the Commission was not required to conduct its own complementary analysis. Consequently, the General Court confirmed that the two recapitalization measures constituted an unlawful state aid.

Netherlands and Others v. Commission **(Case T-186/13)**
On June 30, 2015, the General Court annulled a Commission decision[38] establishing that the reduction of the price of land and the waiver of ground exploitation fees by a Dutch public-private partnership ("PPP") to Schouten-de Jong Bouwfonds ("SJB"), a company active in the real estate development sector, constituted state aid.

In 2004, the Dutch municipality of Leidschendam-Voorburg signed a cooperation agreement with a group of private promoters including SJB in order to cultivate a specific area (the "Cooperation Agreement").[39] The municipality, through PPP, would sell plots of land to SJB, and charge a fee in exchange for granting the company a right to exploit certain plots of land.

In its 2013 decision, the Commission concluded that the price charged by PPP to SJB for the land was lower than the contractual price established in the Cooperation Agreement, and SJB was further relieved from ground exploitation fees. The total undue economic advantage amounted to €7 million. In the Commission's view, this advantage reinforced the competitive position of SJB in relation to the other promoters, in breach of the Article 107(1) TFEU.

The General Court annulled the Commission decision. In the General Court's view, PPP behaved as any other private investor would have done *i.e.*, in conformity with the market economy investor principle (the "MEIP").[40] In finding so, the General Court stressed the Commission failed to appreciate pertinent legal circumstances in its MEIP assessment.

First, the Commission failed to take into account a clause concerning the modification of price of the land in case of delay in obtaining the permits, as was factually the case. Thus, PPP could not compel SJB to pay the price initially agreed upon in the Cooperation Agreement.

Second, the Commission disregarded that PPP had an economic incentive to reach an agreement with SJB rather swiftly. Indeed, it was important for PPP that SJB begin to exploit the land as soon as possible, so that PPP could obtain remuneration for the sale of the land and its subsequent exploitation. Also, the sale of the land would limit PPP's risk and potential liability.[41]

Third, when concluding that a termination of the Cooperation Agreement and a damages claim would be better for PPP than the price reduction and waiver of fees, the Commission failed to take into account the following relevant circumstances: (i) the meaning and the scope of certain provisions of the Cooperation Agreement, as well as the possible damages and interest to be paid as a result of the termination, and the costs of non-execution of the project, were uncertain; (ii) SJB had strong bargaining power; and (iii) the municipality had a strong incentive to start exploiting commercial venues that would be built by SJB in the short term.

The General Court concluded that the agreement between PPP and SJB did not constitute state aid within the meaning of Article 107(1) TFEU, and annulled the Commission decision.

[38] Commission Decision C (2013) 87 of January 23, 2013 (State Aid SA.24123 (2012/C) (ex 2011/NN)), OJ 2013 L 148/52.

[39] In 2010, a supplementary agreement was concluded whereby the municipality, the PPP and SJB agreed on a price decrease and the waiver of ground exploitation fees.

[40] Under the MEIP, a public intervention in a company is not considered to be state aid if it is made in terms that a private investor would have accepted under normal market conditions.

[41] The PPP would be liable for 50% of the risks and costs associated with the project until it sold the land.

POLICY AND PROCEDURE

ECJ JUDGMENTS

***CDC Hydrogen Peroxide* (Case C-352/13)**

On May 21, 2015, the Court of Justice clarified a number of jurisdictional issues for follow-on damages actions against cartel participants domiciled in different EU Member States.[42]

In March 2009, the litigation vehicle, CDC,[43] lodged a damages claim with the Regional Court of Dortmund in Germany (the "Dortmund Court"), against six companies fined by the European Commission for participating in the "Hydrogen Peroxide Cartel."[44] The claim against Evonik Degussa GmbH, the only defendant based in Germany, was eventually settled and withdrawn in September 2009. The remaining defendants subsequently challenged the international jurisdiction of the German court. As a result, the Dortmund Court stayed the proceedings and referred three questions to the Court of Justice for a preliminary ruling.

First, the Dortmund Court asked whether, in complex cartel damages cases, all cartel participants domiciled in any EU Member State can be jointly sued for damages in one EU Member State so long as one of the defendants is domiciled in that state (the so-called "anchor defendant"), and, if so, whether this changes once the action against the anchor defendant is withdrawn after the initiation of the lawsuit. The Court of Justice ruled that damages claims arising from a cartel agreement found to constitute a "single and continuous infringement" should be considered to be closely connected, and thus a centralized jurisdiction for all claims is expedient in such cases. This means that victims of cartel infringements can bring their actions for damages before the court of any EU Member State where an anchor defendant is domiciled. This rule applies despite the subsequent withdrawal of the claim against the anchor defendant.

Second, the Dortmund Court asked whether in complex cartel damages cases, the EU Member States' courts have jurisdiction at the venue for the place of tort, and if so, which place that would be. In that regard, the Court of Justice held that the transfer of the claim to CDC had no impact on the determination of jurisdiction, and confirmed that the "place where the harmful event occurred or may occur" covers both "the place where the damage occurred" and "the place of the event giving rise to it." As a result, plaintiffs may, with some limitation, bring a claim before the courts of the place of tort, namely the place where the aggrieved party is domiciled or the place where the cartel was founded.

The third question concerned the need for national courts to take contractual jurisdiction clauses into account. According to the Court of Justice, such clauses are, in principle, admissible and binding on the court seized of a matter. However, the Court held that disputes concerning cartel damages can be governed by such a clause only if the victim can be deemed to have consented to it. Consequently, jurisdiction clauses should only be taken into account if they refer specifically to infringements of competition law.

This judgment addresses jurisdictional issues that were unresolved to date and provides useful guidance for pending and forthcoming cartel damages cases. Although the Court's analysis focuses on the interpretation of Regulation (EC) No. 44/2001 ("Brussels I Regulation"), it will also be applicable to cases which were initiated after January 10, 2015, and, thus, fall under the recast Regulation (EU) No. 1215/2012 ("Brussels I*bis* Regulation").

[42] *CDC Hydrogen Peroxide* (Case C-352/13) EU:C:2015:335.

[43] Cartel Damage Claims Hydrogen Peroxide SA ("CDC") is a Belgian special purpose vehicle that collected damage claims from various undertakings that were allegedly affected by the Hydrogen Peroxide Cartel.

[44] *Hydrogen Peroxide and Perborate* (Case COMP/F/38.620), Commission decision of May 3, 2006.

Deutsche Bahn and Others v. Commission **(Case C-583/13 P)**

On June 18, 2015, the Court of Justice set aside the General Court's judgment[45] of September 6, 2013, annulling two Commission inspection decisions addressed to Deutsche Bahn AG ("DB"). The Court of Justice held that the lawfulness of the Commission's investigation depends on whether it complies with the scope defined in the inspection decision.

In 2011, the Commission issued DB and several of its subsidiaries with three inspection decisions.[46] The first dawn raid, conducted between March 29 and March 31, 2011, aimed at investigating allegations of unjustified preferential treatment granted by DB Energy GmbH to other DB subsidiaries. On March 30, 2011, the Commission adopted a second decision concerning separate allegations of discriminatory practices by DUSS, another DB subsidiary. On July 14, 2011, the Commission decided to further investigate DUSS. The Commission did not obtain judicial authorization before searching the premises in either case. Furthermore, the Commission officials had been aware of the accusations against DUSS when carrying out the first inspection.

On appeal, the General Court dismissed DB's claims for annulment. DB subsequently appealed the General Court's judgment to the Court of Justice.

DB first argued that the General Court had erred in law in holding that the lack of prior judicial authorization did not infringe the right to the inviolability of private premises as guaranteed by Article 8 of the European Convention on Human Rights ("ECHR") .

However, the Court of Justice confirmed the General Court's decision. The Court of Justice recalled that, although the right to inviolability does extend to commercial premises, the scope of protection is limited because they are less vulnerable. In line with the case law of the European Court of Human Rights ("ECtHR"),[47] the General Court was correct in holding that the lack of prior judicial authorization is merely one factor to be considered in determining infringements of Article 8 ECHR. The Court of Justice also referenced an ECtHR judgment expressly stating that a post inspection review may outweigh the lack of prior authorization and thus ensure the lawfulness of the inspection decision.[48]

Second, DB submitted that the lack of prior judicial authorization infringed the right to effective judicial protection enshrined in Article 47 of the EU Charter of Fundamental Rights and Article 6 ECHR.

The Court of Justice rejected this claim and affirmed the General Court's decision that the key issue is the intensity of the review, rather than when it was conducted. By evaluating the evidence and ruling on an inspection decision, the EU Courts do guarantee a high intensity of factual and legal post-review. Moreover, the fact that an undertaking may challenge a decision directly after its announcement ensures the right to effective judicial protection.

Lastly and most importantly, DB claimed that the General Court erred in law in finding that the Commission was allowed to inform its officials about the DUSS allegations before the first dawn raid. The Commission submitted that the approval of fortuitous discoveries was a finding of fact which may not be reviewed on appeal.

The Court of Justice agreed with DB, explaining that the duties set out in Articles 20(4) and 28(1) of Regulation 1/2003[49] aim at safeguarding the undertaking's rights of defense. According to these provisions, the Commission must specify the subject-matter and the purpose of the

45 *Deutsche Bahn and Others v. Commission* (Joined Cases T 289/11, T 290/11 and T 521/11) EU:T:2013:404.

46 Commission decisions C (2011) 1774 of March 14, 2011, C (2011) 2365 of March 30, 2011, and C (2011) 5230 of July 14, 2011.

47 *Société Colas Est and Others v. France* (no. 37971/97, ECHR 2002-III).

48 *Harju v. Finland* (no. 56716/09, February 15, 2011) and *Heino v. Finland* (no. 56720/09, February 15, 2011).

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

inspection. Commission agents may only search for evidence falling within the scope of this subject-matter, and the information obtained must not be used for purposes other than those indicated in the decision. The Court of Justice affirmed the Advocate General's Opinion that the Commission must not inform its agents when preparing the inspections about circumstances—such as separate allegations against the undertaking—that do not relate to the scope of the subject-matter. Providing further information infringes Article 20(4) of Regulation 1/2003 and the rights of defense of the undertaking. Consequently, the Court of Justice annulled the second and third inspection decisions issued to DB.

The Court of Justice judgment strengthens legal protection for undertakings by requiring the Commission to issue inspection decisions with the utmost precision. If the Commission fails to adequately inform the affected undertaking, it is barred from using any evidence discovered during the dawn raid relating to the undisclosed allegations.

COMMISSION DEVELOPMENTS

Data Room Best Practices

On June 2, 2015, the Commission published new Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation (the "Data Room Best Practices"). This guidance provides practical advice on the disclosure of information in data rooms and aims at increasing the level of transparency and legal certainty for the parties involved in order to enhance the efficiency of antitrust and merger investigations. The Data Room Best Practices are not legally binding, nor do they alter the Commission's interpretative notices. They rather reflect DG Competition's current practice that is subject to regular adjustments.

To ensure effective protection of the rights of defense, addressees of a Statement of Objections[50] issued by the Commission have the right to access a non-confidential version of the Commission's file.[51] Both quantitative and qualitative data obtained by the Commission in the course of its investigations may contain sensitive or confidential information protected under Article 339 TFEU. But, particularly for quantitative data, it may not be possible to provide a meaningful non-confidential version of the Commission's file within a reasonable period of time. Therefore, if disclosure is necessary and proportionate, and if the legal requirements are fulfilled, the Commission may exceptionally consider the disclosure of sensitive or confidential information.[52]

In this context, DG Competition may decide at its own discretion to provide restricted access to such documents in a data room. This way, the rights of defense are protected while respecting legitimate interests of confidentiality of data providers. Only a prefixed number of external advisers will be provided access to the documents, and the use of the information is limited to the extent strictly necessary. In deciding if a data room procedure could be an effective tool at the moment in time, DG Competition takes into account (i) the circumstances of the case, (ii) the nature and degree of sensitivity of the information, (iii) the progress of the case, (iv) resource implications, (v) the risk of information leaks, and (vi) the need for speed.

External advisers, in principle limited to external economic advisers or external legal counsel of the addressee, are granted access to the documents only to the extent necessary to evaluate the data used in the Statement of Objections. The purpose is in particular to assess the

[50] Issued under Article 13(2) of the "Merger Implementing Regulation"(Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.04.2004, p. 1) or Article 10(1) of the "Antitrust Implementing Regulation" (Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18–24).

[51] Article 18(1) and (3) of the Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22) , Article 17(1) of the Merger Implementing Regulation, Article 15(1) and (2) of the Antitrust Implementing Regulation.

[52] With regard to merger proceedings see Article 18(1) of the Merger Implementing Regulation, for antitrust proceedings see Article 15(1) of the Antitrust Implementing Regulation.

validity of the Commission's analyses and to verify if the evidence relied upon supports the conclusions drawn and the objections raised by it. Access to the data room is subject to the standard Data Room Rules[53] and the standard Non-Disclosure Agreement.[54]

The Data Room Rules guarantee a high level of confidentiality and enable DG Competition to monitor compliance with these provisions. Most importantly, external advisers are not entitled to remove any information or documents from the data room or disclose confidential information to the addressee of the Statement of Objections or any third party. No external communication in any form is allowed. DG Competition will provide the necessary technical equipment and the confidential documents in electronic format. All printouts, copies made in the data room, or documents brought by the external advisers, can be reviewed by DG Competition's officials at any time. No documents shall be taken out of the data room and all documents shall be destroyed at the end of the procedure. In addition, the Data Room Rules define among other things the exact conditions and duration of access to the data, the location of the data room, and potential sanctions in case of non-respect of the aforementioned requirements.

The only manner information obtained in the data room may be communicated by the external advisers to the addressee is through the Data Room Report which must only contain non-confidential information. The Data Room Report shall be prepared by the external advisers during access to the data room and shall be reviewed and approved by DG Competition before it is submitted to the addressee. To explain their legal analysis and to clarify the procedure, external advisers may decide to prepare and submit to the Commission a confidential version of the Data Room Report that is kept in the sole possession of the Commission, and will not be communicated to the addressees.

[53] *See* Annex A of the Data Room Best Practices.

[54] *See* Annex B of the Data Room Best Practices.

In case of non-respect of any of the obligations arising from the Data Room Rules or the Non-Disclosure Agreement, DG Competition will take all appropriate legal actions, including but not limited to damages actions or notifications to professional associations. The matter may be brought before the Hearing Officer, if DG Competition and the addressees or data providers still disagree in relation to the disclosure of confidential information.[55]

Policy Brief on Interchange Fees Regulation

On June 9, 2015, the Commission published a policy brief concerning Regulation 2015/751 on interchange fees for card-based payment transactions (the "MIF Regulation")[56] that entered into force on June 8, 2015.[57] The main objective of this regulation is to reduce transaction costs for card-based payments within the European Union in order to eliminate direct and indirect obstacles to the proper functioning of an integrated market for electronic payments, and create an EU-wide level playing field for interchange fees that will facilitate market entry of new players and lower general costs for retailers and costumers.

In card-based payments, interchange fees are paid by the bank serving the retailer (acquiring bank) to the bank that issued the card to the customer (issuing bank). The costs generated by this system are passed on to all customers, whether they pay by card or not, because retailers usually incorporate interchange fees in the retail price. So far, the European card market remained highly fragmented with average interchange fees ranging from 0.1% to more than 1.5%. Interchange fees are predominantly determined by payment card schemes and national banking communities. As banks highly benefited from the existing interchange fee system, most banks were reluctant to cooperate with new market entrants offering cheaper payment methods.

[55] *See* Article 3(7) of the Hearing Officers' Terms of Reference.

[56] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, OJ 2015 L 123/1.

[57] Competition Policy Brief, "The Interchange Fees Regulation," issue 2015-3, June 2015.

Firstly, the MIF Regulation prohibits payment service providers from offering or requesting interchange fees exceeding 0.2% of the value of the transaction if a debit card is used, and 0.3% of the value of the transaction for credit card payments. The caps are however not applicable to cash withdrawals, nor to transactions with commercial cards or with payment cards issued by three-party payment card schemes.[58]

Secondly, the MIF Regulation provides a set of new business rules and transparency requirements. It promotes competition by imposing a separation of payment card scheme and processing entities and by prohibiting territorial restrictions in licenses. To ensure that the choice of payment instrument remains with the person bearing the related costs (*i.e*. retailers and eventually consumers), the regulation further bans all measures or agreements restricting or pre-conditioning the possibility to combine different payment brands or payment applications on a card-based payment instrument (so-called co-badging) or preventing retailers from steering costumers to specific payment instruments (*e.g*. by setting a threshold, rebating or charging additional fees). It also prohibits the imposition on retailers of the so-called "Honor all Cards" rule, which is common in licensing agreements and obliges the retailer accepting a card-based payment instrument to also accept other card-based payment instruments issued within the framework of the same payment card scheme. Under the MIF Regulation, retailers are thus entitled to accept certain payment instruments and to reject other products of the same payment card scheme.

ABUSE

General Advocate Opinion

***Case Post Danmark v. Danish competition authority*, Opinion of Advocate General Kokott (Case C-23/14)**

On May 21, 2015, AG Kokott gave her opinion on a request for a preliminary ruling by Denmark's Maritime and Commercial Court concerning the compatibility of a dominant firm's rebates schemes with Article 102 TFEU.[59] The Danish Court asked the Court of Justice (i) to provide some guidance for the assessment of a rebate scheme with standardized volume thresholds uniformly applicable to all customers (including guidance on the need to demonstrate customer discrimination or to apply the "as-efficient competitor" test),[60] (ii) to specify the probability and seriousness of anticompetitive effects required to find an abuse, and (iii) to clarify whether foreclosure effects must be appreciable and, more generally, which circumstances are relevant to determine whether a rebate scheme infringes Article 102 TFEU.

In her opinion, AG Kokott said these questions came "at a time when there are mounting calls for European competition law to adopt a more economic approach." She urged the Court not to follow "current thinking ("Zeitgeist") or ephemeral trends," but to rely on "the legal foundations on which the prohibition of abuse of a dominant position rests in EU law."[61]

The facts and main proceedings

Since 2003, the historical operator on the Danish mail market, Post Danmark, applied a volume-based rebate scheme under which it granted between 6% and 16% rebates on its regular tariffs for direct advertising mail. The rebate scheme benefitted all customers on the same terms. Post Danmark determined the provisional price by reference to the expected volume of purchase at the

58 In a three-party payment card scheme, the company operating the network interfaces directly with retailers and costumers in addition to processing transactions and issuing cards (examples for such schemes are American Express and Diners Club). The regulation applies to four-party payment card schemes where the issuer and acquirer are different entities (examples for such schemes are Visa and Master Card).

59 Post Danmark A/S (Case C-23/14), opinion of Advocate General Kokott, EU:C:2015:343.

60 Under the "as-efficient competitor" test, a rebate scheme is anticompetitive only if its conditions could not be met by an as-efficient competitor.

61 Post Danmark A/S (Case C-23/14), opinion of Advocate General Kokott, EU:C:2015:343, para. 4.

beginning of each reference year and retroactively adjusted the rebate by the end of the year.

By a decision of June 24, 2009 the Danish competition authority found that in 2007 and 2008 Post Danmark had abused its dominant position on the Danish bulk mail market by operating an anticompetitive rebate scheme. The authority held that the rebates tied customers to Post Danmark and foreclosed current and potential competitors from the bulk mail market without creating countervailing efficiencies for consumers. Yet, the authority did not exercise a price/cost analysis along the lines of the "as-efficient competitor" test because there could not be an as-efficient competitor in the specific market context characterized by Post Danmark's incumbency position. The Competition Appeal Tribunal upheld the authority's decision on May 10, 2010 and Post Danmark lodged an appeal to the Danish Maritime and Commercial Court.

Opinion of AG Kokott

AG Kokott supported the view that a rebate scheme operated by a dominant undertaking constitutes an abuse of dominance if it is capable of having economically unjustified exclusionary effects. Such anticompetitive effects do not need to exceed any appreciability threshold: it suffices that their existence be more likely than not.

Contrasting with the traditional approach based on rebate type (loyalty vs. quantity rebates),[62] AG Kokott considered that "it is ultimately immaterial whether the scheme can be assigned to a traditional category of rebate." Any rebate scheme may be anticompetitive as long as it has a loyalty-building effect, so called "suction effect." This effect is proportionately stronger if the rebate rates and target volumes are higher and the rebate scheme has a longer reference period as well as retroactive effects. In this case, she noted that, despite standardized terms, Post Danmark's rebate scheme resulted in a strong suction effect.

Among the relevant parameters for assessing the likelihood of exclusionary effects, AG Kokott mentioned the conditions of competition prevailing on the relevant market and the position of the dominant undertaking, including any statutory monopoly. Other factors, such as exclusionary intent or discriminatory application, may serve as strong indicators but do not constitute a prerequisite to establish exclusionary effects.

Finally, AG Kokott rejected the need to apply the "as-efficient competitor" test in cases where the abusive nature of a rebate scheme "is immediately shown by an overall assessment of the other circumstances of the individual case." She noted in particular that "the added value of expensive economic analyses is not always apparent and can lead to the disproportionate use of resources" and that "it is wrong to suppose that the issue of price-based exclusionary effects can be managed simply and in such a way as to ensure legal certainty by applying some form of mathematical formula." Competition authorities and courts are yet free to use the "as-efficient competitor" test, unless the market structure makes it impossible for another undertaking to become as efficient as the dominant undertaking.

[62] See, Hoffmann-La Roche vs. Commission (Case C-85/76) EU:C:1979:36.

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