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HORIZONTAL AGREEMENTS

Commission Decisions

Case COMP/39.309 Liquid Crystal Displays ("LCD")

The Commission published a decision of December 8, 2010, in which it fined six LCD makers (Samsung, LG Display, AU Optronics, Chimei InnoLux, Chunghwa Picture Tubes and HannStar Display) a total of €648 million for taking part in a cartel between October 2001 and February 2006.[1] The Commission based its findings on, *inter alia*, contemporaneous minutes of around 60 meetings (so-called "Crystal Meetings") to which the six parties participated with a view to directly or indirectly fix prices for their world-wide sales of LCD panels for IT and TV applications. The Commission noted the critical significance for the cartel of the regularity of the meetings (which occurred on a monthly basis) as well as the monitoring arrangements comprising (real-time or during meetings) exchanges of commercially sensitive information.

Several parties argued that Commission lacked jurisdiction, because the infringement had no substantial, foreseeable, and immediate effects in the Community. The Commission refused such arguments noting that (i) the effects of the cartel were substantial on the European market due to its seriousness, its long duration and the role of the parties for final and intermediate products in Europe; (ii) the effect on the European market was foreseeable as the price fixing and the output reduction would be expected to affect the downstream market for all IT and TV applications; and (iii) the effect was immediate as the cartel directly influenced the setting of prices for LCD panels delivered directly or through transformed products to European customers.

AU Optronics argued that, as of May 2005, managerial level meetings were replaced by meetings of lower-level employees, focusing on information incapable of reducing uncertainties. The Commission considered that the decision to downsize the meetings did not alter the nature of the forum, since its characteristics stayed in place and, in any event, the parties continued to discuss commercially sensitive market data.

Chimei InnoLux contested the Commission's finding of a single, complex, and continuous infringement on the ground that the TV and IT segments constituted separate relevant markets. The Commission observed that, quite to the contrary, the same parties followed the same objective and the same *modus operandi* with respect to both segments, and according to settled case law, the Commission was entitled to rely on the scope of the participants' interactions in defining the product scope of the cartel.

In reaching its fining decision, the Commission deviated from its normal practice. First, it only included in the value of sales the parties' EEA direct sales of LCD panels, *i.e.*, all the products sold to both customers of LCD panels and customers of televisions, monitors and notebooks where the LCD panel was internally transformed by the cartelist undertaking. Indirect sales were not considered, as direct sales already guaranteed a sufficient degree of deterrence. Second, the Commission did not base the fine on the parties' sales in the last full business year of the infringement, because, given the exponential growth of the sales over the years, this would have unduly inflated the starting amount. Thus, the Commission took into account the average annual value of sales based on the parties' actual sales over the entire duration of the infringement. Third, for the purpose of calculating the duration of the infringement, the Commission did not round up periods as suggested by the Fining Guidelines, but considered the actual duration of participation of the parties in the infringement on monthly and *pro rata basis* (rounding down).

In the absence of mitigating or aggravating circumstances, the basic amount was not adjusted. Although a deterrence multiplier was applied to Samsung, reflecting its particularly large turnover beyond the sales of products related to the cartel, Samsung received full immunity from fines under the Leniency Notice. LG Display was granted a 50% leniency reduction and, additionally, partial immunity for 2006, because it provided evidence relating to facts previously unknown to the Commission with a direct bearing on the duration of the cartel. AU Optronics also received a 20% reduction of the fine under the Leniency Notice. Chunghwa Picture Tubes, though not formally applying for leniency, was granted a 5% reduction, as it voluntarily provided self-incriminating evidence beyond the scope of the Commission's requests for information.

1 LCD – Liquid Crystal Displays (Case COMP/39.309), Commission decision of December 10, 2010, at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39309/39309_3580_3.pdf.

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VERTICAL RESTRAINTS

ECJ – Judgments

Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v. Président De L'Autorité De La Concurrence And Ministre De L'Économie, De L'Industrie Et De L'Emploi

On October 13, 2011, the European Court of Justice ruled that barring online sales is incompatible with Article 101 TFEU.

Pierre Fabre manufactures and markets cosmetics and personal care products. On June 27, 2006, the French Competition Authority began an investigation concerning clauses barring online sales of these products, focusing on, *inter alia*, a requirement in Pierre Fabre's selective distribution contracts that the products had to be sold in a physical space that complied with specific criteria and that a qualified pharmacist be present at the retailer's point of sale during all opening hours in order to provide personalised advice to customers. This requirement led to a *de facto* ban of Internet sales.

The Court was asked whether a general and absolute ban on selling contract goods to end-users via the Internet in the context of a selective distribution network constitutes a restriction of competition by object for the purposes of Article 101 (1) TFEU,[2] whether such a ban could be covered by Regulation 2790/1999, the block exemption regulation for certain vertical restraints, and, if not, whether it might be eligible for an individual exemption under Article 101(3).

The Court agreed with the EU Commission that the *de facto* exclusion of a method of marketing products that does not require the physical movement of the customer considerably reduces the ability of an authorised distributor to sell the contractual products to customer outside its contractual territory or area of activity, and is therefore liable to restrict competition.

As a general matter, the Court recalled that selective distribution systems must be considered, in the absence of an objective justification, as a restriction of competition by object. It added that its consistent case law nevertheless recognizes that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services with respect to high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim to achieve a legitimate goal capable of improving competition in relation to factors other than price have thus been recognized as an element of competition which complies with Article 101(1) TFEU.

The Court repeated its consistent case law that a selective distribution system is not prohibited by Article 101(1) TFEU if resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion. In addition, the characteristics of the product in question must require such a network in order to preserve its quality and proper use, and the applicable criteria are proportionate to this aim.

Although the Court noted that it is for the national court to decide whether the Internet ban in this case could be justified by a legitimate aim, the Court nevertheless provided some guidance. It recognized that Pierre Fabre's resellers were chosen on the basis of non-discriminatory and objective criteria of a qualitative nature. However, the next question was whether the restrictions of competition pursue legitimate aims in a proportionate manner.

Referring to its case law in the field of the fundamental freedoms, the Court noted that it had rejected arguments to justify a ban on Internet sales relating to the need to provide individual advice to the customers and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses. The Court also rejected the preservation of the prestigious image of the products as a legitimate aim justifying a ban on Internet sales in just one sentence containing no reasoning or justification.

The Court concluded that a ban on Internet sales amounts to a *restriction of competition by object where ". . . following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified."*[3]

Regarding the second question, the Court found that Article 4(c) of Block Exemption Regulation 2790/1999, which excludes from the regulation's scope selective distribution agreements that have the object of restricting active and passive sales to end users, applied in this case because the *de facto* ban on internet sales had the object of restricting at least passive sales to customers end-users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system. The Court

2 Initially, the French Court of Appeal used a different terminology by referring to a "hardcore restriction of competition by object." The Court, however, reformulated this question in the way described above.

3 *Pierre Fabre Dermo-Cosmétique SAS v. Président De L'Autorité De La Concurrence, Ministre De L'Economie, De L'Industrie Et De L'Emploi* (Case C-439/09) judgment of October 13, 2011, para. 47, not yet published.

rejected Pierre Fabre's argument that the ban should be deemed equivalent to prohibiting a reseller from operating in an unauthorized establishment, on the grounds that Internet sales are a marketing method, and not an unauthorized place of establishment.

Finally, the Court did not exclude the possibility that an Internet ban could be exempted under Article 101(3) TFEU, but declined to provide further guidance to the national court, because it did not have enough information, leaving the national court to decide whether Article 101(3) TFEU was satisfied in this case.

INTELLECTUAL PROPERTY AND LICENSING

ECJ – Judgments

Cases C-403/08 And C-429/08 Football Association Premier League Ltd And Others v. QC Leisure And Others And Karen Murphy v. Media Protection Services Ltd

On October 4, 2011, the European Court of Justice rendered a judgment concerning the compatibility with Article 101 TFEU of territorial restrictions in licenses for copyright and comparable rights, holding that Article 101 TFEU prohibits bans on passive sales of decoders to viewers outside the licensed territory enabling them to watch the protected content for private purposes.

The Football Association Premier League Ltd ("FAPL") runs the English Premier League and grants licenses in respect of broadcasting rights for live transmission of the football matches, on a territorial basis.

To protect the territorial exclusivity of each broadcaster, each broadcaster undertakes in its license agreement with FAPL to prevent the public from receiving its broadcasts outside the area for which it holds the license. Broadcasters are thus prohibited, in particular, from supplying decoding devices that allow their broadcasts to be decrypted for the purpose of being used outside the territory for which they hold the license.

In the United Kingdom, BSkyB held the license for live transmission. However, certain pubs in the United Kingdom began to use foreign decoding devices to access Premier League matches (for instance by using Greek channels) for their pub customers. The decoder cards were manufactured and marketed with the authorization of the Greek service provider, but were subsequently used in an unauthorized manner, since the Greek broadcasters contractually prohibited the use of the cards outside Greece.

Actions were launched against pub owners and the suppliers of the cards before English Courts. In the course of the proceedings, the High Court of Justice of England and Wales made a preliminary reference to the Court, asking questions relating to the scope of the EU Directives on Conditional Access, Television without Frontiers, Satellite Broadcasting, and Copyright, the free movement of goods and services, and the scope of Article 101 TFEU.

The Court's application of Article 101 TFEU was closely linked with the Court's review of copyright-related issues. Interestingly, the Court held that sport events cannot be subject to copyright because they do not represent an intellectual creation. However, this finding was not determinative for the Court's conclusions because the Court proceeded on the assumption that sport events may be subject to intellectual protection under national rules. The Court moreover recognized that the broadcasts at issue embodied copyrightable works, including the opening sequence, the Premier League anthem, pre-recorded film sequences, and graphics. More generally, there are grounds to argue that the filming of a sport event constitutes in itself a copyrightable work.

Accordingly, the real issue was to identify the relevant acts of exploitation that are subject to copyright and therefore require authorization from the rights-holder. In the present case, a number of different acts were involved:

The first act was the broadcasting of the matches by the Greek broadcaster in Greece. This clearly represents an independent act of exploitation that is subject to copyright. But the Greek broadcaster had received a license for Greece and its broadcast was therefore lawful. The spill-over of the broadcast into other territories, including the United Kingdom, did not represent a distinct act of exploitation because the Satellite Broadcasting Directive expressly limits the act of communication to the public to the uplink of the broadcast: Article 1(2) of the Satellite Broadcasting Directive (that the Court referenced) provides that: *"the act of communication to the public by satellite occurs solely in the Member State where [. . .] the programme-carrying signals are introduced into an uninterrupted chain of communication."*

The second act was the accessing and watching of the broadcast by private viewers in the United Kingdom. It was undisputed that viewing creates ephemeral copies in the memory of decoders and TVs. But the Court concluded that such copies have no independent economic significance. According to the Court, these temporary acts of reproduction *"form an inseparable and non-autonomous part"*

of viewing the broadcast and therefore are exempt from copyright pursuant to Article 5(1) of the Copyright Directive.

In this case, there was also a third relevant act, namely the display of the broadcast by U.K. pub owners to their customers. The Court construed the criterion that the public must not be present at the place of origin of the communication narrowly as only excluding instances of direct physical contact between performer and public. Such a direct physical contact did not take place here. The Court therefore held that the display of the broadcast in a pub constitutes a distinct act of communication to the public that requires separate authorization by the rights-holder.

Given that, in the Court's analysis, private (as opposed to public) viewing of the Greek broadcast in the U.K. does not constitute an independent act of exploitation, an overall ban on the importation of Greek decoders restricts the free movement of services without justification on grounds of IP protection. The only act of IP exploitation within the chain of broadcast, reception, and (private) viewing is the broadcasting of the matches by the Greek broadcaster, which takes place in Greece. That act is authorized by the rights-holder and compensated by the Greek license fee. At the same time, the rights-holder remains free to prevent the public viewing of the broadcast in pubs or other public places. The Court thus concluded that an interest in securing a premium for exclusivity in the U.K. cannot justify blocking the sale of Greek decoders since such an interest goes beyond the IP exclusivity afforded by the Satellite Broadcasting Directive.

Similarly, a contractual restriction prohibiting the sale of Greek decoders outside Greece exceeds the scope of copyright exclusivity as construed by the Court. The Court therefore concluded that such a prohibition conflicts with Article 101 TFEU. At the same time, the Court expressly confirmed that a rights-holder may legitimately grant an exclusive broadcasting license to a "sole licensee" for the territory of "a single Member State." The Court emphasized that such exclusive licenses are "not called into question." The Court only takes issue with what it describes as an "additional obligation" not to sell decoders outside the allocated territory.

The Court dismissed the possibility of exemption under Article 101(3) TFEU without detailed discussion.

The practical implications for rights-holders flowing from the judgment are ambiguous. On the one hand, the Court confirmed that rights-holders are entitled to grant exclusive broadcasting licenses, *i.e.*, they can commit not to grant licenses to other broadcasters within the same Member State. On the other hand, the judgment implies that they may not be able to guarantee a licensee absolute protection against spill-over from broadcasts in other Member States since rights-holders cannot impose an absolute ban on the export of decoders. However, it follows from the judgment that rights-holders may exclude the sale and use of decoders for public viewing. In addition, consistent with past case law, it should be permissible to prohibit active selling of decoders outside the licensed territory. The judgment also does not preclude limiting the grant of a license to specific language versions, which may help to limit spill-over effects.

In sum, the Court's judgment provides a number of important clarifications on the application of the rules on copyright, free movement, and competition law for the licensing of satellite broadcasts, although questions about the application of Article 101(3) TFEU remain open. At the same time, the Court takes care to limit its clarifications to the facts of the case and therefore avoids potential conflicts with the rules on online dissemination of digital content as set out in the Copyright Directive.

MERGERS AND ACQUISITIONS

First-Phase Decisions Without Undertakings

Case COMP/M.6212 LVMH/Bulgari

On June 29, 2011, the Commission unconditionally cleared LVMH Moët Hennessy – Louis Vuitton Group's ("LVMH") acquisition of Bulgari S.p.A ("Bulgari"). Both parties to the transaction are active in the luxury goods sector, in particular, watches and jewellery, perfumes and cosmetics, fashion and leather goods, including accessories, and operate at the production, wholesale, and retail levels. LVMH also owns and operates several selective distribution retail chains.

In its decision, the Commission specifically addressed LVMH's arguments regarding the definition of the relevant product market. LVMH submitted that a product market for all luxury goods exists, based on the fact that customers in this sector are driven by "emotional" and suggestive desires as opposed to practical needs, while from a supply-side perspective, most brands are easily able to expand their existing product lines by making use of their marketing and distribution strategies. The Commission accepted that luxury goods should be distinguished from mass market goods, stating that such goods are characterized by relatively high prices, rich creative content, and are marketed under a prestige trademark. In light of its market investigation, the Commission questioned the alleged substitutability of all luxury products, although it did accept that some substitutability may exist where the product is intended to be

a gift, for example, a consumer might choose between a fragrance and a small leather item. The Commission ultimately left the question of market definition open, as no competition concerns were raised even if narrower and separate product markets within the luxury goods market were considered.

In relation to the distribution of luxury goods, the Commission confirmed that the distribution of luxury products through selective travel retail outlets constitutes a separate product market from the sale of luxury perfumes and cosmetics through selective distribution networks. The Commission found that the market for selective distribution of luxury perfumes and cosmetics includes multi-brand selective retail chains specializing in perfumes and cosmetics, appointed independent perfumeries, department stores, their corresponding websites, and selective distant selling.

The Commission concluded that the transaction would not impede effective competition either horizontally or vertically, under any plausible market definition within the EEA or a substantial part of it, as Bulgari holds only small market shares and LVMH continues to face effective competition from several other luxury goods manufacturers.

Case COMP/M.6281 Microsoft/Skype

On October 7, 2011, the Commission unconditionally cleared Microsoft's acquisition of Skype. Microsoft is active in the design, development, and supply of computer software, including communication services (such as Windows Live Messenger, or "WLM", and Lync). Skype offers software that enables text, voice, and video communications over the Internet.

The principal issues raised by the transaction were horizontal overlaps between the parties' communication software offerings and the potential conglomerate effects between Microsoft's products, such as Windows (its operating system ("OS") product), its commercial office suites (Microsoft Office), and Skype's communications software.

The decision treated consumer and enterprise communications software services as two discrete product markets due to their distinct business models, pricing strategy, and range of services offered. Within each market, the Commission discussed possible future segmentation by functionality (text (instant messaging, or "IM"), voice, video), platform (personal computers, smartphones, tablets etc.), OS, and, in the case of enterprise services, by size of customer, but it declined to further segment the product markets in this case given that the transaction did not, on any segmentation, give rise to competition concerns.

The decision describes the market for consumer communications services as nascent, dynamic, and fast-growing, such that market shares are largely not indicative of competitive strength. The market is also said to be characterized by short cycles of innovation driven by competition based on quality, rather than price. The decision also noted that barriers to entry are low, in particular given that most users communicate with only an "inner circle" of 4-6 people who could easily migrate platforms, thus mitigating network effects.

In its horizontal assessment of the consumer market, the Commission found that with regard to IM, Skype would add only a very limited increment to WLM's 30%-40% share in the EEA. Similarly, in voice calls, WLM would only add a very limited increment to Skype's 40%-50% share. Conversely, with respect to voice calls, the transaction would add Skype's 40%-50% share to WLM's 30%-40% share. Despite the high combined share, the Commission did not find the transaction problematic due to the market characteristics described above. In addition to finding that market shares are not strongly indicative of ongoing dominance in such fast-changing markets, the Commission found that customers would quickly switch providers if Skype started charging for its services or stopped innovating. It noted, in particular, the rapid ascent of Google and Facebook as IM platforms once they began offering IM functionality.

As for potential conglomerate effects, the Commission found that while Microsoft had the ability to foreclose competitors, through, *e.g.*, degrading Skype's interoperability with competing OS platforms, it would not have the incentive to do so since Skype's value is dependent on its large consumer base. Moreover, Microsoft is not a dominant player in the growing field of mobile platforms. Given the market characteristics described above, the Commission also found it unlikely that Microsoft would either tie or bundle its products with Skype.

With respect to the enterprise communications services market, the Commission's investigation revealed it to be fast-growing. The decision also described a trend toward "consumerization" of products, whereby devices primarily designed for consumer use are increasingly adopted in the workplace and companies expect consumer functionalities to also be available on enterprise products. It then analyzed the potential horizontal overlaps on the enterprise

communications market. However, the Commission found that even in the narrowest market segmentation, Microsoft lacked significant market share and faced active competition from market leader Cisco, as well as Citrix and IBM. Skype was not perceived as a market player since it lacks key enterprise-grade functionality.

Finally, the Commission provided an assessment of potential conglomerate effects in the enterprise segment, responding to submissions from competitors of Microsoft concerned that the merger could lead to tying or bundling with Skype's VoIP functionality. In particular, respondents pointed out that Microsoft could create an exclusive or preferential interoperability between Skype and Microsoft's Lync application. For enterprises with customer call centers, Lync would then be preferable due to Skype's large installed user base. However, the Commission found that Microsoft would not be able to engage in such a strategy since Skype does not have the queuing and routing functionality necessary in a call center. It also concluded that it would not have the incentive to do so, since Skype will continue to be available for download at no charge in order to remain competitive.

Case COMP/M.6376 ArcelorMittal/ATIC Services

On December 2, 2011, the Commission unconditionally cleared ArcelorMittal's acquisition of ATIC Services Group ("ATIC"). ArcelorMittal is active in steel mining and the production of steel products. ATIC provides import and onward inland transportation services, primarily for coal and iron ore, and to a limited extent for finished steel products. ATIC's core activity is the provision of seaport terminal services for dry bulk goods at ports in the Netherlands, France, and Poland.

The transaction gave rise to vertically affected markets as a result of ATIC's strong position in terminal services, which are upstream of steel production, in which ArcelorMittal is active. The Commission subdivided the upstream affected market for terminal services according to three types of cargo: (i) parcel goods (in particular containers), (ii) dry bulk goods, and (iii) liquid bulk goods. Terminal services for dry bulk goods were further segmented by commodity, with distinct sub-markets being identified for (i) coal and iron ore, (ii) agri-bulk, and (iii) other dry bulk goods.[4] The Commission elected not to further divide terminal services markets according to mode of onward shipping.[5] With respect to the downstream steel affected markets, the Commission adopted the proposed segmentation of the notifying party and, based on its decision in Mittal/Arcelor,[6] distinguished between four broad categories of steel products: (i) cold-rolled carbon steel, (ii) hot-dip galvanized and electro-galvanized strip and sheet steel, (iii) organic coated sheet steel, and (iv) heavy steel. While acknowledging that the location, connection to inland terminals, and draught capacity of terminals each has an impact on the decision making process of customers, the Commission left open the question of geographic market definition, as even under the narrowest definition it concluded that the transaction would not raise any competition concerns.

ArcelorMittal enjoys a leading position in each of the downstream affected markets; however, the Commission found that the substantial market shares of ArcelorMittal's nearest rivals in these segments prevented the company from exercising significant market power. As to the upstream markets, the Commission found that within the most narrowly defined product and geographic markets (*i.e.*, terminal services for coal and iron ore at Dutch ports), ATIC's market share stood between 80% and 90%, while under a wider market definition (terminal services for coal and iron ore and other dry bulk excluding agri-bulk at ports in the Le Harve Hamburg region), ATIC's market share was between 40% and 50%.

The Commission concluded that even on the narrowest market definition, the merged entity would not have the ability or the inventive to foreclose ArcelorMittal's rival steel producers. First, the Commission noted that, with respect to ATIC's most important terminal in terms of capacity (EMO-EKOM in Rotterdam), ArcelorMittal would not have authority post-transaction to determine individual customer contracts. Furthermore, EMO-EKOM and other important ATIC terminals are jointly controlled by parties with opposing, if not competing, interests to those of ArcelorMittal, and these parties could frustrate any attempt by ArcelorMittal to exclude particular steel customers. Secondly, the Commission found that ArcelorMittal's more robust competitors do not rely on ATIC terminals, as they possess their own captive terminals, and smaller players in the steel industry can make use of alternative terminal services in the region, such as the European Bulk Services terminal at Rotterdam, and the Rietlanden terminal at Amsterdam. Thirdly, the

4 The Commission here followed the approach to defining terminal services markets set out in *Sea-Invest/EMO EKOM* (Case COMP/M.3848), Commission decision of August 18, 2006.

5 In *Hutchinson/RCPM/ECT* (Case No JV.55), the Commission considered differentiating between coal and iron ore terminal services for hinterland traffic (from deep-sea ships directly to inland barges, trains or trucks) and coal and iron ore terminal services for transshipment traffic (from deep sea ships to relay/feeder vessels).

6 *Mittal/Arcelor* (Case COMP/M.4137), Commission decision of August 3, 2006.

Commission held that switching between terminals was likely to be easier for steel producers in the future, given the planned improvements in handling capabilities at various ports in the Le Harve Hamburg region.

In considering the potential for the merged entity to have an incentive to foreclose, the Commission considered that because handling fees represent only a small proportion of the transport costs for coal and iron ore, any increase in such fees would be likely to have only a limited impact on the cost structure of, and hence competition within, the downstream steel market. Furthermore, the Commission contended that as ArcelorMittal is already a major customer of ATIC, and does not require any further volumes at ATIC terminals, a denial of service by the merged entity to steel producers could result in loss-making underutilization of capacity. For these reasons, the Commission considered the transaction was unlikely to result in input foreclosure, and accordingly found it compatible with the internal market.

STATE AID

ECJ – Judgments

Joined Cases C-463/10 P And C-475/10 P Deutsche Post AG And Federal Republic Of Germany v. European Commission

On October 13, 2011, the ECJ upheld the appeals brought by Deutsche Post and Germany and annulled the Orders of the General Court,[7] which had rejected as inadmissible their actions for annulment against a Commission decision requiring Germany to provide information in proceedings relating to State aid to Deutsche Post.[8] Following this judgment, it is now clear that information injunctions adopted by the Commission pursuant to Article 10(3) of Regulation No. 659/1999[9] ("the Regulation") can be acts open to challenge within the meaning of Article 263 TFEU.

In the context of a formal investigation procedure relating to State aid in favour of Deutsche Post, Germany refused to send information to the Commission after having received an information injunction under Article 10(3) of the Regulation ("the Decision"). The Appellants appealed the Decision to the General Court, which upheld the Commission's objection of inadmissibility and stated that the Decision did not constitute an act open to challenge. On appeal to the ECJ, the Applicants argued that the General Court had committed various errors of law in the interpretation of the concept of an act open to challenge.

The Court first held that an information injunction constitutes a measure intended to produce binding legal effects. It recalled that Article 10 of the Regulation provides a two stage procedure concerning information requests. In the first stage the Commission will request information; in the second, if despite a reminder the Member State continues to refuse to offer it, the Commission "shall by decision require the information to be provided."[10] This is a decision within the meaning of Article 288 TFEU, thus "binding in its entirety."

The ECJ then held that the General Court erred in finding that the Decision did not constitute an act open to challenge by reason of its preparatory nature. Normally, intermediate measures whose aim is to prepare the final decision and thus express a provisional opinion cannot form the subject matter of an action for annulment, the risk being that the EU judicature may decide on questions on which the institution concerned has not yet stated its position. In the case at hand, however, an action directed against an information injunction could not lead to confusing different procedural stages, as the EU judicature would not rule on the existence of a State aid measure or its compatibility.

Furthermore, an intermediate act cannot form the autonomous subject-matter of an action when the illegality attaching to it can be relied upon in support of an action against the final decision for which it represents a preparatory act. In the case at hand, however, the Court held this condition was not satisfied as the possible illegalities attached to the intermediate measure were not capable of being removed by an action against the final decision. On the one hand, the illegalities allegedly vitiating the decision (the disproportionate and irrelevant nature of the information requested) were not capable of affecting the legality of the Commission's final

7 Order of the General Court in *Deutsche Post AG v. Commission* (Case T-570/08) and *Federal Republic of Germany v. European Commission* (Case T-571/08), judgments of July 14, 2010, not yet published.

8 Commission Decision C (2008) 6468 of October 30, 2008, requiring Germany to provide certain information pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 (OJ 1999 L 83, p. 1), taken in the context of a supplementary investigation concerning State aid granted to Deutsche Post AG by the German authorities (State aid C 36/07 (ex NN 25/07)) [OJ 2007 C 245, p. 21].

9 Council Regulation No 659/1999 of March 22, 1999, laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty, OJ 1999 L 83/1-9.

10 Article 10(3) of Regulation No 659/1999 states: "[w]*here, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (hereinafter referred to as an 'information injunction'). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.*"

decision, since the latter would not be based on information obtained in response to the injunction. On the other hand, a Member State's refusal to comply with an injunction constitutes a failure to fulfil an obligation under the Treaty[11] and, since in the context of this action a Member State cannot validly justify non-performance on the basis of the injunction's illegality, the Member State must have the possibility to challenge the legality of the injunction in the framework of a distinct procedure (*i.e.*, an action for annulment). The Court, finding that the injunction produced independent legal effects and could form the independent subject matter of an action for annulment, declared the Appellants' actions admissible, upheld their appeals, set aside the contested Orders and referred the cases back to the General Court.

Joined Cases C-106/09 P And C-107/09 P European Commission And Kingdom Of Spain v. Government Of Gibraltar And United Kingdom of Great Britain and Northern Ireland

On November 15, 2011, the ECJ upheld appeals filed by the European Commission and Spain against the judgment of the General Court in Joined Cases T-211/04 and T-215/04.[12] In the judgment under appeal, the General Court annulled Commission Decision 2005/261/EC of March 30, 2004,[13] explaining that the Gibraltar tax reform was not, as the Commission had held, selective in nature and, consequently, did not constitute State aid within the meaning of Article 107(1) TFEU.

In April 2002, the Government of Gibraltar announced its intention to introduce a new corporate tax regime. The regime did not set a general tax burden but entailed a combination of bases of assessments, *i.e.*, it would only tax payroll and business properties. The regime also included two additional refinements: i) liability would be triggered only if companies had made profits during the financial year in question and ii) liability would, in any event, be capped at 15% of such profits. In March 2004, the Commission found, however, that the proposed tax reform was both regionally and materially selective and, thus, constituted incompatible aid.

In December 2008, the General Court annulled the Commission's decision on the ground that the Commission had made errors of law in assessment of the criteria of regional and material selectivity. As regards the former criterion, the proposed tax reform was not regionally selective, because, in accordance with the conditions set forth in Azores, the reference framework to assess the regional selectivity of the proposed tax reform corresponded with the territory of Gibraltar, and not the United Kingdom as claimed by the Commission. As a consequence, no comparison could be made between the tax regime applicable to companies established in Gibraltar and that applicable to companies established in the United Kingdom for the purposes of assessing regional selectivity.

As concerns material selectivity, the General Court noted that the Commission had failed to apply the "derogation-based" model developed by the European Courts. According to that model, in order for a given measure to be materially selective, a three-stage analysis must to be followed: i) a normal or general tax regime has to be identified in the geographical area constituting the relevant reference framework; ii) the measure in question must introduce some sort of derogation to the normal or general regime, differentiating between economic operators that are in comparable situations; and iii) it would then be for the Member States to show that this differentiation is justified by the nature and the general scheme of the measure in question.

The Court's recent judgment marks a sharp contrast with the approach of the General Court as to the required legal analysis to ascertain whether a given measure is materially selective. In the appeal, while the Court agreed with the General Court that the requirement to make a profit and the 15% cap on liability were not selective because they represented a mere consequence of random events happening during the period of assessment, the ECJ held that the proposed tax reform favored certain undertakings, *i.e.*, offshore companies. In doing so, it also disregarded the Opinion of the Advocate General, who sided with the interpretation of the relevant case law relied on by the General Court.

In short, the Court concluded that the General Court's focus on the regulatory technique used to design the proposed tax reform was misplaced. The Commission rightly found that the proposed tax reform was materially selective even if the derogation-based model could not be applied in consequence of the absence of a general tax burden and an ensuing derogation. By combining criteria that are in

11 *See* Article 258 TFEU (ex Article 226 TEC): "[i]*f the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.*"

12 *Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland v. Commission of the European Communities* (Joined Cases T-211/04 and T-215/04), 2008 ECR II-3745.

13 *Copper Plumbing Tubes* (Case COMP/E-1/38.069), Commission decision of March 9, 2004.

themselves of a general nature, the Government of Gibraltar discriminated between companies that were in comparable situations with regard to the objective of the proposed tax reform, *i.e.*, the introduction of a general system of taxation for all companies established in Gibraltar. In fact, in the absence of other bases of assessments, the proposed tax reform excluded from the outset any taxation of offshore companies on account of properties which were specific to them, *i.e.*, they have no employees and do not occupy business property. The Court also pointed out that neither the Government of Gibraltar nor the United Kingdom had adduced, at first instance, any justification for the selective advantages enjoyed by offshore companies. In this light, the Court no longer needed to adjudicate on the criterion of regional selectivity.

FINING POLICY

ECJ – Judgments

Cases C-272/09 P And C-389/10 P KME Germany And Others v. Commission And Case C-386/10 P Chalkor AE Epexergasias Metallon v. Commission

On December 8, 2011, the ECJ dismissed the appeals brought by KME Germany, KME France, and KME Italy (collectively the "KME Group") and Chalkor against the judgments of the General Court upholding the fines levied by the Commission on December 16, 2003, against the KME Group and reducing by 10% the fine imposed on Chalkor.[14] On September 3, 2004, the Commission established similar unlawful conduct in the copper plumbing tubes sector and imposed a second set of fines on the two parties.[15]

In their appeals, the KME Group and Chalkor argued that the General Court had failed to examine their arguments closely and thoroughly and deferred, to an excessive and unreasonable extent, to the Commission's margin of discretion. In doing so, the General Court, according to the appellants, had infringed the principle of effective judicial protection, as well as Article 47 of the Charter of Fundamental Rights of the European Union (the "Charter") and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

To substantiate their position, the appellants put forward a number of arguments. First, the appellants argued that the reliance on the doctrines of "margin of appreciation" and "judicial deference" were remnants of the previous enforcement system, characterized by lower fines and a relative higher expertise of the Commission compared to the European Courts in competition matters. Second, the concept of unlimited jurisdiction *ex* Article 261 TFEU and Article 31 of Regulation 1/2003 did not leave room for discretion with respect to Commission's method of calculating the fine. Third, while the European Court of Human Rights has accepted that the imposition of criminal sanctions by administrative authorities is not as such incompatible with Article 6(1) ECHR, such enforcement must be followed by an effective regime of judicial control capable of exercising full jurisdiction, which the General Court did not adhere to. Lastly, the General Court had showed, over the years, significant inconsistency in its review of competition cases, from thorough reviews to applying the standard of a manifest error of assessment.

In assessing the General Court's powers of review, the Court recalled that, according to *Tetra Laval*, the European Courts must not refrain from reviewing the Commission's interpretation of information of a complex nature. It then ruled that, in carrying out the review of legality provided for under Article 263 TFEU, the General Court should not rely on the Commission's margin of discretion as a basis to refrain from an in-depth review of the law and the facts. Moreover, the Court noted that such review of legality is supplemented by the European Courts' unlimited jurisdiction, which allows them to cancel, reduce or increase the fine imposed on undertakings, effectively substituting their own appraisals for the Commission's. However, the concept of unlimited jurisdiction does not amount to an *ex officio* review, as it is for the undertakings to substantiate their grounds of challenge with relevant evidence. In this light, the Court held that the system of judicial review provided for by the TFEU is consistent with the requirements of Article 47 of the Charter. Applying this reasoning to the judgment under appeal, the ECJ dismissed the appeals as it found that, although the General Court repeatedly referred to the Commission's margin of discretion, it did in fact carry out a full and unrestricted review, in law and in fact. In reaching this finding, the Court rejected the companies' arguments regarding the lack of consistency in General Court's case law, noting that it was only reviewing the judgment under appeal and not the General Court's case law as a whole.

GC – Judgments

Case T-11/06 Romana Tabacchi v. Commission

On October 5, 2011, the General Court partially annulled the Commission's decision of October 20, 2005,[16] and cut in half the €2

14 *Industrial Tubes* (Case COMP/E-1/38.240), Commission decision of December 16, 2003.

15 *Copper Plumbing Tubes* (Case COMP/E-1/38.069), Commission decision of March 9, 2004.

16 *Romana Tabacchi Srl v. Commission* (Case T-11/06), judgment of October 5, 2011, not yet reported.

million fine imposed on Romana Tabacchi for its participation in a cartel in the Italian raw tobacco market from 1995 to 2002.

The Court held that the Commission had made a mistake concerning the duration of Romana Tabacchi's participation in the cartel. The Commission could only prove that Romana Tabacchi participated in the cartel from October 1997 to February 1999. As a result, the Court held that the Commission had incorrectly relied on Romana Tabacchi's market share in 2001 for the determination of the starting amount of the fine, as it was no longer Romana Tabacchi's last year of infringement, thereby incorrectly setting a disproportionate starting fine relative to its actual involvement in the infringement.

In reducing the fine, the Court stated that it was not following a precise arithmetic exercise and that it was not bound by the Commission's calculation or the guidelines. Relying on the unlimited jurisdiction conferred on it by Article 31 of Regulation 1/2003, in accordance with Article 229 EC (now Article 261 TFEU), the Court held that, in contrast with a simple review of legality, which merely permits the action for annulment of the contested measure to be dismissed, this unlimited jurisdiction authorizes the Court to "*substitute its own assessment for that of the Commission and therefore vary the contested measure, even without annulling the contested decision, by taking into account all of the factual circumstances, so as to amend for example the amount of the fine.*"

The Court found that the original €2 million fine would likely lead to Romana Tabacchi's insolvency. It thus took note of Romana Tabacchi's actual financial capacity, even though it had already considered that the Commission had not erred in not taking that factor into account in its 2005 Decision.

Case T-38/05 Agroexpansión v. Commission

On October 12, 2011, the General Court confirmed the Commission's decision of October 20, 2004,[17] finding Alliance One (formerly Dimon) jointly and severally liable with its indirectly wholly-owned subsidiary, Agroexpansión, for the latter's participation in a cartel in the Spanish raw tobacco market from 1996 to 2001.

Agroexpansión and Alliance One claimed *inter alia* that the Commission had erred in finding Alliance Once jointly and severally liable for the infringement, arguing that it was not established that Alliance One directly participated in the violation or gave Agroexpansión instructions to do so.

The Court recalled that the imposition of the joint and several liability on a parent company for its subsidiary's acts is not due to the parent company's role in instigating, or to the parent company's involvement in, the infringement, but because the parent company and its subsidiary constitute a single undertaking for the purpose of Article 101 TFEU. In this case, the Court observed that the Commission had not relied solely on the rebuttable presumption that a parent exercises decisive influence over its subsidiary when the parent owns 100% shareholding of the subsidiary, but had also taken account of other factual elements tending to confirm that such influence was actually exercised. The elements consisted of various reports and letters from Agroexpansión which, the Court confirmed, established that Alliance One was informed of the unlawful practice in question. The Court therefore considered that the Commission was right in finding Alliance One jointly and severally liable with Agroexpansión.

However, the Court found that the Commission had not correctly taken into account Agroexpansión's co-operation under the Leniency Notice and had erred in holding Alliance One liable for the infringement for the period prior to November 18, 1997, since it had indirectly acquired all the shares of, and formed an economic unit with, Agroexpansión on that date. As a result, it reduced the fine imposed on Agroexpansión from €2.59 million to €2.43 million, and the part of the fine imposed on Agroexpansión for which Alliance One was jointly and severally liable to about €2.19 million.

Cases T-348/08 Aragonesas Industrias y Energía v. Commission And T-349/08 Uralita v. Commission

On October 25, 2011, the General Court ruled on two separate appeals brought by Aragonesas Industrias y Energía ("Aragonesas") and its parent company Uralita against a decision of the Commission of June 11, 2008, relating to a cartel in the market for sodium chlorate (an oxidizing agent used mainly for bleaching in the pulp and paper industry).

Aragonesas argued that the Commission had not adequately proven its participation in the infringement throughout the period in question, from December 16, 1996 to February 9, 2000. Taken as a whole, the Court found that the evidence (contemporaneous notes by a competitor's representative and statements made by competitors under the Leniency Notice) was excessively sporadic, fragmented, and not sufficiently precise and conclusive to show that Aragonesas participated in the infringement during the entire period

17 *Agroexpansión, SA v. Commission* (Case T-38/05), judgment of October 12, 2011.

at issue. The Court held that only the acknowledgement by Aragonesas that it participated in an unlawful meeting on January 28, 1998 and the statements and notes of the other participants regarding that meeting were sufficiently reliable evidence that could be used against Aragonesas. The Court concluded that the Commission had thus only proved that Aragonesas participated in the cartel in 1998 and annulled the decision for the remaining period.

In its appeal, Uralita challenged the Commission's decision insofar as it imposed on it joint and several liability for Aragonesas's conduct. The Court found, first, that the Commission correctly held that Aragonesas's parent company at the time of the infringement, EIA, had exercised decisive influence over Aragonesas, consistent with the presumption that a parent exercises decisive control over a wholly-owned subsidiary, which was not rebutted by Uralita. Secondly, the Court noted that, following the merger (by way of absorption) in 2003, Uralita had acquired all of EIA's share capital, as a result of which EIA had ceased to exist as a legal person. As a consequence, the Commission was right to conclude that Uralita, as EIA's legal successor, was liable for the infringement committed by the latter. The Court therefore dismissed Uralita's appeal.

Cases T-51/06 Fardem Packaging v. Commission, T-54/06 Kendrion v. Commission, Joined Cases T-55/06 And T-66/06 RKW And JM Gesellschaft Für Industrielle Beteiligungen v. Commission, Cases T-59/06 Low & Bonar And Bonar Technical Fabrics v. Commission, T-68/06 Stempher And Koninklijke Verpakkingsindustrie Stempher v. Commission, T-72/06 Groupe Gascogne v. Commission, T-76/06 Plasticos Españoles (ASPLA) v. Commission, T-78/06 Armando Álvarez v. Commission, T-79/06 Sachsa Verpackung v. Commission

On November 16, 2011, the General Court handed down nine judgments on appeals by a number of manufacturers of plastic industrial bags against a Commission decision of November 30, 2005,[18] relating to a cartel in the industrial bags sector covering the Benelux, France, Germany, and Spain, from January 1982 until June 2002, with the duration ranging from three to twenty years depending on the undertaking. The Court rejected in their entirety all but the following two appeals.

In its appeal, Stempher[19] alleged that the Commission had not provided any evidence of its involvement in cartel activities after June 20, 1997, and that the five-year limitation period had elapsed when, on June 26, 2002, the Commission took on its first action (inspection) capable of interrupting the limitation period. The Court held that the Commission had, indeed, not produced sufficiently precise and consistent evidence to establish that Stempher had continued to participate in the cartel after June 20, 1997. In particular, the Court noted that the only evidence adduced by the Commission of Stempher's involvement in 1997 were a few tables containing sales data exchanged between the parties. The Court ruled that the Commission had not demonstrated that Stempher had received these tables nor that Stempher had contributed to their production. The Court concluded that the five-year limitation period thus precluded the Commission from fining Stempher and annulled the Commission's decision in so far as it imposed a fine of €2.37 million on Stempher.

In its appeal, Bonar[20] contested, among other, the Commission's finding that it had participated in a single and continuous infringement from September 13, 1991 to November 28, 1997, at regional sub-group levels and at a European level (the latter being organized around the Valveplast trade association). The Court found that the Commission had insufficient evidence to show that Bonar knew or should have known that, by participating in meetings of regional sub-groups prior to November 21, 1997, it was joining in a wider cartel extending over a number of European countries. Hence, the Commission had not proven that Bonar participated in a single and continuous infringement before November 21, 1997. As a result, the Court reduced the starting amount of Bonar's fine by 25%, thereby lowering the fine imposed on Bonar from €12.24 million to €9.18 million.

Case T-208/06 Quinn Barlo And Others v. Commission

On November 30, 2011, the General Court reduced the fine imposed by the Commission in 2006 on three companies within the Quinn Group for their participation in a cartel in the methacrylates sector between January 1997 and September 2002, and annulled the Commission's decision in part given that it had failed to establish the companies' liability for a single and continuous infringement.[21]

The Court found that the Commission had established the companies' participation in the cartel (based on five cartel meetings).

18 *Industrial bags* (Case COMP/38354), Commission Decision of November 30, 2005.

19 "Stempher" refers to the undertaking formed by Stempher BV and the limited partnership Koninklijke Verpakkingsindustrie Stempher CV, the applicants in case T-68/06.

20 "Bonar" refers to the undertaking formed by the parent company Low & Bonar and its subsidiary Bonar Technical Fabrics, the applicants in case T-59/06.

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

However, it found that one of the meetings in Barcelona could not be taken into account given the lack of supporting evidence. In particular, the statements relied upon as evidence placed the companies at several other meetings not included in the Commission's decision. As the companies' presence at the Barcelona meeting could not be verified, the Court found that there was a period of 16 months during which the companies had no collusive contacts. However, during this period the other cartel participants had continued to meet regularly. As such, the Court found that the companies' continued participation during this period could not be established and annulled the Commission's decision in so far as it held the parties liable for the period from November 1, 1998 to February 23, 2000. Despite this interruption, the Court held that it was still one and the same infringement. In reassessing the fine, the Court found that a 10% increase on the starting amount of the fine, instead of the 20% imposed by the Commission, adequately reflected the duration of the infringement, and thus reduced the fine from €9 million to €8.25 million.

In examining the gravity of the infringement, the Court found that the Commission had not established the grounds on which the companies' participation in the infringement relating to one of the products should give rise to the companies' liability for the entire infringement relating to the other three products. The Court acknowledged that the parties did not need to be active in all three product markets to be found liable for the entire single infringement. However, the Court held that the Commission could find the companies liable in relation to these markets only if it has proven that they knew or should have known that the cartel was active in all three product markets. Given that the Commission itself stated in its decision that the parties were not necessarily aware of the full extent of the anticompetitive arrangements, the Court annulled the decision insofar as the parties were held liable for infringing competition law in respect of all three products. However, the Court decided not to reduce the fine any further, finding that the 25% reduction to the starting amount of the parties' fine, already granted by the Commission, suitably reflected the gravity of the infringement.

POLICY AND PROCEDURE

ECJ – Judgments

Case C-109/10 P Solvay v. Commission

On April 14, 2011, Advocate General Kokott issued an opinion proposing that the Court of Justice of the European Union set aside the General Court's ruling in Case T-58/01 *Solvay v. Commission*. On October 25, 2011, the Court rendered its judgment, endorsing the Advocate General's view, setting aside the judgments of the General Court and annulling the Commission decisions imposing fines on Solvay for its anti-competitive conduct on the soda ash market.

In 1989, the Commission fined Solvay €20 million for practices including the use of loyalty rebates in the supply of soda ash to glass manufacturers, and the conclusion of various cartel agreements with other European soda ash suppliers. The fine imposed on Solvay was annulled in 1995 on procedural grounds. Having failed in its appeal of the annulment, in December 2000 the Commission subsequently re-adopted its decision and imposed the same fine on Solvay. In December 2009, the General Court upheld in part Solvay's action for annulment of the Commission's later decision, reducing the fine imposed by 25%, to €2.25 million.

Solvay subsequently appealed the ruling of the General Court, arguing that the fine should be annulled in its entirety. Of the nine grounds of appeal, the most important related to procedural irregularities in the Commission's proceedings. Solvay noted that the Commission, having refused Solvay access to file during the administrative process, had mislaid part of the case file when it moved to its current offices in Rue Joseph II. Moreover, the Commission had subsequently refused to grant Solvay a new oral hearing prior to the re-adoption of its infringement decision in December 2000.

Advocate General Kokott found that the Commission had failed to uphold Solvay's procedural rights. In particular, the Advocate General questioned the excessive length of the proceedings, Solvay's limited access to file, and the refusal to grant Solvay a new oral hearing.

First, Advocate General Kokott criticized the Commission's inactivity over the five-year period during which Solvay's first appeal was pending. In the Advocate General's view, Solvay's ability to defend itself had been compromised over time by the departure of staff and the fading memories of those that had stayed with the company.

Second, Solvay's difficulties had been compounded by the Commission's procedural violations in relation to access to file. Contrary to the finding of the General Court, Solvay was not required to show that the misplaced evidence might have been in its favor. Rather, it was sufficient that the documents to which Solvay had been denied access could have contained evidence casting doubt on the Commission's case.

Third, Advocate General Kokott considered that when a procedural irregularity forced the Commission to re-initiate proceedings, the Commission must resume proceedings from the point at which the error occurred. In the present case, this meant that the Commission should have resumed proceedings directly after the point at which Solvay had been issued with the Statement of Objections. Solvay was therefore entitled to a further hearing on the evidence.

The Court took a similar view, making the following observations on Solvay's right of access to the file and right to an oral hearing:

The right of access to the file means that the undertaking concerned must be provided with the opportunity to examine all the documents in the investigation file that might be relevant for its defense. In the present case, Solvay could have found in the missing files evidence originating from other undertakings that may have enabled it to offer an interpretation of the facts different to that adopted by the Commission. The significant volume of content missing from the case file could not be reconstructed from other sources and may have been relevant to Solvay's defense.

Where a Commission decision has been annulled because of a procedural defect relating exclusively to the procedures governing its final adoption by the College of Commissioners, the Commission may adopt a fresh decision containing substantially the same content without rehearing the undertaking concerned. However, in Solvay's case, the right to an oral hearing could not be distinguished from the procedural defects in relation to Solvay's access to file. The previous oral hearing had taken place in circumstances where Solvay had been deprived of access to all relevant documents in the Commission's file. Accordingly, the Commission could not readopt its decision without granting Solvay a new oral hearing.

GC – Judgments

Case T-296/09 EFIM v. Commission

On November 24, 2011, the General Court dismissed an appeal brought by the European Federation of Ink and Ink Cartridge Manufacturers ("EFIM"),[22] against the Commission's decision to close its investigation into possible antitrust infringements by several manufacturers of inkjet printers on the market for inkjet cartridges.

EFIM's original complaint was filed in 2006. The complaint alleged, *inter alia*, that several original equipment manufacturers of printers had illegally excluded manufacturers of replacement inkjet cartridges for their printers. The Commission rejected this complaint by a decision of May 20, 2009. The decision found that the complaint disclosed no evidence of any infringement of Article 101, and that further investigation of the Article 102 allegations would be disproportionate in light of the evidence provided. The Commission observed that the case would be complex and that there was little likelihood of establishing an infringement. In particular, the complaint had failed to show prima facie evidence that any of the OEMs occupied a dominant position on the relevant primary or secondary markets.

EFIM appealed the Commission's decision to close its investigation. EFIM argued that the Commission's decision failed to take into account important facts presented in the complaint and therefore violated the principle of sound administration, the duty of care, the obligation to state reasons, and the applicant's right to a fair hearing. The General Court rejected this argument.

With respect to EFIM's allegations concerning Article 101, the General Court held that neither the complaint nor EFIM's subsequent submissions to the Commission contained sufficient evidence of the infringement alleged. In particular, EFIM had not provided any evidence regarding the licensing and production agreements between OEMs that EFIM alleged to be anti-competitive. (Indeed, the Article 101 claim had not been raised in EFIM's original complaint, but only in subsequent submissions to the Commission.) The Commission had subsequently given EFIM a fair hearing, affording EFIM several opportunities to present its observations (in line with Regulation 773/2004) and that EFIM had availed itself of these opportunities. In light of the weak evidence presented by EFIM, the Commission's decision to close its investigation for lack of evidence could not be considered a manifest error of assessment and did not violate the Commission's obligation to state reasons, or its duty of care.

Similarly, the General Court rejected EFIM's challenge of the decision to reject the part of the complaint relating to Article 102. The Commission had correctly observed that where primary and secondary markets are sufficiently close, competition on the primary market could effectively discipline the secondary market. The General Court confirmed that in such circumstances, the relevant test was whether a customer: "*[could] make an informed choice including*

22 *European Federation of Ink and Ink Cartridge Manufacturers v. European Commission, General Court* (Case T-296/09), judgment of November 24, 2011, not yet reported.

23 *EFIM* (Case COMP/C-3/39.391), Commission decision of May 20, 2009.

lifecycle pricing . . . [and] is likely to make such an informed choice accordingly," and that "*in case of an apparent policy of exploitation being pursued in one specific aftermarket, a sufficient number of customers would adapt their purchasing behavior at the level of the primary market within a reasonable time.*"[23] The General Court confirmed the Commission's conclusions that there was evidence here of a sufficiently close link between the primary market and aftermarket. Accordingly, there was no basis for finding that the OEMs' conduct in this regards may have been abusive.

The General Court also rejected EFIM's final ground of appeal, which challenged the Commission's assessment that there was insufficient Community interest in pursuing the complaint. The General Court found that the Commission need not always consider the seriousness of the allegations for the functioning of competition in the Internal Market. Moreover, the Commission had investigated the sector in two previous cases, both of which found that the OEMs did not occupy a dominant position. EFIM's Complaint did not present any evidence calling into question this precedent. Although EFIM had claimed that only the Commission was in a position to provide effective protection of competition in the circumstances, the General Court noted that Article 101 and 102 were directly effective before the national courts. Accordingly, given the unlikelihood of finding an infringement and the disproportionate resources required to pursue the investigation, there was not a sufficient degree of Community interest in the Commission pursuing the Complaint.

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