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QUARTERLY REPORT

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HORIZONTAL AGREEMENTS

ECJ Judgments

DOLE FOOD AND DOLE FRESH FRUIT EUROPE V. COMMISSION (CASE C-286/13 P)

On March 19, 2015, the Court of Justice dismissed an appeal by Dole Food and its subsidiary, Dole Fresh Fruit (together, "Dole"), against the General Court's judgment of March 14, 2013,[1] upholding the Commission's decision of October 15, 2008 in the banana importers cartel.[2]

In 2008, the Commission fined Dole and two other banana importers a total of €75 million for coordinating their quotation prices for bananas marketed in Northern Europe 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 constituted object restrictions of competition. On appeal, the General Court upheld the Commission's decision and Dole appealed to the Court of Justice.

The Court of Justice disagreed with Dole's claim that the General Court had erred in finding an object restriction of competition. The Court of Justice recalled that restrictions of competition by object are those that are, by their very nature, harmful to competition. They are so likely to have anti-competitive effects that it is unnecessary to prove their actual effects on the market.

It is settled law that an exchange of information between competitors may restrict competition by object if it reduces or removes the degree of uncertainty inherent in the operation of the market. This applies, in particular, to exchanges of forward-looking information, even if it does not directly relate to consumer prices.

It was clear from the General Court's findings that Dole and its competitors had discussed future prices, including pricing trends and their own quotation prices[3] for the market in question. The General Court found that it was possible to infer market signals, market trends, or intended price developments from these quotation prices. Second, the General Court determined that, in some transactions, the actual price was directly linked to the quotation price. Moreover, the Dole employees involved in the communications at issue also participated in the company's internal pricing meetings. Based on the above, the Court of Justice agreed with the General Court's finding that the communications reduced uncertainty for each cartel member as to the foreseeable conduct of its rivals and therefore restricted competition by object.

Dole also submitted that the General Court had erred in its calculation of the fine. In particular, Dole claimed that it was improper to include in the relevant turnover banana sales by Dole subsidiaries not involved in the infringement. In response, the Court of Justice recalled that EU competition law applies to "undertakings." It is settled case law that this concept designates economic units, which may consist of several legally distinct natural or legal persons. Where one such person breaches EU competition law, it is for the entity to which it belongs to answer for that infringement.

The Court of Justice further explained that the proportion of the relevant economic unit's turnover derived from the sales related to the infringement best reflects the economic importance of that infringement. Accordingly, the General Court was correct in holding that the Commission could calculate the fine on the basis of the total yellow banana sales made by all companies of the Dole group, regardless of whether they were actually involved in the infringement.

[1] *Dole Food and Dole Germany v. Commission* (Case T-588/08 EU:T:2013:130).

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

[3] Quotation prices refer to the prices which could be taken into account as a reference. In this case, quotation prices were neither actual prices nor the basis for the negotiation of the actual prices.

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Having also dismissed Dole's other grounds of appeal, alleging a breach of its rights of defense and of the duty to state reasons, a distortion of the facts, and an inadequate assessment of the evidence, the Court of Justice dismissed the appeal in its entirety.

Commission Decisions

LUNDBECK (CASE AT.39226)

On June 19, 2013, the Commission imposed a €93.8 million fine on H. Lundbeck A/S and Lundbeck Limited (together, "Lundbeck"), and fines totaling €52.2 million on generic drug manufacturers Merck, Arrow, Alpharma, and Ranbaxy for preventing or delaying the market entry of generic versions of Lundbeck's branded anti-depressant citalopram in 2002 and 2003.

The Commission found that Lundbeck's molecule patent on the citalopram compound and two original processes for the production of citalopram had expired in early 2002. In anticipation of the molecule patent's expiry, several generic manufacturers began gearing up to launch generic versions of Lundbeck's drug. At the time, however, Lundbeck still held a number of important process patents covering specific methods for manufacturing citalopram. As a result, several disputes arose between Lundbeck and generic manufacturers concerning potential infringements of some of these process patents. In 2002 and 2003, Lundbeck and the generic companies concluded six agreements settling disputes concerning the alleged infringement of three process patents.

The Commission learned of the settlements in around October 2003 from the Danish Competition Authority. At the time, the Danish Competition Authority decided not to pursue the matter further, noting that the Commission viewed the settlements as falling within a "gray area" (*i.e.*, not as object restrictions). The Danish Competition Authority concluded that it was "doubtful whether the agreements [we]re restrictive of competition."[4]

The Commission, however, held that each of the settlements restricted competition by object. It dismissed the "scope-of-the-patent" test put forward by Lundbeck as the appropriate standard for determining the lawfulness of a patent settlement under EU competition law. Under this test, a patent settlement agreement that addresses a genuine patent dispute and does not contain restrictions that exceed the scope of the relevant patent does not violate competition law.

According to the Commission, the scope-of-the-patent test would allow originators to induce generic manufacturers to abandon their efforts to enter markets for drugs whose compound patent had expired, and to do so for the entire duration of the relevant process patent, even if these manufacturers would likely be able to bring a non-infringing product to the market during that period.

Instead, the Commission held that a patent settlement agreement restricts competition by object if the agreement is between an originator and a generic manufacturer that are at least potential competitors and entails a commitment by the generic manufacturer to limit its independent efforts to enter the relevant market with generic products for the duration of the agreement in exchange for a transfer of value that substantially reduces its incentives to independently pursue its efforts to do so. The Commission did not provide a clear definition of a "value transfer," but suggested that a "considerable sum of money" would qualify.[5]

Based on this approach, the Commission took the view that the generic companies were at least potential competitors of Lundbeck at the time of the settlements. The Commission's conclusion was not affected by the facts that (i) one of the generic companies did not have the necessary marketing authorizations to enter the citalopram market in certain EEA countries covered by the Settlements and (ii) Lundbeck continued to hold important process patents for the production of citalopram.

[4] Press release of the Danish Competition Authority, "Undersøgelse af Lundbeck", January 28, 2004.

[5] *Lundbeck* (Case AT.39226), Commission decision of June 19, 2013, para. 640.

Moreover, the Commission did not exclude the possibility that the generic companies may have been manufacturing their products in breach of Lundbeck's process patents. However, the Commission found that the generic companies still might have succeeded in innovating around the relevant patents, invalidating them, or convincing a judge that there was no infringement. The Commission therefore concluded that such market entry represented potential competition, even if it eventually might be found to have violated Lundbeck's patents.

The Commission further found that the settlements required the generic companies not to enter the market for generic citalopram in exchange for a value transfer from Lundbeck. These value transfers involved financial compensation or the right to sell Lundbeck's Citalopram in certain EEA countries. In the Commission's view, a value transfer from an originator company to a generic company in itself is evidence that a patent settlement does not reflect the parties' subjective assessments of the strength of the patent and therefore restricts competition by object. In other words, the Commission's view, the very presence of a reverse payment means that the generic company refrains from selling the generic products due to that payment and not due to the strength of the originator's patents or the likelihood that the generic products will be found to infringe these patents. This conclusion is based on the unprecedented assumption that an originator company has an incentive to make a reverse payment only if it considers its patent to be weak.

The Commission accordingly also rejected Lundbeck's argument that the existence and size of the payments aimed to address the patent hold-up problem and did not necessarily prove that the patent was weak. Lundbeck argued that, where (as is typically the case) an originator stands to lose much more from even a low likelihood of successful generic entry than its generic challengers stand to gain from even a significant likelihood of successful entry, there is an asymmetry of risk. Generic manufacturers can exploit this asymmetry to negotiate significant payments in settlement agreements. The Commission disagreed, contending that the generic companies' leverage was a direct function of the lawful competitive threat they posed to Lundbeck. Moreover, the fact that the generic companies might have had leverage over Lundbeck was irrelevant to assessing whether the settlements restricted competition.

Other "*important factors*" on which the Commission relied included (i) the (highly contentious) finding that each settlement prevented the generic company from selling both infringing and non-infringing citalopram, (ii) the fact that the "value transfers" from Lundbeck roughly equaled the profit the generic companies would have made had they entered the market, and (iii) Lundbeck's undertaking not to sue the generic companies after expiry of the settlements.[6]

Lundbeck and the generic companies have petitioned the General Court to annul the Commission's decision.

FINING POLICY

ECJ Judgments

VERSALIS AND ENI V. COMMISSION (JOINED CASES C-93/13 P AND C-123/13 P)

On March 5, 2015, the Court of Justice upheld the General Court's judgment of December 13, 2012,[7] partially annulling the Commission's decision of December 5, 2007 in the chloroprene rubber cartel.[8]

In 2007, the Commission imposed a total of €243.2 million in fines on Eni SpA ("Eni"), its subsidiary Polimeri Europa SpA, now Versalis SpA ("Versalis") and five other undertakings for participating in a cartel in the chloroprene rubber market from 1993 to 2002. In its decision, the Commission increased the basic amount of the fine against Eni and Versalis by 60%, concluding that the companies

[6] *Id.*, para. 662.

[7] *Versalis SpA and Eni SpA v.Commission* (Case T-103/08) EU:T:2012:686.

[8] *Chloroprene Rubber* (Case COMP/38629), Commission decision of December 5, 2007.

were repeat offenders because their subsidiaries, Anic and Enichem, had been the addressees of Commission infringement decisions in the 1980s and 1990s.[9]

On appeal, the General Court maintained that Versalis was the economic successor of EniChem and thus upheld the successor liability finding, but annulled the Commission's decision insofar as it found Eni to be a repeat offender. The General Court held that the involvement of Anic and Enichem in prior cartel infringements could not form the basis for a finding of recidivism against Eni. Eni was neither sanctioned in connection with these infringements, nor had it been the addressee of the statements of objections in the relevant administrative proceedings. As a result, the General Court concluded that Eni could not have exercised its rights of defense and challenged the Commission's view that it formed an economic unit with its infringing subsidiaries at the time of those infringements.

The General Court reduced the recidivism uplift from 60% to 50%, and the overall amount of the fine imposed on Eni and Versalis accordingly dropped from €132.16 million to €106.20 million.[10] The Commission, Eni, and Versalis appealed to the Court of Justice.

The Commission maintained that it had appropriately found recidivism. It disputed the General Court's conclusion that a parent company could not be held liable for a subsidiary's prior infringement, where the parent was not an addressee of the statement of objections and was not fined. The Commission also claimed that an undertaking's rights of defense are guaranteed if, when the Commission announces its intent to make a finding of recidivism, it gives the parties an opportunity to show that the conditions for such a finding are not met.

The Court of Justice agreed, but nonetheless rejected the Commission's plea. It explained that a finding of recidivism does not require the undertaking accused of recidivism to have been the subject of previous legal proceedings leading to a statement of objections and an infringement decision. Rather, what matters is an earlier finding of a first infringement based on the conduct of a subsidiary with which the parent company involved in the second infringement formed a single economic unit at the time of the first infringement. Moreover, the objective of suppressing anti-competitive practices and deterring their re-occurrence would be jeopardized if undertakings were able to alter their legal structure to make it impossible or particularly difficult for the Commission to impose penalties for recidivism. Accordingly, it is sufficient for the undertaking accused of recidivism to be able to defend itself when the allegation of recidivism is made.

The Court of Justice nonetheless upheld General Court's judgment on other grounds. Specifically, the Commission had only mentioned the aggravating circumstance of recidivism invoked against Eni in one paragraph of its decision. That paragraph stated that Eni was a repeated offender, without further explanation, and referred to a footnote citing two prior Commission decisions that were not addressed to Eni. This did not enable Eni to understand in what capacity and to what extent it was alleged to have been involved in the mentioned infringements. Therefore, Eni could not properly defend itself against the finding of recidivism and the EU Courts could not carry out their review.

Versalis and Eni also argued that the General Court had erred in confirming that the aggravating circumstance of recidivism applied to Versalis because it was the economic successor of Polimeri Europa SpA and Enichem, which had been fined for cartel conduct in the 1990s. In particular, Eni and Versalis disputed the General Court's use of the criterion of economic succession, which allows for the transfer of liability between a company and its economic successor. They also alleged that the General Court had exceeded the bounds of its jurisdiction by upholding the Commission's finding of recidivism on the basis of reasoning different than that of the Commission.

[9] *Polypropylene* (Case IV/31149), Commission decision of April 23, 1986; and PVC II (Case IV/31865), Commission decision of July 27, 1994.

[10] The General Court also reduced the deterrence multiplier applied by the Commission from 1.4 to 1.2 on account of a breach of the principle of equal treatment. Another cartelist placed in a similar situation as Eni had indeed been subject to a deterrence multiplier of only 1.2.

The Court of Justice disagreed. According to the Court of Justice, it was apparent from the General Court's judgment that it was reasonable to find the requisite economic continuity between Enichem and Polimeri Europa SpA on the one hand and their successor companies on the other. Moreover, the General Court did not exceed its powers, but relied on information contained in the Commission's decision to find that the conditions for a finding of recidivism were met.

Having also dismissed the other grounds of appeal alleging errors of law in the attribution of liability to Eni and Versalis, distortions of the facts, breaches of the principles of equity, proportionality, and equal treatment, and a misapplication of the deterrence multiplier and the Leniency Notice,[11] the Court of Justice dismissed the appeals in their entirety.

ECJ Advocate General Opinions

TOTAL SA V. COMMISSION (CASE C-597/13 P) AND *TOTAL MARKETING SERVICES V. COMMISSION* (CASE C-634/13 P), OPINION OF AG WAHL

On March 26, 2015, Advocate General ("AG") Wahl delivered his opinions on appeals by Total SA ("Total") and its wholly-owned subsidiary, Total Marketing Services ("Total Marketing") (successor in law to Total Raffinage Marketing), against the General Court's judgment of September 13, 2013,[12] upholding the Commission's decision of October 1, 2008 in the paraffin wax cartel.[13] AG Wahl advised the Court of Justice to dismiss Total's appeal, but to partially uphold that of Total Marketing.

In 2008, the Commission imposed €676.01 million in fines on nine undertakings for participating in a cartel in the paraffin wax sector between 1992 and 2005. The Commission fined Total Raffinage Marketing €128.16 million. Its sole shareholder Total was held jointly and severally liable for the entirety of the fine. On September 13, 2013, the General Court dismissed Total's appeal against the Commission's decision, but partly upheld Total Raffinage Marketing's separate appeal, reducing the fine to €125.46 million to reflect the actual duration of its participation in the cartel. Total and Total Raffinage Marketing appealed to the Court of Justice.

Total Marketing's Appeal

In Case C-634/13 P, Total Marketing alleged violations of the rules of evidence, the duty to state reasons, and the principles of legal certainty and the presumption of innocence. Specifically, Total Marketing argued that the General Court had erred in holding that Total Marketing had participated in the infringement from May 26, 2000 to June 26, 2001 and May 12, 2004 to April 28, 2005 based on Total Marketing's failure to publicly distance itself from the infringement during those periods. AG Wahl advised the Court of Justice to annul the General Court's judgment only insofar as it had held that Total Marketing had continued to participate in the infringement after May 12, 2004.

As regards the period between May 12, 2004 and April 28, 2005, AG Wahl recalled that the Commission must prove not only the existence of a cartel, but also its duration. Where there is no evidence directly establishing the duration of an infringement, the Commission must at least adduce evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between the two relevant dates.

When anticompetitive agreements are concluded at a meeting of competing undertakings, it is sufficient for the Commission to establish that the undertaking concerned participated in the relevant meeting to prove its involvement in the infringement, unless that undertaking publicly distanced itself from that infringement. By contrast, in the absence of anti-competitive contacts, the mere fact that an undertaking failed publicly to distance itself from the infringement is insufficient to prove its participation in such infringement.

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

[12] *Total SA v. Commission* (Case T-548/08) EU:T:2013:434, *Total Marketing Services v. Commission* (Case T-566/08) EU:C:2015:208, judgments of September 13, 2013.

[13] *Paraffin Wax* (Case COMP/39.181), Commission decision of October 1, 2008.

AG Wahl found that Total Marketing had not participated in any anti-competitive meeting after May 12, 2004. Neither was there any evidence that Total Marketing had had any contact with the other cartel members after that date. Under those circumstances, Total Marketing's failure publicly to distance itself from the infringement was immaterial. AG Wahl therefore concluded that the Commission had failed to establish Total Marketing's continued participation in the infringement after May 12, 2004.

AG Wahl distinguished this period from the period between May 26, 2000 and June 26, 2001. In the latter case, the issue was whether Total Marketing had interrupted—rather than put an end to—its participation in the infringement during the relevant period.

Where an infringement extends over a number of years and consists of acts pursuing a single aim, the fact that it reveals itself at different periods separated by more or less lengthy intervals has no bearing on the existence of the infringement, provided the various anti-competitive acts pursue a single aim and come within the framework of a single and continuous infringement. The Commission need not adduce concrete evidence of the undertaking's participation in the infringement for all specific periods, so long as its findings are supported by consistent and objective indicia.

AG Wahl noted that both the Commission and the General Court had undertaken a detailed examination of the facts relevant to Total Marketing's participation in the infringement between May 26, 2000 and June 26, 2001. In the absence of any distortion of these facts by the General Court, the Court of Justice had no jurisdiction to revisit the General Court's factual assessment.

AG Wahl further argued that Total Marketing's pleas, alleging a violation of the principles of effective judicial protection and equal treatment and of the duty to state reasons, were unfounded or inoperable. AG Wahl therefore advised the Court of Justice to annul the General Court's judgment only insofar as it held that Total Marketing had continued to participate in the infringement after May 12, 2004.

Total's Appeal

In Case C-597/13 P, Total argued that the General Court had erred in failing to reduce Total's fine in the same proportion as the fine against its subsidiary Total Marketing. According to Total, the General Court's failure to align Total's fine modified the joint and several nature of its liability for Total Marketing's actions. The resulting discrepancy in the fines imposed on Total and Total Marketing indeed meant that Total's liability was no longer derived exclusively from that of Total Marketing.

AG Wahl disagreed. AG Wahl explained that, where the parent company's liability derives exclusively from that of its subsidiary, the Commission may not recover from the parent company an amount greater than that for which its subsidiary is liable. It is incumbent upon the Commission to take full account of a judgment reducing the fine against the subsidiary when recovering the fine from the parent company.

AG Wahl also recalled that the EU courts cannot rule *ultra petita* (outside of their authority). If an addressee of a Commission decision brings an action for annulment, the matter to be tried by the EU courts relates only to those aspects of the decision which concern that addressee, not unchallenged aspects of the decision concerning other addressees. Where, however, the liability of the parent company is derived exclusively from that of its subsidiary, and where the parent company and its subsidiary have brought parallel appeals sharing the same object, the EU courts may—but are not required to—reflect the outcome of the action brought by the subsidiary in the amount of the fine against its parent.

AG Wahl concluded that it was not the judgment under appeal which, on its own, modified the joint and several nature of Total's liability. Rather, it was the result of the combined effects of that judgment and the General Court's judgment on Total Marketing's parallel appeal. Moreover, these separate appeals to the General Court did not share

the same object, because both undertakings had questioned the Commission's findings as to the duration of the infringement on slightly different grounds.

Having also advised the Court of Justice to dismiss Total's other ground of appeal alleging a violation of the duty to state reasons, AG Wahl advised the Court of Justice to dismiss Total's appeal in its entirety.

ABUSE/STATE ENTERPRISES

General Court Judgments

EASYJET V. COMMISSION (CASE T-355/13)

On January 21, 2015, the General Court[14] dismissed the appeal brought by easyJet Airline Co. Ltd ("easyJet") against a Commission decision of May 3, 2013, rejecting easyJet's complaint that Luchthaven Schiphol NV ("Schiphol"), the operator of the Amsterdam Schiphol Airport, had abused its dominant position by setting discriminatory and excessive security and passenger service charges.[15] The Commission refused to investigate easyJet's complaint because the same alleged practices had already been investigated under Dutch national law by the predecessor of the Netherlands Authority for Consumers & Markets ("ACM"). easyJet appealed to the General Court.

The General Court dismissed easyJet's claim that Article 13(2) of Regulation 1/2003,[16] which allows the Commission to reject a complaint already "dealt with" by a National Competition Authority ("NCA"), does not entitle the Commission to reject a complaint previously rejected by a NCA on priority grounds (*i.e.*, based on a finding that an investigation would have the same outcome as an earlier investigation of the same alleged practices). It held that the Commission properly may reject a complaint, based on such an earlier NCA decision, provided the NCA has investigated the case. This is supported by a literal interpretation of Article 13(2), the Network Notice,[17] which clarifies that the phrase "dealt with" does not give any indication as to the NCA's finding (and may therefore include rejections on priority grounds), and the European Court of Justice's jurisprudence, which affirms the broad discretion of NCAs to ensure the optimal allocation of cases within the European Competition Network.

The General Court further held that the Commission may reject a complaint based on Article 13(2) only where it has already been reviewed in the light of EU competition law. Regulation 1/2003 does not, however, prohibit a NCA from relying on conclusions it reached under national legislation when investigating a possible breach of EU competition law. In the present case, the Commission found that the ACM had dealt with the applicant's complaint in the light of Article 102 TFEU. Though conducted partially under Dutch air navigation law, the ACM had, in particular, indicated the extent of its review under EU competition law by describing the similarities between the two sets of rules and ascertaining the competitive disadvantage caused by Schiphol's pricing.

Together with the General Court's recent ruling against Si.mobil telekomunikacijske storitve,[18] the present judgment confirms the broad interpretation of Article 13 of Regulation 1/2003. The Commission may reject a complaint either where an NCA is already pursuing a case or where that complaint has previously been rejected by an NCA on priority grounds. Both cases evidence that a complainant cannot rely on Regulation 1/2003 to transfer an investigation across forums.

[14] *easyJet Airline v. Commission* (Case T-335/13) EU:T:2015:36.

[15] *easyJet/Schiphol* (Case COMP/39.869), Commission decision of May 3, 2013.

[16] Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003 ("Regulation 1/2003").

[17] Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43.

[18] *Si.mobil telekomunikacijske storitve d.d. v. Commission* (Case T-201/11) EU:T:2014:1096.

SLOVENSKÁ POŠTA A.S V. COMMISSION (CASE T-556/08)

On March 25, 2015, the General Court[19] dismissed the appeal of Slovenská Pošta a.s. ("Slovenská Posta") against a decision of October 7, 2008, in which the Commission held that amendments to Slovakia's postal law illegally extended Slovenská Posta's monopoly in traditional mail services to the market for the delivery of hybrid mail and limited the availability of related downstream services.[20]

The General Court rejected Slovenská Pošta's claim that the Commission had misapplied Article 106(1), which prohibits Member States from creating a situation in which an undertaking in a state-created monopoly is caused to abuse its dominant position.[21] First, the General Court dismissed Slovenská Pošta's claim that the Commission had incorrectly defined the market. It determined that the Commission was not bound by the general guidance in its Postal Notice[22] when defining the relevant market. To make its claim, Slovenská Pošta thus needed to prove manifest error in the Commission's assessment, which it had failed to do.

The General Court agreed with the Commission that the Postal Law[23] extended Slovenská Pošta's monopoly in traditional mail services to the neighboring market for hybrid mail services.[24] The General Court disagreed with Slovenská Pošta that the market for hybrid mail services was already covered by the previous Postal Law, because the market for hybrid mail had been liberalized and was now served by several providers. Thus, the Postal Law did extend Slovenská Pošta's exclusive rights in traditional mail services to a neighboring competitive market.

The General Court also dismissed Slovenská Pošta's claim that reserving hybrid mail services to Slovenská Pošta had not limited the downstream services available to all users. It concluded that Article 106(1) is breached where an undertaking cannot avoid abusing its dominant position merely by exercising its exclusive right. This includes situations where an undertaking is unable to satisfy the demand for a service covered by a statutory extension of its exclusive rights and the provision of the service by private corporations is rendered impossible by the statute.[25] The General Court agreed with the Commission that there was separate demand for those additional services which Slovenská Pošta would not be able to satisfy. It thus found that the extension of Slovenská Pošta's exclusive rights to hybrid mail services deprived users of access to these additional services.

While the Commission's Postal Notice contains a presumption that exclusive rights are *prima facie* justified, the General Court considered that it is not applicable if the relevant services have been liberalized and the functioning of the universal service, which the exclusive rights aim to protect, is not endangered. The General Court found that the burden of proof under Article 106(2) remained with Slovenská Pošta, and that the methodology used by Slovenská Pošta failed to provide a reasonable and reliable estimate of the cost of Slovenská Pošta providing the universal service.[26]

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[19] *Slovenská pošta a.s v. European Commission* (Case T‑556/08) EU:T:2015:189.

[20] *Slovakian Postal Law* (Case COMP/39.562), Commission decision of October 7, 2008.

[21] Article 106 of the Treaty on the Functioning of the European Union.

[22] Commission Notice regarding the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C 039.

[23] Act No. 507/2001 Coll. on Postal Services as amended by Act No.15/2004, containing the legislative rules applicable to postal services in Slovakia.

[24] Traditional mail services include the physical clearance, sorting, and distribution of mail items. Hybrid mail services include the electronic transmission, sorting, and routing of mail items, and their subsequent physical production and delivery to the addressee.

[25] *Klaus Höfner and Fritz Elser v. Macrotron GmbH* (Case C-41/90) EU:C:1991:161.

[26] The General Court identified four shortcomings: (1) in calculating the net cost of the universal service, Slovenská Pošta failed to consider the intangible benefits stemming from the universal service obligation; (2) in calculating net avoidable costs, Slovenská Pošta took in into account post offices that did not constitute a cost burden; (3) in calculating net avoidable costs, Slovenská Pošta also took into account the costs of non-postal services; and (4) in allocating costs and revenues to particular post offices, Slovenská Pošta's method lead to certain post offices being considered loss making, without consideration of

The General Court dismissed Slovenská Pošta's claim that the Commission had infringed the principle of legal certainty and legitimate expectations by deviating from earlier administrative practices and adopting a different market definition under the Postal Notice. While the Commission risks breaching general principles of law where it publicly adopts rules of conduct and departs from them, the Commission did not depart from the Postal Notice in this instance. Further, because the Commission is not bound by its previous decisions, Slovenská Pošta could not form legitimate expectations on this basis.

The judgment confirms that State measures re-monopolizing a market in favor of an incumbent firm benefiting from exclusive rights in a neighboring market, particularly where the incumbent is unable to meet demand when other firms could, will run afoul of Article 106(1) TFEU. It also confirms that statutorily granted exclusive rights will not benefit from the presumption of legitimacy under the Postal Notice if they concern a market that has previously been liberalized. Rather, the State must demonstrate that the restriction of competition resulting from monopolization measures is necessary to finance the universal service.

MERGERS AND ACQUISITIONS

Commission Decisions

Second-phase Decisions Without Undertakings

AEGEAN/OLYMPIC II **(CASE COMP/M.6796)**

On October 9, 2013, the Commission unconditionally approved the acquisition of sole control over Olympic Air S.A. ("Olympic") by Aegean Airlines S.A. ("Aegean") following a Phase II investigation. Having prohibited in January 2011 the first attempt of the two Greek airlines to combine their operations,[27] this time the Commission authorized the transaction because the conditions for applying the "failing firm" defense were met.

Aegean and Olympic are Greek airlines providing passenger and cargo air transport services. Olympic became fully-owned by Marfin Investment Group ("Marfin") through a privatization in October 2009.

The competitive concerns were similar to the ones expressed in the 2011 prohibition decision, *i.e.*, the creation of a monopoly position on several domestic routes from Athens. The Commission examined the markets for passenger air transport services on public service obligation ("PSO") and non-PSO routes. With respect to PSO routes, which are awarded pursuant to a tender procedure, the Commission found that the parties are not close competitors. With respect to non-PSO routes, the Commission assessed a variety of factors, including the closeness of competition, the level of competitive constraint exerted by direct international flights, and the likelihood of timely and sufficient entry. It concluded that the transaction raised competitive concerns on five domestic routes from Athens because it led to very high combined market shares and eliminated an important competitor.

Nevertheless, the Commission unconditionally approved the acquisition because it determined that, even in the absence of the transaction, Olympic would have exited the market and Aegean would have captured its share. To reach this conclusion, the Commission assessed the three "failing firm" defense criteria:

- First, the Commission concluded that, in contrast with its situation in 2010-11, Olympic had become a failing firm and would have simply terminated operations if not taken over. Olympic had never been profitable since its privatization in 2009, was highly unlikely to become profitable in the future, and would have been forced to exit the market because its parent company—Marfin—had limited ability and no financial incentive to continue funding operations if the transaction were to be prohibited. Accordingly, the Commission determined

alternative commercial reasons which may have justified maintaining these offices.

[27] *Olympic/Aegean Airlines* (Case COMP/M.5830), Commission decision of January 26, 2011.

that, absent the transaction, Olympic would have exited the market in the short term.

- Second, the Commission determined that Aegean was the only credible potential acquirer for Olympic. One U.S. company, Chrysler Aviation, showed potential interest in acquiring Olympic during the investigation. However, the Commission was not convinced of the seriousness of Chrysler Aviation's intentions and concluded that it was not a credible alternative purchaser. Accordingly, there was no less anticompetitive alternative to the notified concentration.
- Third, the Commission found that there was no credible interest from third parties to acquire Olympic's assets. Hence, in the absence of the transaction, Aegean would have become the only service provider and would have captured Olympic's market share on a number of overlap routes.

Historically, the Commission has interpreted these three conditions strictly, accepting "failing firm" considerations only exceptionally.[28] *Aegean/Olympic II* demonstrates the Commission's readiness to approve an otherwise problematic transaction if the "failing firm" defense criteria are fulfilled, *i.e.*: (i) but for the transaction, the allegedly failing firm would, in the near future, have been forced out of business because of financial difficulties; (ii) there is no less anti-competitive alternative purchaser than the proposed acquirer; and (iii) the effect on competition is no worse if the transaction is approved because, in the absence of the transaction, the assets of the failing firm would have inevitably exited the market.

TELEFONICA DEUTSCHLAND/E-PLUS (CASE COMP/M.7018)

On July 2, 2014, following a Phase II investigation, the Commission conditionally approved the acquisition by Telefónica Deutschland Holding AG ("Telefónica") of sole control of E-Plus Mobilfunk GmbH & Co. KG ("E-Plus") from Koninklijke KPN N.V. Telefónica and E-Plus are providers of wireless telecommunication services, such as voice, SMS, MMS, and mobile data services, in Germany.[29] Telefónica and E-Plus also provide other services, including wholesale network access to third parties such as Freenet AG.

The proposed transaction gave rise to horizontally and vertically affected markets in Germany in: (i) retail mobile telecommunications; and (ii) the wholesale market for access and call origination on public mobile telephone networks. In both markets, the Commission's concerns stemmed from the fact that the transaction would have reduced the number of competitors from four to three and increased concentration levels in already concentrated markets.

Retail mobile telecommunications market. In line with its previous practice, the Commission neither segmented this market by the type of payment modality (post-paid or pre-paid) or customer (business or private), nor defined separate markets for data-only services or the voice segment. In this market—characterized by high barriers to entry and a lack of countervailing buyer power—the transaction combined the third and fourth largest mobile network operators ("MNOs"), which were close competitors for low-value and prepaid customers. The remaining entities—namely, the merged entity, Deutsche Telekom, and Vodafone—would all be large MNOs of a similar size. Additionally, E-Plus, the most aggressive competitor in terms of price and launching innovative offers, would be eliminated. Thus, the Commission was concerned that the removal of E-Plus would diminish the incentives of the remaining MNOs, as well as the mobile virtual network operators ("MVNOs") and service providers present on the market, to compete aggressively. Further, the Commission's quantitative assessment indicated that the elimination of horizontal competition resulting from the

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[28] Rare examples where the Commission approved a transaction based on the "failing firm" defense include *Kali+Salz/MdK/Treuhand* (Case IV/M.308), Commission decision of December 14, 1993 and *BASF/Eurodiol/Pantochim* (Case COMP/M.2314), Commission decision of July 11, 2001.

[29] Telefónica provides these services primarily under its core brand "O2", whereas E-Plus's core brands are "E-Plus" and "BASE".

transaction would likely lead to significant price increases in certain segments of the market.

Wholesale market for access and call origination on public mobile networks. The Commission found that, despite the relatively low combined market shares (10-20%) and E-Plus's low market share (below 5%), the transaction would have eliminated E-Plus as an important competitive constraint on Telefonica, because pre-transaction E-Plus had been a pioneer with a strategy to achieve broader 4G population coverage. The Commission also noted that the merged entity would not have had sufficient incentives to grant access to its mobile network at commercially attractive conditions, coupled with difficulties of MVNOs and service providers in switching their existing wholesale customers to another MNO.

The Commission did not accept the parties' efficiency claims, finding in particular that the alleged improvements in quality would be limited and not merger specific.

To address the Commission's concerns, Telefónica agreed to the MNO commitment, the Mobile Bitstream Acess ("MBA") commitment, and the non-MNO commitment. The MNO commitments included divestiture to a new MNO of certain Telefónica assets and services necessary to start operating on the German market, such as spectrum, national roaming, and shops. The second group of commitments required Telefónica to sell up to 30% of the merged entity's capacity—corresponding to a market share of 11%, compared to Telefónica's current 15% share—to three MVNOs in Germany. Finally, Telefónica committed to extend existing wholesale agreements with its and E-Plus's current wholesale customers, and grant all MVNOs and service providers wholesale access to its 4G network.

In addition, as a part of the non-MNO commitments, Telefónica also committed to make contractual amendments in order to make it easier for its wholesale partners to switch their customers that are hosted on the parties' networks to different business models (*e.g.*, from a service provider model to an MVNO model). As a result of these amendments, the wholesale partners will be able to make this switch without any penalty.

HUNTSMAN CORPORATION/EQUITY INTERESTS HELD BY ROCKWOOD HOLDINGS **(CASE COMP/M.7061)**

On September 10, 2014, following a Phase II investigation, the Commission conditionally approved the acquisition by Huntsman Corporation ("Huntsman") of a number of equity interests held by Rockwood Holdings ("Rockwood"). Huntsman and Rockwood are U.S. companies, active globally in specialty chemicals and advanced materials for industrial and commercial purposes.

Huntsman sought to acquire Rockwood's three main businesses: (i) titanium dioxide pigments ("TiO_2")[30] and functional additives businesses operating under the Sachtleben brand; (ii) color pigments businesses, timber treatment and wood protection chemicals businesses in North America, as well as water treatment businesses; and (iii) a specialist provider of automotive spare parts.

The Commission found that the acquisition as notified would have enabled the combined company to raise prices in the market for TiO_2 for printing ink applications. Based on a detailed price correlation analysis performed by the Commission, the Commission distinguished TiO_2 markets on the basis of manufacturing process (sulphate-based or chloride-based) and final application (coatings, plastics or specialty applications including ink), and defined a separate market for TiO_2 for printing ink applications. The transaction combined two leading suppliers and close competitors—Huntsman and Sachtleben—each with an approximately 30-40% share. The Commission was concerned that other TiO_2 producers, such as DuPont, Tronox, Kronos, and Eastern European and Asian producers would not be able to effectively constrain the merged entity, which benefitted from several technical and commercial advantages. In particular, 30-40% of the demand came from small and unsophisticated customers, most TiO_2 competitors were either unable to produce

[30] TiO_2 is an inorganic chemical used to add opacity, brighten and whiten various industry and consumer good products, such as PVC window frames, automotive coatings, toothpaste, or cookies.

grades for printing ink applications of sufficient quality, or did not have the incentive to do so due to their size and entry costs, and know-how and capital expenditure requirements created substantial entry barriers. The Commission concluded that the transaction would have created a dominant position in the market for TiO_2 for printing ink applications, and customers would not be able to switch easily to alternative suppliers.

To address the Commission's concerns, Huntsman proposed to divest to an up-front buyer its main TiO_2 business used for printing ink applications, including the TR52 brand, technology, know-how, and certain key personnel. Although the remedy removed the overlaps between the parties' activities in the market for TiO_2 in the EEA, the Commission required a global divestiture to ensure the divested business's competitiveness and viability.

First-phase Decisions With Undertakings

HOLCIM/LAFARGE **(CASE COMP/M.7252)**

On December 15, 2014, the Commission cleared, subject to commitments, the acquisition of the French company Lafarge S.A. ("Lafarge") by the Swiss company Holcim Ltd. ("Holcim"). The concentration between Lafarge and Holcim, which involved merger control filings in 20 jurisdictions, brought together the world's largest manufacturers of construction materials, including cement, ready-mix concrete ("RMX"),[31] and aggregates.[32]

The Commission examined the competitive effects of the transaction in these three markets and in related products, including asphalt, cement additives, clinker, white cement, and alternative fuels. In light of the Commission's precedent and the relatively limited delivery distances, the Commission's substantive assessment focused on the merger's impact on customers in local catchment areas around each party's manufacturing facilities.

The Commission's analysis focused on horizontal unilateral effects. Any potential concerns regarding coordinated effects were eliminated by the approved remedies, which removed all overlaps between the parties' activities in all relevant EEA markets and maintained the same structure and the same number of competitors, and therefore did not change the likelihood of coordination.

As regards grey cement, the Commission found that the transaction would give rise to serious competition concerns in certain catchment areas around the parties' manufacturing facilities in Austria, Czech Republic, France, Germany, Hungary, Romania, Slovakia, and the U.K., where the parties' combined shares ranged between 30% and 70%, and in the French overseas territory of Réunion, where the combined shares reached 90% to 100%. In RMX and aggregates, the Commission identified competition concerns in several catchment areas around the parties' facilities in France, Romania, and the U.K., where the parties' combined shares ranged from 50% to above 90%. The Commission concluded that the combined entity would not face sufficient competitive constraints because of its high market shares and the small number of alternative cement suppliers. In addition, imports could not exert significant competitive pressure, *inter alia*, due to logistical barriers, custom formalities, differences in currency exchange rates, and specific quality requirements (*e.g.*, French customers attach particular importance to the voluntary quality marking developed by the French authorities).

To address the identified concerns, Lafarge and Holcim offered, together with the merger notification, a divestment package that eliminated competitive concerns in all overlapping catchment areas across the EEA. The Commission approved the parties' commitment to divest to an upfront buyer integrated cement plants, cement grinding stations and terminals, RMX plants, aggregates quarries, and the related assets. The divestment included Holcim's entire business in the Czech Republic and Slovakia;

[31] RMX is a blend of aggregates, grey cement, water, and additives in a freshly mixed and un-hardened state that hardens into a durable construction material.

[32] Aggregates include gravel, crushed rock, and sand, which are the three primary raw materials used in construction and civil engineering.

Lafarge's entire business in Germany, Romania, and the U.K. (except its Cauldon cement plant in Staffordshire);[33] Holcim's main activities in cement, RMX, and aggregates in France; Holcim's overall operating assets in Hungary; Holcim's Gador plant and Yeles grinding station in Spain; and Lafarge's entire business (except its shareholding in the Ciments de Bourbon grinding station) in Réunion.

The commitments provided for the possibility of transferring the divestment business to a suitable purchaser either through a simple sale transaction or, via a hybrid transaction, consisting of the sale of a significant shareholding in the divestment businesses to one anchor investor, followed by the sale of the remaining shares in an initial public offering or spin-off. The spin-off option would involve a distribution of divestment business shares to the merging parties' shareholders *pro rata* to their interest in the merging parties' share capital, combined with a listing of the divestment business' shares on one or more stock exchanges. This sophisticated structure allowed for enhanced flexibility and minimized the risk that certain parts of the divestment package would not find an appropriate buyer. After a competitive divestiture process, the parties finally divested the European package of assets to the Irish group CRH, and this new transaction was cleared by the Commission on April 24, 2015.

The transaction is notable for the size of the remedies package and the fact that it was submitted together with the notification, enabling the Commission to clear the transaction in Phase I.

NOVARTIS/GLAXOSMITHKLINE ONCOLOGY BUSINESS (CASE COMP/M.7275)

On January 28, 2015, the Commission approved, subject to commitments, the acquisition by Novartis AG ("Novartis") of GlaxoSmithKline plc's oncology business (the "GSK Oncology Business").

Novartis, a Swiss healthcare company, is active in the development, manufacture, and distribution of pharmaceutical, eye care, generics, consumer health, and vaccines products. GSK is a healthcare company headquartered in the U.K. active in the pharmaceuticals, vaccines, and consumer healthcare sectors. The GSK Oncology Business acquired by Novartis includes ten marketed and two pipeline pharmaceuticals for the treatment of advanced cancers, as well as the transfer of related rights, licenses, marketing authorizations, employees, and R&D. The acquisition was part of a three-part inter-conditional transaction between Novartis and GSK, which also included the acquisition by GSK of Novartis's global human vaccines business (except for the influenza vaccines business) and a new GSK-controlled venture combining GSK's and Novartis's global consumer health businesses (which were notified separately and approved on the same date as the present transaction by a separate Commission decision in Case M.7276, published in the second quarter of 2015).[34]

The portfolio of oncology pharmaceuticals acquired by Novartis includes: (i) the so-called targeted therapies, which aim to block the growth and spread of cancer by interfering with specific molecules that are involved in tumor growth and progression; and (ii) mature oncology products used in chemotherapy treatment of cancer.

The Commission's concerns with the transaction as originally notified related to a class of targeted therapies called B-Raf and MEK inhibitors that inhibit the over-expression of the B-Raf and MEK proteins. Since the parties' respective B-Raf and MEK inhibitors (the GSK Oncology Business's Tafinlar and Mekinist and Novartis's LGX818 and MEK162) are currently being researched and developed for the treatment of a number of cancer types (*e.g.*, advanced melanoma, ovarian cancer), the Commission assessed potential competition concerns with respect to each type of cancer and within a geographic market that is at least EEA-wide. The Commission found

[33] The divestment in the U.K. was intended to allow for the entry of a fifth independent domestic producer of cement in the U.K., as required by the UK competition authority in January 2014, to resolve coordinated effects concerns in the UK cement market (see the Final Report of the Competition and Markets Authority on aggregates, cement and ready-mix concrete market investigation, dated January 14, 2014).

[34] To be covered in the second quarterly report.

that the transaction as originally notified would have given rise to competition concerns due to potential overlaps between the parties' B-Raf and MEK inhibitors for: (i) the treatment of advanced melanoma; (ii) the treatment of ovarian cancer; and (iii) the broader clinical research programs regarding the treatment of a number of other cancers. The Commission's decision is notable for its strong focus on pipeline-to-pipeline overlaps and the potential loss of innovation competition. In previous merger cases regarding oncology pharmaceuticals, the Commission typically scrutinized pipeline products only if they were at an advanced stage of development (generally, Phase III clinical trials) and overlapped with marketed products or with other pipeline products about to enter the market.

- **Treatment of advanced melanoma**. The Commission found that competition concerns arose with respect to the treatment of advanced melanoma from the overlaps between Novartis's B-Raf and MEK inhibitors, which were undergoing Phase III clinical trials as single agents and combination treatment, and the GSK Oncology Business's B-Raf and MEK inhibitors, which were approved as single agents and were in Phase III clinical trials as combination treatment (market-to-pipeline and pipeline-to-pipeline overlap). The market investigation indicated that, in the near future, B-Raf and MEK inhibitors, used in combination, would become the new standard of care in the treatment of advanced melanoma. Because only three companies are marketing or conducting Phase III clinical trials on B-Raf and MEK inhibitors for the treatment of advanced melanoma, the transaction would have reduced the number of competitors from three to only two. The Commission also found that the transaction would likely have led to the abandonment of plans to launch Novartis's B-Raf and MEK inhibitors.

- **Treatment of ovarian cancer**. According to the Commission, the transaction would have created a potential overlap in the market for targeted therapies in the treatment of low-grade serous carcinoma ("LGSC"), which is a rare type of ovarian cancer, for which the parties' respective MEK inhibitors are in Phase III clinical trials (pipeline-to-pipeline overlap). Because post-transaction, the combined company would face only one competitor, AstraZeneca with a MEK inhibitor in Phase II clinical trials, the transaction would have reduced the available treatments for LGSC from three to two.

- **Broader clinical research programs**. The parties were conducting various early-stage (largely Phase I and II) clinical trials investigating the potential use of their respective B-Raf and MEK inhibitors in a number of additional cancers, and Roche was the only other company with a pair of MEK and B-Raf inhibitors. Thus, the Commission found that the transaction would have resulted in a loss of innovation competition.

The Commission also found overlaps between the parties' mature oncology products used in chemotherapy treatment, in particular as regards the topotecan, nelarabine, and ondansetron molecules, but ruled out competition concerns in these areas. Although the parties' combined shares exceeded 50% in some segments, any potential concerns were alleviated by the mature nature of the markets, a small increment, historical share decreases, significant competitive constraint being exerted by alternative suppliers, or the parties not being one another's closest competitors.

To address the identified competition concerns as regards the parties' B-Raf and MEK inhibitors, the Commission accepted Novartis's commitment to: (i) transfer the rights to its MEK inhibitor back to its owner and licensor Array BioPharma Inc. ("Array"); and (ii) divest its B-Raf inhibitor to Array, provided that Array enters into a partnership agreement with a suitable healthcare company to develop the products globally and commercialize them in the EEA.

MEDTRONIC/COVIDIEN (CASE COMP/M.7326)

On November 28, 2014, the Commission approved the acquisition of sole control of Covidien plc. ("Covidien") by Medtronic, Inc. ("Medtronic"), subject to the divestiture of a

Covidien's pipeline product that would have competed with an existing Medtronic device. Medtronic, headquartered in Minnesota, U.S., is a world leader in the development of medical technology and the provision of products and services treating a variety of conditions, including cardiac and vascular diseases, diabetes, and neurological and musculoskeletal conditions. Covidien, headquartered in Ireland, develops, manufactures, and sells a diverse range of medical devices.

The parties' activities are largely complementary: Medtronic is primarily active in the treatment of heart diseases, spine, implants, neurology, and diabetes; Covidien is not active in these areas.

The overlaps were limited to two broad areas – peripheral vascular devices, used in the treatment of diseases caused by cholesterol-containing fat or blood clots accumulated in the vessels; and electrosurgical devices, used to perform surgery and control bleeding with the use of an electric current

Despite the existence of eight markets with combined market shares above 50% and share increment above 10% in peripheral vascular devices, the Commission's competitive assessment did not identify any competition concerns other than in drug coated balloons ("DCBs"). This was due to a variety of factors, including (i) little product differentiation, (ii) the presence of strong competitors post-merger, such as Abbott and Johnson & Johnson, (iii) low substitutability between the parties' products, (iv) strong countervailing buyer power of hospitals, and (v) low barriers to expansion and entry, with regulatory approvals essentially being limited to obtaining an EU-wide CE mark.

In the market for DCBs, Medtronic was the leader and Covidien had a product in development – Stellarex. In the absence of the necessary regulatory approvals, Covidien's pipeline product was neither an actual nor a potential competitor. Nevertheless, the Commission considered that, in light of the promising clinical trials results, Stellarex would have started to exert significant competitive pressure on Medtronic in the near future. The Commission concluded that Stellarex was likely to become a closer competitor to Medtronic than all other existing competitors' products. According to Medtronic's internal planning documents, the combined company would have ceased the development of Stellarex..

In addition, following a complaint from a market participant, the Commission analyzed conglomerate theories of harm in the advanced energy devices segment.. The key theory of harm was that the new entity could engage in: (i) commercial bundling, *i.e.*, selling Covidien's product LigaSure, which, according to the complainant was a "must-have" product, together with other advanced energy products from Medtronic's portfolio for a lower price than if bought separately and/or (ii) technical bundling, *i.e.*, ensuring that LigaSure's electrosurgical generator is only functional with products of the new entity, thereby leveraging its strong position in the LigaSure market to increase sales of other Medtronic products. The Commission rejected both claims. A commercial bundling strategy would fail because LigaSure and Medtronic's advanced energy products are not purchased by the same customers, not used for the same treatment procedures, and not sold via the same procurement cycles. A technical bundling strategy was unlikely because the products could not be made interoperable quickly or cheaply.

To address the Commission's concerns, Medtronic proposed the same remedy it offered to the U.S. antitrust regulators - the divestment of Covidien's entire worldwide DCB business, including all IP rights, manufacturing equipment, staff and regulatory material necessary for the pipeline product. The Commission deemed the commitments suitable and sufficient to enable a new player to further develop and bring Stellarex to the market. The proposed buyer, Spectranetics, was approved as suitable and Covidien closed the Stellarex sale on January 27, 2015.

***IMS HEALTH/CEGEDIM BUSINESS* (CASE COMP/M.7337)**

On December 19, 2014, the Commission authorised IMS Health, Inc.'s ("IMS Health") acquisition of the major part of Cegedim S.A.'s Customer Relationship Management and Strategic Data businesses (the "Cegedim Business"). IMS Health is an information and technology services company that provides companies active in the healthcare sector with solutions to measure and improve their performance. The Cegedim Business consists of three principal areas of activity: client relationship management ("CRM") solutions, healthcare professionals databases, and certain other information services.

The Commission identified overlaps in the markets for: (i) CRM software, which helps pharmaceutical companies manage customer relationship by organizing, automating, synchronising, and displaying in a user-friendly format data concerning customers, sales, marketing, customer service, and technical functions; (ii) business intelligence solutions, including master data management ("MDM") software; (iii) primary market research ("PMR") services, which involve canvassing views of healthcare professionals on promotional and non-promotional activities of pharmaceutical companies using questionnaires and compiling the responses in reports; (iv) real-world evidence ("RWE") services, which consist of the provision of information, technology, and services that help pharmaceutical companies analyze different aspects of their business based on actual patient experiences; and (v) consulting services for healthcare companies.

The Commission's investigation focused on a possible-sub market for syndicated PMR services. The Commission observed that the parties had high combined market shares in France (40-50%), Italy (40-50%), and Spain (60-70%), and faced only a limited number of competitors in these countries. The Commission noted that the parties were the main established providers of PMR databases and the only credible suppliers of PMR data at the headquarter level of pharmaceutical companies for at least several Member States or the EEA as a whole.

The Commission also analyzed vertical concerns. Specifically, it assessed the parties' ability and incentive to limit third party access to: (i) the parties' PMR data, which is used for the provision of PMR services; (ii) the parties' RWE data, which is used for the provision of RWE services; (iii) the Cegedim Business's healthcare professional databases, which is an input for CRM and MDM software; and (iv) IMS Health's brick structure, which is used for interpreting the data in healthcare professional databases, and for operations of CRM and MDM software. The Commission determined that after the transaction, the combined IMS Health would have the ability and incentive to foreclose access to its brick structure, to the detriment of healthcare professional databases in competition with the Cegedim Business's database *OneKey*, and competitors offering CRM and MDM.

The Commission conditionally cleared the transaction subject to the divestiture of IMS Health's syndicated promotional audit business in the EEA and Switzerland, and IMS Health's commitment to enter into third party access agreements concerning its brick structure and future updates or substitutes for the brick structure upon customer request, for a period of ten years. The Commission was concerned that there might be limited interest from suitable purchasers and therefore required an upfront buyer (*i.e.*, mandating that the parties identify a suitable divestiture purchaser before closing the main transaction).

***AIRBUS/SAFRAN/JV* (CASE COMP/M.7353)**

On November 26, 2014, the Commission conditionally approved the establishment of a joint venture between two airspace companies: Airbus Group N.V. ("Airbus") and the French company Safran S.A. ("Safran"). The joint venture, owned equally by each party, combined: (i) Airbus's activities as a prime contractor for the development and manufacturing of European civil space launchers, as well as a supplier of related subsystems and equipment; (ii) Safran's activities as a supplier of civil space launcher propulsion systems and related subsystems and equipment; (iii) Airbus's and Safran's activities in satellite

propulsion (electric and chemical) and other satellite subsystems; (iv) Safran's tactical propulsion activities; (v) Airbus's and Safran's activities related to strategic missiles; and (vi) Airbus's and Safran's shares in Arianespace, a European space launcher provider, of respectively 28.5% and 10.6%. Airbus retained its business as a prime satellite contractor, which was downstream of the parties' contributed activities in supplying satellite subsystems and equipment.[35]

The Commission focused its assessment on vertical relationships in the areas of space launchers, satellites, and space transportation.

Space launchers and space launcher subsystems and equipment. The Commission concluded that the transaction created vertical relationships between the joint venture's activities as a prime contractor for the development of civil space launchers (contributed by Airbus) and Safran's contributed upstream business in integrating propulsion systems. There were also vertical relationships at the level of smaller subsystems and equipment where the joint venture combined the parties' system integration capabilities and the supply of specific subsystems or equipment. Despite the parties' high combined shares in most of these segments, the Commission excluded concerns that the joint venture foreclose its suppliers by preferring in-house production. According to the Commission, the transaction would improve the effectiveness and integration of the launchers production process and ESA could prevent foreclosure strategies by exercising control over the supplier selection process and by implementing its best practices and the *juste retour* principle.[36]

Satellites and satellite/space transportation subsystems and equipment. The Commission focused on a few small subsegments of the satellite subsystems and equipment business of the joint venture.

Despite the parties' low combined shares in the supply of electric propulsion for satellites, the Commission determined that Airbus, which retained its business as a prime contractor for satellites, would have had the ability and incentive to limit the joint venture's supply of Hall-effect electric satellite propulsion (contributed by Safran) to Airbus' competitors in the downstream market for satellite prime contracting (input foreclosure). The Commission found that Hall-effect propulsion, which is still a new technology, could become essential to satellite prime contractors and that Safran's contributed business did not face strong competition in Europe because no other regional firm offered a comparable substitute yet. Additionally, the Commission found that there were high switching costs and entry barriers in the market for Hall-effect propulsion. Conversely, due to Airbus's significant presence in the prime contracting of satellites (a share of approximately 40-50%) and the difficulties of propulsion suppliers to sell thrusters to U.S. satellite prime contractors, the Commission was concerned that Airbus might have had the ability and incentive to disadvantage and limit its purchases from the joint venture's rivals in the upstream market for Hall-effect satellite propulsion (customer foreclosure).

The Commission identified other potential input foreclosure concerns arising from Airbus's ability and incentive to limit the joint venture's supply of (i) cylinder-shaped carbon-carbon materials,[37] (ii) standard accuracy pressure transducers sensors ("SAPT"),[38] and (iii) thermostructural composite heat shields (in particular silicon carbide heat, all contributed by Safran, to Airbus's rivals in satellite/space

[35] Subsystems and equipment for launchers and satellites are normally developed and manufactured by several subcontractors (in an upstream market) and supplied in a downstream market to a so-called prime contractor, a company responsible for building a launcher or satellite. A prime contractor is selected by the system operator, *e.g.*, the European Space Agency.

[36] A rule that the share of business awarded to a Member State's manufacturers shall correspond to its financial contribution to a given project.

[37] Safran manufactures carbon-carbon cylinders, which are thermostructural composite materials made of carbon fibre and plastic, used in optical earth observation satellites to mount space telescopes.

[38] SAPTs are pressure sensors equipped with a temperature bulb in order to gauge pressure of fluids in tanks (high pressure) and in other parts of the satellite propulsion subsystems before injection (low pressure).

transportation prime contracting. The Commission concluded that Safran had either a monopoly or strong market positions in the supply of these components in Europe, and that the ESA's presence would not be sufficient to prevent potential foreclosure attempts. Finally, the Commission also concluded that the joint venture might provide Airbus with confidential information regarding satellite components, especially in relation to technologies developed by Safran's contributed business in the new European Neosat platform (jointly developed by Airbus and Thales Alenia Space), which could be used by Airbus strategically against its competitors in satellite prime contracting activities. Similarly, the Commission noted the concerns raised by the joint venture's competitors in electric satellite propulsion subsystems about the transfer of their information from Airbus (their customer) to the joint venture (their competitor).

To address these vertical concerns and secure a Phase I authorization, the parties offered, for 10 years, not to contribute to the joint venture Safran's electric satellite propulsion business and not to enable the joint venture to influence, or obtain any confidential information about that business. Additionally, the parties committed to conclude a framework supply agreement with Safran's main customer, ensuring the non-discriminatory supply of: (i) cylinder-shaped carbon-carbon materials; (ii) SAPT; and (iii) thermal protection systems made of silicon carbide for civil re-entry bodies. This agreement was to be used as a benchmark for the joint venture's obligation to supply these products to any other satellite or prime contractor under transparent and objective terms. Additionally, the parties agreed that the ESA would monitor the enforcement of this supply assurance commitment and arbitrate any potential disputes.

STATE AID

ECJ Judgments

OTP BANK NYRT V MAGYAR ÁLLAM, MAGYAR ÁLLAMKINCSTÁR (C-672/13)

On March 19, 2015, the Court of Justice issued a preliminary ruling on a Hungarian court's question whether a state guarantee based on a 2001 decree concerning aid intended to facilitate access to housing (the "2001 Decree"),[39] which pre-dated the accession of Hungary to the EU, was new state aid that should have been notified under Article 108(3) of the TFEU.

Under the 2001 Decree, the Hungarian state would guarantee loans given by credit institutions to eligible builders. The guarantee requires the Hungarian State to (i) reimburse the credit institutions 80% of the amount of any loans that become irrecoverable, as well as to (ii) guarantee the repayment of any advances that become irrecoverable. In September 2008, OTP Bank Nyrt ("OTP") obtained such guarantee. Following the Hungarian government's refusals to reimburse OTP for irrecoverable loans, OTP brought an action before the Hungarian courts requesting repayment under the state guarantee. Seeking to have OTP's action set aside, the Hungarian government argued that the state guarantee constituted incompatible state aid. The Hungarian courts requested a preliminary ruling from the Court of Justice.

The Court of Justice first examined the three conditions set out in Article 107(1) of the TFEU to determine whether the state guarantee constituted a state aid. The Court of Justice concluded that the state guarantee: (i) constituted aid granted by the State or through state resources, in particular, because it had been given on the basis of the 2001 Decree; (ii) was liable to affect trade between Member States and to distort competition because it had strengthened the position of the credit institutions, making it more difficult for operators established in other Member

[39] Government Decree No 12/2001 of January 31, 2001, concerning aid intended to facilitate access to housing (*Magyar Kőzlőny* 2001/11).

States to penetrate the Hungarian market; and (iii) appeared to be selective because it exclusively benefitted credit institutions.[40] Thus, the state guarantee constituted *prima facie* state aid within the meaning of Article 107(1) of the TFEU.

The Court of Justice then analyzed whether the state guarantee constituted new or existing state aid. (Only new state aid requires the Commission's approval under Article 108(3) of the TFEU.) The Court of Justice recalled that any aid scheme or individual aid measure put into effect prior to, but still applicable after, the entry into force of the TFEU in a given Member State must be considered existing state aid.[41] This is however subject to the requirements set out in the Act of Accession of Hungary to the EU.[42] The Court of Justice concluded that the state guarantee did not meet the conditions for existing aid set out in the Act and, accordingly, that it constituted new state requiring the Commission's approval.[43] The Court of Justice further stated that it was for the referring court to verify whether Hungary had notified the aid and, if not, to declare the aid unlawful. The Court of Justice established that, if the aid were declared unlawful, the referring court would, in principle, be bound to order the recovery of the non-notified aid.

40 However, the Court of Justice left for the referring court to confirm the selective nature of the state guarantee by determining whether economic operators other than credit institutions could also benefit from such guarantee, as argued during the oral hearing.

41 Article 1 b) (i) of Council Regulation No 659/1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ 1999 L83/1.

42 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ 2003 L236/33.

43 Pursuant to the Act of Accession, a measure may only be deemed existing aid if it (i) was put into effect before December 10, 1994, (ii) was listed in the Act of Accession, and (iii) was notified and analyzed by the Commission under the pre-accession transitional measures. However, the Decree of 2001, on the basis of which the state guarantee was granted, entered into force after December 10, 1994, was not mentioned in the list of aid set out in the appendix to Annex IV to the Act of Accession and was not notified to the Commission under the transitional measures.

General Court Judgments

RYANAIR V. COMMISSION (CASE T-500/12) AND *AER LINGUS V. COMMISSION* (CASE T-473/12)

On February 5, 2015, with two separate judgments,[44] the General Court partially annulled a Commission decision[45] on the recovery of state aid resulting from differentiated air travel tax rates implemented by Ireland. The General Court upheld the finding of unlawful aid, but concluded that the Commission erred in quantifying the recovery amount because it had presumed – and not assessed – the actual advantage retained by the beneficiary airlines.

Starting on March 30, 2009, Ireland imposed an excise duty, known as the air travel tax ("ATT"),[46] for passengers departing from larger Irish airports.[47] Although charged directly to airline operators, the ATT was intended ultimately to be passed on to passengers through the ticket price. The ATT was initially based on the distance between the airports of departure and arrival, levied at a rate of €2 for passengers flying to destinations less than 300 km from Dublin Airport, and €10 in all other cases. Following internal market infringement proceedings, in which the differentiated rates were found to constitute a restriction on the freedom to provide services, contrary to Article 56 TFEU and Regulation 1008/2008,[48] Ireland modified the ATT so that, as of March 1, 2011, a single rate of €3 was applied to all departing passengers, regardless of distance travelled. The contested decision concerned the period during which the differentiated rate applied, that is, from March 30, 2009 to March 1, 2011.

44 *Ryanair v. Commission* (Case T-500/12) EU:T:2015:73; *Aer Lingus v. Commission* (Case T-473/12) EU:T:2015:78.

45 Commission Decision C (2012) 5037 of July 25, 2012 (State Aid SA.29064 (11/C, ex 11/NN)), OJ 2013 L119/30, regarding differentiated air travel tax rates implemented by Ireland.

46 *See* Section 55 of the Finance Act (No. 2) 2008, entry into force March 30, 2009.

47 *I.e.*, From March 30, 2009, airports carrying greater than 10,000 passengers a year, and from June 3, 2009, airports carrying greater than 50,000 passengers a year.

48 Regulation No 1008/2008 on common rules for the operation of air services in the Community, OJ 2008 L293/3.

In the contested decision, the Commission concluded that the lower rate constituted unlawful state aid because it conferred an advantage on carriers serving the routes to which it applied, principally domestic destinations and certain destinations in the western UK. The main beneficiaries were Aer Lingus, Ryanair, and Aer Arann. The Commission determined that the lower rate was an exception to the normal rate of €10 because it applied to only 10–15% of flights subject to the tax. The Commission concluded that the advantage amounted to the difference between the lower (€2) and the normal (€10) ATT rate *i.e.*, €8 per passenger, and ordered recovery from the beneficiary airlines.

Ryanair and Aer Lingus appealed, and also intervened in support of the other airline's appeal. Their principal grounds of appeal related to: (i) the characterization of the €10 rate as the reference rate for the assessment of selective advantage, and (ii) the calculation of the advantage obtained from the lower rate.

The applicants argued that the €10 rate could not be the reference rate because the Commission had found it unlawful, and the Commission's assessment of the reference rate should have taken into account the right to reimbursement of the unlawfully-levied tax. The General Court rejected these arguments, underlining that the €10 rate was not unlawful per se under EU law, but only as applied in conjunction with the lower rate. The General Court found that the Commission was not required to take potential reimbursement into account in its assessment because any hypothetical reimbursement under Article 56 TFEU would not have been automatic and the right to reimbursement under Article 108 TFEU did not arise on the facts.

However, the General Court accepted the applicants' pleas that the Commission had erred in quantifying the advantage granted under the ATT. The General Court recalled that the ATT was formally intended to be passed on to passengers, and that the advantage did not consist in the difference between the lower and higher ATT rates, but on "the possibility of offering more attractive prices to their customers and thereby increasing their turnover."[49] Accordingly, the General Court found that the Commission should have assessed the extent to which the airlines actually retained the economic benefit arising from the application of the €2 rate. The General Court also stated that the Commission could fulfill this obligation by conferring the task of precisely quantifying that advantage to national authorities.

On the grounds that recovery of aid must be limited and proportionate to the financial advantages actually arising from that aid, the General Court annulled the contested decision in so far as it evaluated the aid to be recovered as €8 per passenger.

The Commission has appealed the decisions of the General Court to the Court of Justice.[50] The appeal is pending.

Commission Decisions

ROMANIA – MICULA V. ROMANIA (ICSID ARBITRATION AWARD) (SA.38517 (2014/C))

On March 30, 2015, the Commission ordered Romania to recover incompatible state aid granted in compensation for an abolished investment aid scheme.[51]

In 1998, Romania put in place a state aid scheme aimed at attracting investments in disadvantaged regions. The beneficiaries could avail themselves of tax breaks and exemptions/refunds of custom duties on raw materials for 10 years. Romania abolished the scheme in 2005 to comply with EU state aid rules prior to its EU accession. Subsequently, the claimants—three companies owned by Mr. Ion Micula and Mr. Viorel Micula—launched an arbitration procedure under the auspices of the International Center for Settlement of Investment Disputes, pursuant to the Romania—Sweden Bilateral Investment

[49] *Ryanair v. Commission* (Case T-500/12) EU:T:2015:73.

[50] *Commission v. Ryanair* (Pending Case C-165/15 P), appeal lodged on April 9, 2015; and *Commission v. Aer Lingus* (Pending Case C-164/15 P), appeal lodged on April 9, 2015.

[51] Commission Decision C(2014) 6848 of March 30, 2015 (State Aid SA.38517 (2014/C) (2014/NN)), not yet published.

Treaty ("BIT"), requesting compensation equal to the value of the foregone benefits.

On December 11, 2013, the arbitral tribunal awarded the claimants a compensation of *c.* €82 million, plus interest.[52] The claimants requested the recognition and enforcement of the award in Romania and the United States.[53] On February 20, 2014, the Romanian authorities informed the Commission that they had partially implemented the award by offsetting the awarded damages against taxes owed by one of the claimants. On May 26, 2014, the Commission issued an injunction requiring Romania to suspend the implementation of the award.[54] Subsequently, the Commission initiated a formal investigation with a view to examining the implementation of the award under the EU state aid rules.

The Commission concluded that the implementation of the award would grant the claimants an economic advantage—not available under normal market conditions—corresponding to the amounts foreseen under the abolished scheme between the period of its repeal and scheduled expiry. Thus, the claimants' position would be reinstated as if the scheme had never been abolished.

Finally, the Commission distinguished the case at hand from *Asteris*, where the Court of Justice found that state aid "is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals."[55] By contrast, the damages at hand are awarded on the basis of an intra-EU BIT that the Commission deems incompatible with the Treaty and with the aim of re-instating the aid that Romania had abolished. Accordingly, the principle underlying *Asteris* is not applicable in the present circumstances.[56]

In turn, the (partial) execution of the award amounted to unlawful (not notified)[57] and incompatible (contrary to Article 107(3(a) and 107(3)(c) TFEU)[58] new aid.[59] Correspondingly, the Commission ordered the recovery of the compensation paid to the beneficiaries.

POLICY AND PROCEDURE

General Court Judgments

EVONIK DEGUSSA GMBH V. EUROPEAN COMMISSION (CASE T-341/12) *AND AKZO NOBEL NV AND OTHERS V. EUROPEAN COMMISSION* (CASE T-345/12)

On January 28, 2015, the General Court dismissed the appeals of Azko Nobel NV, Azko Chemicals Holding AB, and Eka Checmicals AB ("Azko") and Evonik Degussa GmBH ("Evonik") against the Commission's rejection of their requests to treat as confidential certain information in the context of the bleaching chemicals cartel decision.

On May 3, 2006, the Commission ruled that a number of companies, including Akzo and Evonik, had participated in a cartel in the bleaching chemicals markets. A

52 ICSID Case No. ARB/05/20, Ioan Micula, Viorel Micula, *SC European Food SA, SC Starmill SRI, SC Multipack SRL v. Romania*, Final Award of December 11, 2013.

53 Romania separately seeks the annulment of the award. All proceedings are pending.

54 On September 2, 2014, the claimants appealed the injunction to the General Court (*see Micula and Others v. Commission* (Case T-646/14). The appeal is pending.

55 *Commission v. Greece* (Case C-369/07) EU:C:2009:428, para. 72.

56 In addition, in *Lucchini*, the Court held that a national court was prevented from applying national law where it would "*frustrate the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law"* (*see Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini* ("Lucchini") (Case C-119/05) EU:C:2007:434, para. 59).

57 The partial implementation of the award was not notified to the Commission and was thus unlawfully put into effect in violation of Article 108(3) TFEU.

58 The Commission may deem compatible with the internal market a state aid to promote the economic development of certain disadvantaged areas within the EU, as set out in the Guidelines on regional State aid. However, the Commission concluded that the present award does not fulfill the conditions.

59 In addition, the Commission concluded that its decision is in line with Article 351 TFEU given that the Romania-Sweden BIT (concluded between two Member States) falls outside of the Article 351 TFEU ambit: "[t]*he rights and obligations arising from agreements concluded* […] *for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*"

non-confidential version of this decision was published in 2007. On November 28, 2011, however, the Commission informed the parties of its intention to publish a more detailed non-confidential version of the decision, in the interest of transparency. This non-confidential version would include certain information provided by the parties in the context of their leniency applications. The parties objected and applied to the Hearing Officer requesting that all the information that they had provided to benefit from the Commission notice on immunity from fines and reduction of fines in cartel cases (the "2002 Leniency Notice")[60] be omitted from the non-confidential version.

On May 24, 2012, the Hearing Officer rejected these requests and authorized the publication of the information at issue. The Hearing Officer emphasized that the scope of his review was limited to assessing only the confidentiality of the decision; he did not have the power to remedy any alleged breach by the Commission of the legitimate expectations of the parties. The Hearing Officer also took the view that: (i) the Commission has broad discretion as to the amount of information published, and references to documents contained in the administrative file do not qualify as business secrets or other confidential information; (ii) the parties had not demonstrated that the disclosure of information submitted under the 2002 Leniency Notice would cause them serious harm; (iii) an undertaking fined by the Commission for a competition law breach may have an interest in the non-disclosure of the details of the conduct in question, but this does not warrant any particular protection; and (iv) they could not claim to have a legitimate interest in being protected against the risk of private damages actions. The parties brought actions challenging the Hearing Officer's stance before the General Court.

The General Court rejected the parties' appeals. In relevant part, the General Court found that information sought to be shielded from disclosure does not fall within the obligation of professional secrecy merely on the basis of voluntary submission under the 2002 Leniency Notice.

Information falls within the obligation of professional secrecy only if: (i) the information is known only to a limited number of persons; (ii) disclosure will seriously harm the person that provided it or third parties; and (iii) the interests to be harmed by disclosure are objectively worthy of protection. The General Court concluded that the conditions were not met, finding, in particular, that it is for the Commission to balance the following competing interests: the public's interest in knowing as fully as possible the reasons for the Commission's action; the interest of promoting legal certainty so that undertakings may know the type of behavior for which the Commission is likely to find an infringement; and the Commission's interest in protecting the effectiveness of the leniency program.

GASCOGNE SACK DEUTSCHLAND AND GASCOGNE V. EUROPEAN UNION (CASE T-577/14)

On February 2, 2015, the General Court rejected, based on Article 114 of the Rules of Procedure of the General Court, the Court of Justice's argument that the action for damages brought by Gascogne Sack Deutschland GmbH and Gascogne (together, "Gascogne") before the General Court arising from unreasonable delay in judicial proceedings was inadmissible.

In 2005, the Commission fined sixteen companies, including Gascogne, €290.71 million for operating a cartel in the plastic industrial bags market.[61] After the General Court dismissed its appeal,[62] Gascogne appealed to the Court of Justice, claiming infringement of its fundamental right to a hearing within a reasonable time under Article 47 of the Charter of Fundamental Rights.[63] The Court of Justice dismissed the appeal, finding that, although the General Court had breached the right of the parties to have

[60] Commission notice on immunity from fines and reduction of fines in cartel cases , OJ 2002 C 45, p. 3.

[61] *Industrial bags* (Case COMP/F/38.354), Commission decision of November 30, 2005.

[62] *Groupe Gascogne SA v. Commission* (Case T‑72/06) T:2011:671.

[63] *Gascogne Sack Deutschland GmbH, Kendrion NV and Groupe Gascogne SA v. Commission* (Cases C-40/12, C-50/12, and C-58/12).

their case heard within a reasonable time, there were no indications that this affected the outcome of the proceedings. Therefore, the failure to deliver the judgment within a reasonable time could not lead to its annulment on appeal. The Court of Justice further held that any claim for compensation for the damage caused by the General Court's delay in delivering the judgment must be brought before the General Court itself, rather than on appeal before the Court of Justice.

Gascogne then brought such an action before the General Court against the EU. The Court of Justice submitted that Gascogne's application was inadmissible under Article 44(1)(b) of the Rules of Procedure of the General Court for lack of designation of the party against whom the application was made. The General Court rejected this argument because under Article 340(2) TFEU, in the case of non-contractual liability, the EU shall make good any damage caused by its institutions. Further, according to settled case law, an action for damages based on Article 340(2) TFEU can be brought against the EU, which has legal personality. Therefore, the application had to be considered admissible because it specified that the action was being brought against the EU.

In addition, the Court of Justice submitted that the application was inadmissible for lack of designation of the institution in charge of representing the EU. The General Court pointed out that, where the liability of the EU is incurred by an act of one of its institutions, it is represented before the General Court by the institution or institutions accused of the act giving rise to liability. According to the General Court, there was no doubt that Gascogne's application was directed against the EU because, read together, Articles 13 and 19 TEU provide that the Court of Justice (comprising the General Court) is an institution of the EU. Further, the General Court held that there is no general principle of representation of the EU by the Commission. Indeed, Article 355 TFEU, which provides that the Union shall be represented by the Commission, applies only in each Member State and not before the European Courts. According to the General Court, this interpretation is further substantiated by Article 17(1) TEU, which provides that, with certain exceptions, the Commission shall ensure the Union's external representation. The General Court therefore rejected the plea of inadmissibility brought by the Court of Justice.

The General Court will next proceed on the merits and examine whether the alleged harm occurred, as well as its causal connection with the excessive length of the legal proceedings. Other actions for damages caused by the General Court's failure to adjudicate within a reasonable time recently have been lodged (*e.g.*, in January 2015 other members of the plastic bag cartels, namely Aspla and Armando Álvarez, lodged such claims).[64]

SEA HANDLING SPA V COMMISSION (CASE T 456/13)

On March 25, 2015, the General Court dismissed an action for annulment brought by SEA Handling SpA ("SEAH") against a Commission decision refusing it access to documents relating to a state aid investigation, which resulted in a Commission decision on December 19, 2012 concerning capital injections made by the publicly owned Milan airport manager, SEA SpA ("SEA").[65]

Following an in-depth investigation into ground handling services at the Milan airports, the Commission found that the capital injections made between 2002 and 2010 by SEA in favor of its ground handling subsidiary SEAH, constituted unlawful state aid that had to be recovered.[66] On February 27, 2013, SEAH requested access to documents relating to the administrative procedure leading to the adoption of this decision. The Commission ignored this first request for access and, having extended the time limit for its answer, rejected SEAH's follow-up application.

On August 21, 2013, SEAH petitioned the General Court to overturn the Commission's refusal to grant access to

64 *ASPLA and Armando Álvarez v Court of Justice of the European Union* (Case T-40/15).

65 *Sea Handling v. European Commission* (Case T-456/13) EU:T:2015:185, not yet published (working document).

66 Commission Decision C (2012) 9448 of December 19, 2012 (SA.21420 ((C14/2010) (ex NN 25/2010)(ex CP 175/2006)).

documents. SEAH claimed, in particular, that the Commission had infringed the procedural rules under Regulation 1049/2001[67] regarding public access to documents held by the EU institutions.

The General Court lamented the delay in the Commission's decision, but ultimately found that it could not be annulled on the ground of procedural irregularity. The Court held that the absence of response to the first request was without legal consequences for SEAH because it could file a confirmatory application under Article 7(4) of Regulation 1049/2001. It further found that the Commission's successive extensions of the time limit to respond to the confirmatory application were not valid,[68] but recalled that Regulation 1049/2001 provides for an implied refusal decision if an institution does not answer within the foreseen time limit.[69] However, this implied refusal decision does not preclude the Commission from issuing a late reasoned decision because the very purpose of this mechanism is to offer the applicant the possibility to obtain such reasoned decision by challenging the implied refusal.

The General Court also confirmed that a refusal of access to documents concerning a procedure for reviewing state aid can be justified by the general presumption that the disclosure of those documents would undermine investigation activities, and that the documents need not be examined individually in this case. It found that the Commission had not erred in law by applying this general presumption. The investigation procedure at hand was closed, but disclosure of the requested documents was still likely to undermine the investigation activities' protection because the Commission could be required to resume its activities as a result of the appeals that were pending against the merits of the decision.[70] The Court further recalled that the presumption does not preclude the interested parties from showing that certain specific documents, or parts of them, are not covered by the presumption, or that there is an overriding public interest justifying the disclosure of a specific document, yet SEAH had failed to do so.

On June 8, 2015, SEAH appealed the judgment of the General Court.[71]

ECJ Advocate General Opinions

DEUTSCHE BAHN AG AND OTHERS V. EUROPEAN COMMISSION (CASE C-583/13-P), OPINION OF ADVOCATE GENERAL WAHL

On February 12, 2015, Advocate General ("AG") Wahl delivered an opinion[72] on Deutsche Bahn AG's ("DB") appeal against a judgment of the General Court[73] on balancing the need for effective investigative tools and the right to protection against unjustified searches.

In 2011, the Commission adopted three decisions[74] ordering inspections of the premises of DB and several of its subsidiaries in connection with an Article 102 investigation. After these inspections, DB brought actions against the Commission for annulment of the three decisions. On September 6, 2013, the General Court dismissed these appeals.

On appeal to the General Court, DB argued that the General Court had: (i) misinterpreted and misapplied the fundamental right to the inviolability of private premises; (ii) misinterpreted and misapplied the fundamental right to effective judicial protection; (iii) erred in designating certain

[67] Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43 ("Regulation 1049/2001").

[68] The time limit prescribed by Article 8(1) of Regulation No 1049/2001 is mandatory and can only be extended under the circumstances expressly set out in Article 8(2) of Regulation 1049/2001.

[69] Article 8(3) of Regulation1049/2001.

[70] *Italy v. European Commission* (Case T-125/13) and *Comune di Milano v. European Commission* (Case T-167/13).

[71] *Sea Handling v. European Commission* (Case C-271/15 P).

[72] *Deutsche Bahn and Others v. Commission* (Case C-583/13 P) EU:C:2015:92, opinion of Advocate General Wahl.

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

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

documents discovered during the first inspection as "found by chance" within the meaning of the Dow Benelux judgment;[75] and (iv) erred in law in placing on the appellants the burden of proving that those documents had not been "found by chance."[76]

AG Wahl stated that these allegations relate to two broader issues: the compatibility of the current EU system of inspections under Regulation 1/2003[77] with Articles 7 and 47 of the Charter of Fundamental Rights of the European Union, and the consequences of an illegal search by the Commission.

The first two grounds of appeal concerned the lack of *ex ante* judicial review as an alleged breach of the rights to the inviolability of private premises and to effective judicial protection. AG Wahl proposed that both these grounds be rejected. First, there is no requirement that the Commission obtain judicial authorization before conducting on-site inspections, because the EU system ensures an adequate level of protection of the right to the inviolability of private premises through *ex post* judicial review. Second, the mere fact that judicial review occurs *ex post* is not an infringement of the right to effective judicial protection.

The second two grounds of appeal related to the extent to which the Commission may look for evidence during an inspection. Under Regulation 1/2003, the Commission is given extensive and discretionary powers regarding investigations of possible competition law infringements. Article 28 of Regulation 1/2003, however, limits such powers, and is designed to prevent the Commission from undertaking fishing expeditions. It requires that the evidence searched for be related to the subject matter and aim detailed in the investigation decision. Nevertheless, it would be disproportionate to require the Commission to ignore evidence related to a different possible infringement that it happened to find during the course of an investigation. The Dow Benelux[78] judgment sets out an exception to this general rule, namely, evidence found by chance and not covered by the subject matter of the inspection may be used by the Commission to launch a new investigation.

In the present case, just before the first inspection took place, the Commission staff was informed of a different complaint, evidence of which was subsequently found. The Commission used this evidence as a basis for the two subsequent investigation decisions. The General Court determined that these circumstances fell under the Dow Benelux exception.

AG Wahl disagreed. In his view, the Commission had failed to explain why information on the second suspected infringement needed to be reported to its staff before an investigation into a different suspected infringement was about to take place. According to AG Wahl, the only connection was that both infringements concerned DB's subsidiaries, but had the Commission considered both to be part of an overall single plan, it should have referenced it in the first inspection decision. AG Wahl concluded that the Commission had circumvented the rules of Regulation 1/2003 by using an inspection to look for documents that concerned an unrelated matter. AG Wahl found that this conduct had breached not only the appellant's right of defense, but also the right of inviolability of private premises, placing it squarely outside the scope of Dow Benelux and rendering the question regarding burden of proof irrelevant.

Finally, for the reasons set out below, AG Wahl concluded that these breaches constituted a sufficient basis for the annulment of the second and third inspection decisions: (i) when an inspection decision is annulled, the Commission is prevented from using any evidence obtained during the inspection; (ii) because Article 28 of Regulation 1/2003 is very broad, the Commission should be precluded from using the information thereby obtained

[75] *Dow Benelux v. Commission*, (Case C-85/87) EU:C:1989:379.

[76] *Deutsche Bahn and Others v. Commission* (Case C-583/13 P) EU:C:2015:92, opinion of Advocate General Wahl.

[77] 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.

[78] *Dow Benelux v. Commission*, (Case C-85/87) EU:C:1989:379.

as evidence of an infringement or as the basis for any other unfavorable or prejudicial decision against the undertaking; (iii) the information at stake in the present case is capable of affecting the legality of the second and the third investigations, because it is referenced in the text of the investigation decisions; (iv) a procedural error cannot be cured by the adoption of a new inspection decision, otherwise the prohibition set out in Article 28 of Regulation 1/2003 would be deprived of any effectiveness; and (v) undertakings are not required to raise objections to any potential unlawful conduct while the investigation is being conducted.

Commission Developments

COMPETITION POLICY BRIEF ON DAMAGES DIRECTIVE

Directive 2014/104/EU on antitrust damages (the "Damages Directive") was adopted on November 10, 2014, with an implementation deadline of December 27, 2016.[79] The Damages Directive aims not only to harmonize the rules across the EU, making it easier for anyone who has suffered harm as a result of an EU antitrust violation to claim compensation before national courts, but also to improve the interaction between private and public enforcement of EU competition law.

Under the existing regime, victims of competition law breaches can rely on the doctrine of direct effect to enforce their right to compensation. However, private enforcement has been ineffective and underused, with the majority of claims being brought in only three Member States (namely, the UK, Germany, and the Netherlands), and by direct victims (such as big businesses that purchase from the infringing undertakings) rather than indirect purchasers (such as consumers and SMEs).[80] To remedy the difficulties in private enforcement, the Damages Directive makes several changes to the law to make it easier for victims to claim compensation.

First, the Damages Directive provides that national courts can, after assessing the proportionality and relevance of a disclosure request, order the disclosure of different categories of evidence by companies or by third parties not involved in the damages action. However, the Damages Directive prohibits the disclosure of certain categories of evidence, such as leniency statements, submissions made for settlement purposes, and documents created for the purpose of, or during, an investigation. Further, the Damages Directive provides that immunity recipients will benefit from a conditional limitation of their joint and several liability, such that they will be liable only to their own direct or indirect customers. However, if other injured parties cannot obtain full redress from the other infringing parties, the immunity recipient will also be liable for their damages. This combination of rules is designed to ensure claimants' access to the evidence necessary to support their claims and that the effectiveness of leniency programs is not jeopardized.

Second, the Damages Directive introduces two rebuttable presumptions: (i) that cartel infringements cause harm; and (ii) that cartel overcharges are, at least to an extent, passed on to purchasers.

Third, the Damages Directive provides that victims may bring a damages action one year after the final decision of a national competition authority ("NCA"), and that an NCA infringement decision constitutes proof of that infringement before the national courts of that Member State. The rationale behind these provisions is to allow injured parties to avoid litigation costs by eliminating the need to prove certain elements necessary for a successful claim.

Further, although the Damages Directive is intended to facilitate claims in national courts, it recognizes that alternative forms of dispute resolution are available, including arbitration, mediation, and settlements.

[79] The Directive was adopted by the European Parliament and European Commission under the ordinary legislative procedure; the first time the European Parliament has been involved in legislation concerning the enforcement of EU competition rules ("The Damages Directive – Towards more effective enforcement of the EU competition rules," [2015] January (1) Competition Policy Brief, p.1.)

[80] SMEs are small and medium-sized enterprises, as determined by (i) number of employees; and (ii) turnover or balance sheet total. *See* Commission Recommendation of May 6, 2003 (2003/361/EC).

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