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EC Competition Report

APRIL – JUNE 2009

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VERTICAL RESTRAINTS

Opinions of Advocate General

Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, C- 519/06 P
GlaxoSmithKline Services v. Commission

On June 29, Advocate General Trstenjak advised the European Court of Justice to confirm on different grounds the Court of First Instance's annulment of the Commission's finding that GlaxoSmithKline ("GSK") had violated Article 81 of the EC Treaty by operating a dual pricing system under which it priced pharmaceutical products sold and dispensed in Spain at a lower level than the same products destined for export outside Spain.

The Advocate General stated, contrary to the Court of First Instance, that agreements that seek to restrict parallel trade are anticompetitive by object, and that no detrimental effect on end-customers need be shown to reach such a conclusion. Importantly, however, the Advocate General held that even agreements restricting competition by object could be exempted under Article 81(3) EC if the applicable conditions are satisfied. The Advocate General confirmed the CFI's holding that the Commission had provided inadequate reasoning to reject GSK's arguments and evidence in support of an exemption of its dual pricing system, while specifying that this should not be interpreted to mean that GSK's dual pricing should have been exempted. Finally, the Advocate General confirmed that the particular characteristics of the relevant economic sector must be taken into account when considering whether an agreement should be exempted.

In March 1998, GSK's Spanish subsidiary notified to the Commission its pricing policy, as set forth in its general sales conditions, for 82 medicines intended for sale to Spanish wholesalers. GSK's general sales conditions, which were counter-signed by wholesalers accounting for more than 90% of GSK's Spanish sales, effectively introduced a dual pricing scheme. Prices would differ depending on whether or not Spanish law allowed GSK full pricing freedom, as follows:

- GSK would respect Spanish legislation and not exceed the maximum regulatory price that the Spanish health authorities, under Spanish law, establish for drugs that were (i) financed by the Spanish Social Security or other Spanish public funds; and (ii) dispensed in Spain, *i.e.*, through Spanish pharmacies or hospitals.
- Where one of these two requirements was not met, GSK would use its freedom to set the price "according to real, objective and non-discriminatory economic criteria and completely irrespective of the destination of the product determined by the purchasing warehouse." GSK would use as a reference the price that it initially proposed to the Spanish health authorities when determining regulated prices under Spanish law, updated periodically to reflect inflation.

In practice, this scheme, which GSK admitted was aimed at restricting parallel imports, led to drugs being sold in Spain at regulated prices that were lower than prices for products exported outside Spain. The Judgment does not indicate whether GSK also sold the same products at unregulated prices to Spanish patients that are privately insured or otherwise not subject to the Spanish social security system. It would be more difficult to object to a dual pricing scheme if there were such sales in meaningful volumes. It would be curious, to say the least, if a pharmaceutical company could establish its own price for privately insured patients in Spain but had to respect the regulated price for publicly insured Spanish patients also for export sales outside Spain.

Following complaints by certain wholesalers, the Commission in May 2001 adopted a decision declaring that GSK had infringed Article 81 EC by entering into an agreement with Spanish wholesalers to restrict parallel imports. The Commission reasoned as follows. First, the general sales conditions amounted to an agreement between GSK and the wholesalers that consented to them. Second, by limiting parallel trade, the dual pricing scheme had both the object and effect of restricting competition and thus violated article 81(1) EC. Third, an individual exemption under Article 81(3) EC could not be granted because GSK had failed to show that the dual pricing scheme would contribute to improving the production or distribution of goods or to promoting technical or economic progress.

The Advocate General found that the Commission had correctly decided that agreements that seek to restrict parallel trade have as their object a restriction of competition. According to the Advocate General, a restriction of competition by object must be assumed to exist where, having regard to its legal and economic context, the agreement has the potential and tendency to produce a sufficiently negative impact on competition, in this case, a restriction of the intra-brand competition generated by parallel trade, which in turn restricts the choice for direct

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customers to obtain supplies of GSK's medicines either from intermediaries in the countries of destination or in the exporting country, and to pass on any benefits deriving from this competition to end-customers.

The Court of First Instance had found that the Commission could not hold GSK's general sales conditions to have the object of restricting competition without analyzing whether they had the effect of restricting competition to the detriment of end-customers.

According to the Advocate General, the Court of First Instance applied a legally erroneous interpretation of the notion of restriction of competition by object when it required an analysis of the disadvantages for the final consumers. The Advocate General found no support for such an interpretation in Article 81(1) EC, adding that a restrictive agreement's benefit to consumers must be taken into account when deciding whether to exempt it under Article 81(3) EC. Importantly, the Advocate General recognized that even agreements restricting competition by object could be exempted under Article 81(3) EC if the applicable conditions are satisfied. The Advocate General specifically rejected the notion that a restriction by object amounted to a *per se* infringement.

On the Commission's review of Article 81(3) EC, the Advocate General specified that the debate concerned solely the Commission's lack of reasoning in rejecting GSK's submissions, rather than whether the Commission should have exempted GSK's general sales conditions based on the evidence provided by GSK. The Advocate General rejected the Commission's submission that, based on the economic data supplied by GSK, it had been unable to establish that there had been in the past a direct link between the loss of financial resources for GSK caused by parallel trade and the cancellation of research and developments projects. The Advocate General observed that the existence of an appreciable objective advantage warranting application of Article 81(3) EC could be demonstrated in ways other than by establishing a direct link between parallel trade and expenditure on research and development. As a result, the Commission could not reject GSK's detailed submissions solely because no such direct link had been demonstrated. Rather, the Advocate General explained that where an undertaking backs up its arguments in a detailed and relevant manner, the Commission must also respond to those arguments in a detailed manner. The Commission may reject in general terms, as it did in this case, only arguments that are likewise couched in general terms.

The Advocate General specified in particular that, in balancing the disadvantages resulting from an agreement's restriction on parallel trade against its potential advantages in terms of promoting technical progress, the Commission must take account of all circumstances, in particular the specific nature of the relevant economic sector, that might render the impact of the limitation on parallel trade less serious.

In conclusion, the Advocate General's confirmation that an agreement that restricts parallel trade is anticompetitive by object, and that no detrimental effect on consumers need be shown, is in line with past case law. However, there appears to be a logical mismatch between recognizing a category of agreements, whose anticompetitive nature does not depend on demonstrating their effects, but nevertheless accepting that such agreements could be exempted, but then only subject to a detailed analysis of their effects. In such case, a question arises as to the relevance of qualifying an agreement as anticompetitive by object. The practical implication of the Advocate General's conclusions seems to be that the defendant in the case of a restriction by object will have to prove not only that the agreement's efficiencies outweigh its restrictive effects, but also, in the first place, the extent of such restrictive effects. Whether this is the correct approach for the application of Article 81(1) and (3) EC will be the crucial question that the ECJ will need to consider. It is not excluded that it will hold that agreements that seek to restrict parallel trade, and that are therefore anticompetitive by object, may not be exempted. The ECJ may reason that the category of anticompetitive agreements by object reflects a policy decision that such agreements should not be authorized under any circumstance.

HORIZONTAL AGREEMENTS

ECJ – Judgments

Case C-8/08 *T-Mobile Netherlands and Others*

On June 4, 2009, the European Court of Justice ruled on the criteria for establishing whether a concerted practice has an anti-competitive object, the applicable standard of proof where a national court applies Article 81(1) and, the required causal link, if any, between a concerted practice and market conduct where the concerted practice is an isolated event.

These questions arose in the context of a decision by the Dutch competition authority finding 5 mobile communications operators in the Netherlands liable for an infringement of Article 6(1) of the Dutch Mededingingswet ("Mw"). According to the decision, the undertakings had, by means of information exchanged during a meeting held on June 13, 2001, concluded an agreement or entered into a concerted practice relating to mobile telephone subscriptions. Following the successful appeal of this decision by T-Mobile, KPN

and Orange, the competition authority withdrew its allegation that the undertakings had concluded an agreement. It nonetheless maintained its allegation that the undertakings had been party to an anti-competitive concerted practice under Article 81(1) EC Treaty and Article 6(1) Mw. T-Mobile, KPN, Orange, Vodafone and Telfort appealed this decision to the Rechtbank te Rotterdam ("Rechtbank"), which, in its judgment of July 13, 2006, annulled the original appealed decision and ordered the competition authority to adopt a new decision. T-mobile, KPN, Orange and the competition authority appealed the Rechtbank's decision to the College van Beroep voor het dedrijfsleven (Administrative Court for Trade and Industry, Netherlands ("Administrative Court")), which stayed proceedings and referred the issue to the European Court of Justice for a preliminary ruling.

The Court held that a concerted practice has an anti-competitive object for the purposes of Article 81(1) EC if it is capable, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market. In the context of an information exchange between competitors, this will be the case where the exchange of information is capable of removing uncertainties between participants as regards the timing, extent and details of the future conduct of the undertakings concerned. However, the Court held that a direct link between the concerted practice and the end price paid by consumers is not necessary, as the aim of Article 81 EC is to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition. The Court left the question of whether the information exchange at issue in the present case constituted a concerted practice with an anti-competitive object, and left this to be determined by the referring court.

The Court next considered whether national courts are required to apply the presumption, established in the consistent case law of the Community Courts, that undertakings participating in a concerted practice with an anti-competitive object that remain active on the market are presumed to take account of the information exchanged with their competitors. The Court concluded that this presumption is intrinsic to the concept of concerted practice in Article 81(1) EC and therefore should be applied by national courts. Absent evidence to rebut that presumption, which it is for the undertakings participating in the practice to adduce, national courts should presume that undertakings remaining active on the market did take account of information exchanged with their competitors.

The Court further confirmed that this causal presumption should be applied even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion. In particular, the Court noted that the number of meetings held between the participating undertakings is less important than whether they afforded them the opportunity to take account of the information exchanged so as to substitute practical cooperation between themselves for the uncertainty and risks of competition. Where it can be established that undertakings successfully concerted with one another and remained active on the market, the Court held that these undertakings may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.

The Court's ruling is thus significant in suggesting that even a single instance of unlawful information exchange creates a presumption of ongoing effects, shifting the burden to defendants to show absence of ongoing effects or public distancing.

MERGERS & ACQUISITIONS

CFI – Judgments

Case T-48/04 *Qualcomm Wireless Business Solutions Europe BV v. Commission*

On June 19, 2009, the European Court of First Instance ruled on Qualcomm's appeal against the European Commission's conditional approval of the creation of the "Toll Collect" joint venture (the "JV") by DaimlerChysler, Deutsche Telekom, and Cofiroute. Toll Collect was created pursuant to the award of a tender by the German government for the provision of toll collecting services for trucks making use of German motorways. The Court clarified the time limit that applies to appeals against a Commission decision brought by interested parties that are not addressees of the decision.

In this case, the Commission consulted Qualcomm, as a participant in one of the product markets affected by the creation of the JV (the market for the provision of telematics services and equipment), in the context of the Commission's market testing of a package of commitments submitted by the JV members that sought to address the Commission's concerns as to the possible anticompetitive effects of the transaction. The Commission cleared the transaction on April 30, 2003. Qualcomm received a non-confidential version of the Commission's decision on May 23, 2003. According to the Commission, Qualcomm was legally notified of the Commission's decision on May 23, 2003.

Appeals may be lodged within 2 months and 10 days of being notified of a Commission decision. Since Qualcomm's appeal was lodged only on February 10, 2004, the Commission requested that the Court rule Qualcomm's appeal inadmissible. In response,

Qualcomm argued that the correct starting point for calculating whether it had respected the time limits in bringing its appeal was the date of the publication of the Commission's decision in the EU's Official Journal on November 18, 2003. Qualcomm's position was based on the fact that it was not an addressee of the Commission's decision and that the receipt of a non-confidential version of the decision could not be viewed as having constituted Qualcomm's notification of the Commission's decision.

The Court ruled for Qualcomm and held that the starting date for the calculation of the time limit to lodge an appeal of a Commission decision for non-addressees of decisions is the date of publication of the decision in the EU's Official Journal. The Court held that to accept the Commission's argument would be a breach of the principal of equal treatment, in that the argument put forward by the Commission would allow the Commission to "select" companies that could appeal a decision before other companies with standing to appeal.

Commission

Commission Report on the Functioning of the EC Merger Regulation

On June 18, 2009, the European Commission adopted a report (the "Report") on the functioning of Regulation No. 139/2004 (the "EC Merger Regulation"). The main conclusion of the Report is that the EC Merger Regulation contributes to more efficient merger control in the EU, but that there is also scope for further improvements.

The current form of the EC Merger Regulation came into force on May 1, 2004. It divides competences between the Commission and national competition authorities based on turnover thresholds. It also contains three "corrective mechanisms" to this division of competences – the so-called "two-thirds rule", the pre-notification referral system, and the post-notification referral system. The objective of the "two-thirds rule" is to exclude from the Commission's jurisdiction certain cases, which contain a clear national nexus to one Member State because more than two thirds of the sales of the companies involved occur within one and the same Member State. The pre-notification referral system allows for re-allocation of jurisdiction from the Member State(s) to the Commission or vice-versa based on the parties' request. Under the post-notification referral system, a Member State may request the Commission to assess the merger or request a transfer to its national competition authority.

The purpose of the Report is to understand and assess how the jurisdictional thresholds and the corrective mechanisms have operated during the 5-year span. The Report concludes that the threshold criteria, considered in conjunction with the corrective mechanisms, operate in a satisfactory manner in allocating jurisdiction. Nevertheless, the Commission's analysis indicates that there are still a significant number of transactions, which need to be notified in more than one Member State, requiring parallel investigations by the national competition authorities. A large majority of such cases involve markets, which are wider than a Member State's territory or relate to several national or narrower markets. Consequently, there are a number of transactions with significant cross-border effects that remain outside the scope of the EC Merger Regulation. Against this background, the Report concludes that there is further scope for the "one-stop-shop" review by the Commission. The Commission also considers that it may be the "more appropriate authority" in cases notified in at least three Member States that give rise to competition concerns because the negative consequences of parallel proceedings and the potential for a contradictory outcome are particularly important in such cases.

The Report notes that, in practice, the application of the two-thirds rule has sometimes led to national competition authorities deciding on cases with potential cross-border effects. Furthermore, public interest considerations other than competition policy have been applied by national competition authorities in such cases to authorize mergers, which could have given rise to competition concerns. The Report thus concludes that the present form of the "two-thirds" rule merits further consideration.

The Report notes that the Commission, the national competition authorities, and stakeholders consider these mechanisms to have considerably enhanced the efficacy and jurisdictional flexibility of merger control in the EU. The Report highlights further scope to use pre-notification referrals. The negative aspect that was noted by stakeholders was the overall timing and cumbersomeness of the referral procedure.

In a number of areas, the Report thus highlights aspects which merit further discussion, but leaves open the question as to whether any amendment to the existing rules or practice is appropriate. The Report will serve as a basis for the Commission to assess, at a further stage, whether it is appropriate to take further policy initiatives.

Second-phase decisions with Undertakings

Case COMP/M.4525 *Kronospan/Constantia*

The Commission published its decision of September 19, 2007, approving Kronospan's takeover of Constantia's particleboard division, subject to conditions. The Commission's in-depth

investigation revealed that the concentration, as originally notified, would have led to a substantial impediment of effective competition in the raw particleboard sector.

Both parties were active in the manufacture and supply of wood based products, namely raw particleboard, coated particleboard, decorative laminates and components, all used in the furniture industry. Kronospan was to acquire three wood based products businesses from Constantia – the German, the Hungarian and the Austrian company.

In its analysis of the transaction the Commission first determined that each wood-based product constituted an independent antitrust market. The Commission then concluded that the transaction could impede effective competition in the market for raw particleboard. As opposed to other wood based products where markets are EEA-wide or regional, the relevant geographic market for raw particleboard is determined by transport distances (a radius of 500 km from the customer). The Commission's market investigation indicated that approval of the transaction as notified would mean that customers in Austria, Hungary, Slovakia and Romania would have had only limited possibilities to switch suppliers of raw particleboard. In addition, the main suppliers would not have sufficient spare capacity to increase supplies in the affected areas, as such expansion would require considerable investments and a significant lead-time.

In particular, the Commission found that the removal of Constantia's raw particleboard business from the competitive landscape would lead to the elimination of an important source of competition on the Austrian market.

To remove these concerns, Kronospan agreed to acquire only Constantia's German and Hungarian wood companies, whereas the Austrian company would remain with Constantia. Furthermore, Kronospan committed not to acquire, or have a company controlled by or affiliated with it acquire, the Austrian company for a certain period of time.

First-phase decisions with Undertakings

Case COMP/M.5355 *BASF/Ciba*

On March 12, 2009, the European Commission cleared BASF's acquisition of Ciba, subject to conditions. The Commission's decision assessed competition in a large number of horizontal and vertical affected markets, and offers insight into the Commission's willingness to tolerate elevated market shares in product markets with commodity properties, such as chemicals. Four of those markets are profiled below.

In the chemical intermediary markets, the Commission had serious doubts about the transaction with respect to the product dimethylaminoethyl acrylate ("DMA3"). Of note, the Commission's market investigation took issue with BASF's estimates of certain of its rivals' market shares. BASF had submitted that it, together with Arkema, enjoyed between 80-90% of the EEA market. Five producers, including Ciba, accounted for the rest, each with a share of less than 5%. The Commission's investigation found that two of these competitors did not participate in the EEA merchant market. Though Ciba and the other two remaining small producers appeared to have approximately the same EEA market share, the Commission termed the transaction to be a 3-2 merger. This level of concentration in the market gave the Commission reason for serious doubts that were not allayed by the partial substitutability of other products, which the Commission found to be insufficiently significant. BASF resolved the doubts by committing to the divestiture of certain of its DMA3 assets.

In paper chemicals markets, the transaction raised serious doubts for the Commission in the market for synthetic dry strength agents. Despite a combined market share of 50-60% in the EEA, BASF contended that the post-transaction market share at a worldwide level would be low, and that it faced competition in the EEA from producers with comparable or larger market shares on the worldwide market. The Commission's decision contains only a brief analysis of the appropriate geographic market in this product area, noting only that the market is "*at least not narrower than EEA*", but does not explain whether or for what reasons a wider geographic market is or is not plausible. In its competitive assessment, the Commission focused on the fact that third parties voiced concerns that the transaction would limit alternative suppliers in the EEA. The elevated post-acquisition market share and the reaction from third parties gave the Commission cause for serious doubts, which BASF alleviated by committing to divest assets that would eliminate the overlap.

In the markets for colorants, the Commission had serious doubts about the effect of the transaction for two pigments. The combined market share in the market for those pigments was 40-50% and 50-60%. Despite the fact that the combined entity would face competition from at least two other significant producers in each pigment market (*i.e.*, a 4-3 merger), the Commission's doubts were only resolved by BASF's commitment to divest assets that eliminated the overlap in these markets. In other pigment markets, the Commission tolerated elevated market shares of up to 50-60% due to the fact that the addition of Ciba's market share was incremental (less than 5%).

In latex products, the transaction represented a 3-2 merger in styrene acrylic latex products for paper applications. The level of concentration in the industry had recently been altered as a consequence of the acquisition of Rohm and Haas by Dow. Post-Dow/Rohm and Haas, the combination of BASF and Ciba's businesses caused the Commission to have serious doubts about the compatibility of the transaction with the common market in this product market, and as a consequence, BASF had to commit to divesting Ciba's styrene acrylic latex business in order to eliminate the Commission's doubts.

Case COMP/M.5232 *WPP/TNS*

On September 23, 2008, the European Commission cleared the merger of WPP and TNS, subject to conditions. WPP is an international marketing communications services group, while TNS is a consultancy firm that provides a broad range of market research and information services.

The two aspects of this case that are of particular interest are the Commission's analysis of the transaction's impact on the EEA market for television audience measurement ("TAM") services (where the transaction was a "3 to 2" merger), and the Commission's analysis of the vertical effects of the transaction.

In the TAM market, the merging parties accounted for a combined market share of 60-70%. WPP and TNS argued that, despite this high market share, the fact that TAM service consumers enjoyed countervailing market power, allied to the bidding nature of this market, limited any anticompetitive post-transaction market power. The Commission rejected these arguments. Contrary to the merging parties' contention, market participants indicated that any countervailing buyer power would not be sufficient to address the Commission's concerns. Furthermore, the market was characterized by the existence of high entry barriers to entry. In order to address the Commission's concerns, WPP agreed to either divest its shares in its AGB Nielsen joint venture (active as a TAM services provider), or the TAM services of TNS.

As to the vertical effects of the transaction, the Commission analyzed the vertical relationship between the TAM and the Media Buying markets (buying media time or space in different types of media) as well as the vertical impact of the transaction on Media Adex market segments (the estimation of expenditure on advertising across the media).

The concern regarding the possible anticompetitive effects on the vertical relationship between the TAM and Media Buying segments was that TNS, as sole provider of TNS services in various Member States where WPP was active as a media buyer, would enter into strategic input foreclosure regarding the supply of TAM services. Such strategic input foreclosure would consist in the merged entity attempting to gain advantages over its competitors at the media buyer level by supplying unreliable or delayed data to its competitors.

These concerns were dismissed by the Commission on a number of grounds: (1) the loss of reliability of TAM services would likely lead to a significant loss of revenues; (2) the collective acquisition of TAM services, usually leading to non-discriminatory distribution of TAM data between media buyers would allow for the efficient detection of any decrease in quality of the service and the subsequent organization of a new tender for these services; and (3) vertical relationships between these markets already existed and had not led to attempted strategic foreclosure.

The concern regarding the possible anticompetitive effects on the vertical relationship between the Media ADEX services provision market and the buyer market for such services was that TNS, as a Media ADEX services provider, would enter into input foreclosure. Such input foreclosure would, according to competitors, seek to favor the merging entities' Media ADEX services buying division (WPP was active on this market). However, the Commission found that such a strategy was unlikely due to the low entry barriers into the upstream market.

First-phase decisions without Undertakings

Case COMP/M.5380 *Toshiba/Fujitsu HDD Business*

On May 11, 2009, the European Commission cleared Toshiba's acquisition of Fujitsu's Hard Disk Drive ("HDD") business. This decision is of some interest due the Commission's discussion on the possible existence of a broad market for data storage that would include both traditional forms of HDDs as well as the more recent technology commonly known as Solid State Drives ("SSDs").

Prior Commission decisions in this industry had left open the precise definition of the antitrust market for HDDs. However, in assessing the competitive effects of past transactions in this field, the Commission had considered sub-categories of HDDs according to their end use, *i.e.* (i) Enterprise and Server HDDs (used in servers and enterprise storage systems), (ii) Desktop HDDs (*e.g.* used in PCs), and (iii) Mobile HDDs (*e.g.* used in laptop PCs).

In this case, the Commission acknowledged that SSDs and other flash based memories might play a competitive constraint on HDDs. SSDs have improved technological characteristics in comparison to HDDs.

For example, SSDs use NAND flash memory chips that have no moving parts, making them more reliable, less fragile, smaller, and less energy consuming. These improved characteristics have led to SSDs replacing HDDs in some segments, namely in cases where small form factors or small capacity needs play an important role in consumer purchasing decisions.

Ultimately, the Commission found that the abovementioned demand substitution between certain types of HDDs and SSDs was in its infancy, and concluded that SSDs currently represented a neighboring market to the HDD market. However, the Commission noted that this finding was valid "*for the time being*", thus appearing to suggest that, as technological advances are made, SSDs and at least some forms of HDDs will likely form part of the same antitrust market.

Case COMP/M.5508 *SoFFin/Hypo Real Estate*

On May 14, 2009, the European Commission unconditionally cleared the acquisition of Hypo Real Estate ("Hypo") by a fund, the Special Financial Market Stabilisation Fund ("SoFFin"), established by the German government for the purposes of stabilizing the financial markets in the current economic crisis.

The most interesting aspect of the Commission's decision is its detailed assessment of whether Hypo, after its acquisition by the German government, would as a matter of law continue to operate as an independent economic unit, or instead be subject to the control of the German government or its designate. The former scenario would remove the transaction from the Commission's jurisdiction. The latter scenario would confer jurisdiction upon the Commission so long as Hypo and the German entity acquiring Hypo surpassed one of the two turnover thresholds in the EC Merger Regulation.

The Commission focused on the fact that post-acquisition there would be no safeguards or other arrangements that would prevent SoFFin from dictating Hypo's commercial strategy, budget or other affairs. On account of this power, the Commission found Hypo not to constitute an independent economic unit. Having made this threshold finding, the Commission considered which entity would ultimately obtain control of Hypo. It analyzed the structure and management of SoFFin, an unincorporated entity whose management had been entrusted by law to a series of committees and agencies appointed by the German ministry of finance ("BMF"), the German central bank, the German federal government, and the German federal states. Although it did not reach an ultimate determination as to which entity would obtain control of Hypo, the Commission found that SoFFin and its various supervising authorities were subject to the legal and substantive supervision of the BMF. The Commission also noted the BMF's residual legal power to substitute its own decisions for those of SoFFin or its management, and to specify the conduct of those bodies. The BMF was therefore held to be an economic unit to have acquired control of Hypo. Due to an absence of competitive concerns, the Commission left open the question of whether it ought to consider whether BMF was the appropriate economic unit for assessing the transaction, or else whether it ought to be analyzed at a higher level, such as at the level of the central bank, or at the level of the entire German government.

As the German government, through the central bank and the BMF, controlled and exercised supervisory authority over a publicly established bank, the Commission assessed this second bank's turnover, together with Hypo's turnover, for the purposes of determining that indeed the transaction surpassed the turnover thresholds in the EC Merger Regulation. The Commission then assessed the competitive effect of the potential coordination of the conduct of Hypo and the second bank's commercial conduct. Due to an absence of competitive concerns (or in fact any affected markets), the Commission did not make any final determinations or give meaningful guidance as to the appropriate product or geographic market definitions in the banking industry.

ABUSE OF DOMINANT POSITION

Commission decisions

Rambus

On June 12, 2009, the Commission published a notice inviting interested parties to submit their comments on a set of commitments proposed by Rambus. The commitments are intended to bring to an end the Commission's investigation into Rambus's alleged abuse of a dominant position in the market for Dynamic Random Access Memory ("DRAM") chips, a type of electronic memory processor that provides temporary storage of data in electronic devices.

On July 30, 2007, the Commission issued a statement of objections reaching the preliminary conclusion that Rambus had infringed Article 82 EC by claiming unreasonable royalties for the use of certain patents for DRAMs. Industry standards for DRAMs were developed during the 1990s by an industry association known as the Joint Electron Device Engineering Council ("JEDEC"). JEDEC-compliant DRAMs today represent approximately 95% of the DRAMs market, and are used in almost all PCs worldwide. Rambus claims that its patents cover technologies included in these JEDEC standards and is

asserting these against manufacturers of DRAMs that comply with the JEDEC standard. The complainants allege that Rambus, which participated in JEDEC between 1992-1995, intentionally failed to disclose the existence of its patents and patent applications prior to adoption of the JEDEC DRAMs standards.

The Rambus case is the first time that the Commission has investigated a so-called "patent ambush" case. In parallel proceedings in the US, the Federal Trade Commission ("FTC") found that Rambus had violated Section 2 of the Shearman Act, and imposed a remedy applying to all relevant products imported into or exported from the US. Subsequently, in April 2008, the DC Court of Appeals overturned the FTC's orders against Rambus. In February 2009, the US Supreme Court denied the FTC's request for certiorari of the DC Court's decision.

In its statement of objections, the Commission reached the preliminary conclusion that, without the alleged patent ambush, Rambus would not have been able to impose such high royalty payments upon the JEDEC-compliant DRAMs manufacturers. The Commission considered that Rambus's conduct risked undermining confidence in the standard-setting process. The standard-setting process, the Commission argued, was crucial in promoting technical development and innovation.

Without conceding the legal and factual conclusions reached by the Commission in the statement of objections, Rambus offered commitments pursuant to Article 9 of Regulation 1/2003, intended to allay the Commission's concerns. Specifically, Rambus committed to:

- Offer licenses with maximum royalty rates of 1.5% for JEDEC-compliant double data rate synchronous dynamic random access memory ("DDR SDRAM") controllers of the following standards types: DDR2 SDRAM, DDR3 SDRAM, GDDR3 SDRAM and GDDR4 SDRAM;
- Offer a royalty holiday for licensees who ship less than 10% of their JEDEC-compliant DRAM products in single data rate synchronous ("SDR") and double data rate synchronous ("DDR") DRAM memory types (subject to the licensee's compliance with the terms of the license);
- Offer licenses with maximum royalty rates of 1.5% per unit for JEDEC-compliant SDR memory controllers, until April 2010, falling to 1.0% thereafter; and,
- Offer royalty rates of 2.65% per unit for JEDEC-compliant DDR, DDR2, DDR3, GDDR3 and GDDR4 memory controllers of the following standards types, until April 2010, falling to 2.0% thereafter.

The proposed commitments would apply to future shipments only, and would last for a period of five years from the date of adoption of the commitment decision.

STATE AID

CFI Judgment

Case T-152/06 *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v. Commission*

On June 9, 2009, the Court of First Instance dismissed an action brought by the Swedish tourism company Nya Destination Stockholm Hotell & Teaterpaket AB ("NDSHT") seeking the annulment of a Commission decision not to investigate a complaint against alleged State aid granted to the Stockholm Visitors Board ("SVB"), a company owned by the City of Stockholm and responsible for the promotion of the Stockholm region.

The Commission concluded that the measures in question did not constitute unlawful aid, but existing aid, and that there were no grounds to institute proceedings under Article 88(1) EC (which obliges the Commission to keep existing aid schemes under review and to propose appropriate measures to the Member States when required).

The Court held that the appeal was inadmissible because the Commission's letters informing the complainant of its decision not to pursue the complaint were not actionable measures for the purposes of Article 230 of the EC Treaty. The Court explained that, with respect to existing aid, the initiative to propose to a Member State to review any such aid lies with the Commission alone. The Court also noted that the applicable procedure as regards existing aid, set out in Articles 17 to 19 of Regulation 659/1999, does not contemplate the possibility of a decision addressed to the Member State concerned being adopted by the Commission at the end of the preliminary examination stage. The Court further noted that, if, following an initial assessment, the Commission finds that the complaint relates not to unlawful aid, but to existing aid, it cannot do more than inform the applicant, pursuant to the second sentence of Article 20(2) of Regulation 659/1999, that there are insufficient grounds for taking a view on the case. The Court concluded that, to the extent it does not constitute a decision on the compatibility of the measures at stake with the EC State aid rules and it does not have any impact

on the applicants' legal position, any such informal communication does not constitute an actionable measure and that the applicant's action was therefore inadmissible.

POLICY AND PROCEDURE

ECJ – Judgments

Case C-429/07 *X BV*

On June 11, 2009, the European Court of Justice ruled that Article 15(3) of EC Regulation 1/2003 permits the European Commission to submit written observations to the court of a Member State in the context of litigation concerning the tax deductibility of a fine imposed by the European Commission for an infringement of Article 81 EC Treaty. Article 15(3) provides that "[…] where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States […]".

On November 27, 2002, the Commission fined BPB, Knauf, Lafarge, and Gyproc for violating Article 81(1) EC by participating in an agreement and concerted practice in the plasterboard sector from 1992 to 1998. On July 8, 2008, the Court of First Instance confirmed the Commission's decision. Before this date, however, one of undertakings ("X KG") partially deducted the value of the fine from the taxable income of a subsidiary situated in the Netherlands ("X BV"). This deduction was challenged by the Dutch tax authorities, but was subsequently approved by the Rechtbank te Haarlem. The tax authorities thus referred the matter to the Gerechtshof te Amsterdam.

On hearing of the proceedings, the European Commission informed the Gerechtsholf te Amsterdam that it wished to submit written observations as *amicus curiae* under Article 15(3) of Regulation 1/2003. However, X KG and the Dutch tax authority argued that Article 15 does not give the Commission the right to submit written observations on its own initiative. At the hearing, the Gerechtshof te Amsterdam stayed proceedings and referred the question to the European Court of Justice.

The Court reasoned that the outcome of a dispute regarding the tax deductibility of a fine imposed by the Commission is part of the coherent application of Articles 81 or 82 EC. The Commission's ability to impose effective penalties cannot be dissociated from the principle of prohibition of anti-competitive practices, and the ability to tax deduct fines would risk impairing the effectiveness of penalties imposed by the Commission, since it would allow the companies concerned to offset the burden of that fine with a reduction of the tax burden. The Court thus concluded that the Commission may submit on its own initiative written observations to a national court of a Member State in proceedings concerning the deductibility from taxable profits of the amount of a fine imposed by the Commission for an infringement of Articles 81 and 82 EC.

Opinions of Advocate General

Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG, Bolloré SA and Distribuidora Vizcaína de Papeles SL v. Commission*

On April 2, 2009, Advocate General Bot advised the Court to hold that the Court of First Instance had committed an error of law in Joined Cases T 109/02, T 118/02, T 122/02, T 125/02 and T 126/02, T 128/02 and T 129/02, T 132/02 and T 136/02 *Bolloré*,[1] by failing to annul those parts of the Commission's decision implicating Bolloré, directly and personally, in cartel conduct concerning carton board, because the Commission's statement of objections ("SO") was insufficiently precise to enable Bolloré to exercise its rights of defense.

In its appeal, Bolloré argued that the Commission's SO had indicated that Bolloré would be held liable for the unlawful conduct of Copigraph, its wholly owned subsidiary, solely in its capacity as parent company. Bolloré was therefore unable to foresee that the Commission's decision would also rely on Bolloré's own involvement in the cartel activities and was, as a result, unable to defend itself against this aspect of the Commission's objections during the administrative proceedings.

The Court of First Instance confirmed that the SO was insufficiently precise to enable Bolloré to either discern or defend itself against objections based on Bolloré's direct involvement in the cartel conduct. However, it ultimately concluded that this did not justify the annulment of the decision, holding that the Commission's error did not have had a decisive effect on the operative part of the decision.

Advocate General Bot disagreed. According to Advocate General Bot, the Court of First Instance failed to recognize the fundamental nature of the principle of an undertaking's rights of defense. Any undertaking alleged to have committed an infringement of the EC Treaty must be afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged, as well as on the documents relied on by the Commission in support of its allegations. By denying

1 [2007] ECR II 947.

Bolloré such an opportunity in the present case, the Commission's error deprived those parts of the decision in which Bolloré was directly and personally implicated in the infringement of any legality. As an essential element of the Commission's decision against Bolloré, Advocate General Bot held that these elements should therefore have been annulled.

Advocate General Bot further noted that the Court of First Instance had limited its reasoning to the validity of the decision itself. As a result, it failed to consider the other possible consequences of an Article 81 EC infringement decision, including potential liability in national courts for third party damages actions. The Advocate General also explained that the breach of an undertaking's rights of defense could constitute a violation of Article 6 of the European Convention on Human Rights

Case C-97/08 P *Akzo Nobel NV and Others v. Commission*

On April 23, 2009, Advocate General Kokott advised the European Court of Justice to dismiss Akzo Nobel's ("Akzo") appeal against the Court of First Instance's judgment of December 12, 2007,[2] confirming the Commission's decision of December 9, 2004, fining Akzo, jointly and severally with four of its wholly-owned subsidiaries, € 20.99 million for participation in a cartel in the choline chloride industry. Akzo was fined as the parent company of its subsidiaries, although it had itself not participated in the cartel.

Akzo did not dispute that a parent company can be called to account for the cartel offences of its subsidiaries if it exercises decisive influence over them, but denied that decisive influence may be presumed where a parent company owns 100% of the shares in its subsidiaries. In response, Advocate General Kokott reasoned that the existing case law establishes a rebuttable presumption that a parent company that wholly controls its subsidiary exercises decisive influence over it, adding that the rebuttable nature of the presumption does not imply that it is for the Commission to adduce evidence of the actual exertion of influence by the parent company over its subsidiary. Rather, it is for the parent company to produce evidence to dispute the exercise of decisive influence.

Advocate General Kokott advised that Court should reject the Court of First Instance's case law in Joined Cases T 109/02, T 118/02, T 122/02, T 125/02 and T 126/02, T 128/02 and T 129/02, T 132/02 and T 136/02 *Bolloré*,[3] in which the Court of First Instance held that a parent could only be liable for its subsidiary's anticompetitive conduct if "indicia" of decisive influence were demonstrated in addition to a 100% shareholding. She explained that, where there is a complete coincidence of interests between the parent company and its wholly-owned subsidiary, the obvious conclusion must be that the subsidiary does not determine its own market conduct independently.

With regard to the subject matter of the parent company's decisive influence, Advocate General Kokott rejected the Akzo's claim that the only relevant criterion is the exertion of influence on the determination of the subsidiary's market conduct. Advocate General Kokott held that this is just one factor on which the Court should base its assessment of decisive influence. She further noted that the decisive influence of the parent company does not necessarily have to result from specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct. A single commercial policy within a group may be inferred also indirectly from the totality of the economic and legal links between the parent company and its subsidiaries. The decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit. Advocate General Kokott therefore concluded that the Court of First Instance had correctly emphasized the importance of the economic and legal organizational links, rather than examining only the group's commercial policy in the narrower sense.

CFI Judgments

Cases T-12/03 Itochu v. Commission, T-13/03 Nintendo and Nintendo of Europe v. Commission and T-18/ 03 CD-Contact Data v. Commission

On April 30, 2009, the Court of First Instance rejected Itochu's appeal and accepted part of Nintendo's and CD-Contact's appeals, reducing their corresponding fines. The Commission had fined Nintendo and seven of its exclusive distributors for concluding agreements and engaging in concerted practices designed to prevent parallel trade in Nintendo games.[4]

Itochu argued that the Commission had violated its right for equal treatment. It challenged the Commission's practice of dividing the participants in a violation into groups according to their market shares in order to set the basic amount of the fine, and complained

2 Case T-112/05 Akzo Nobel and Others v Commission [2007] ECR II-5049

3 [2007] ECR II 947.

4 Cases IV/35.587 *PO Video Games*, COMP/35/706 *PO Nintendo Distribution*, and COMP/36.321 *Omega – Nintendo*, Commission decision of October 30, 2002.

that it had been placed in the same group as companies with much higher market shares. The Court considered that the Commission's practice was not arbitrary and did not exceed the limits of the Commission's discretion. The fact that the starting amounts are not strictly proportionate to the market shares of the companies is inherent to the Commission's approach, and the differences in the market shares raised by Itochu were not so significant as to place the applicant in a different group.

Itochu complained that the Commission also violated its right to equal treatment by multiplying its basic fine by a factor of three like the cartel leader, Nintendo, which was a significantly higher multiplier than that applied to John Menzies PLC, which played a much more dominant role in the cartel than Itochu. The Court noted that the Commission has the power to decide the level of fines in order to reinforce their deterrent effect, and that the deterrence factor depends on many factors, and not merely on each undertaking's specific situation. The Court concluded that Itochu could thus not rely on the differences between the respective roles of the different participants in the infringement in order to claim that the multiplier applied to its fine was not equitable and proportionate.

Itochu also argued that the Commission failed to give adequate weight to Itochu's passive role in the cartel and to its economic situation, which prevented it from refusing the terms of the distribution agreement imposed by Nintendo. The Court responded that Itochu could not claim that it played only a passive role in the infringement because it had concluded the distribution agreement with Nintendo. The Court also noted that, on several occasions, Itochu spontaneously communicated to Nintendo information regarding parallel imports into its territory. Itochu was thus complying with the agreement without taking an exclusively passive role in the infringement.

In its appeal, Nintendo criticized the Commission for setting the gravity element of the fine on the basis of each participant's share of sales of Nintendo game consoles. According to Nintendo this approach was unprecedented, arbitrary and inappropriate. The Court rejected the complaint, explaining that the shares of sales are representative of the specific weight of each participant's in the distribution system in question and may be used to establish the relative responsibility of each of the participants in the infringement in question.

Nintendo further complained that, in applying a deterrence multiplier to the basic amount of the fine, the Commission failed to consider the likelihood of a repeated infringement by Nintendo, specifically in light of its cooperation during the administrative procedure and its implementation of an antitrust compliance program. The Court observed that, when assessing the need to apply a deterrence multiplier, the Commission is not obliged to evaluate the likelihood that the undertaking in question will re-offend. The factors of cooperation and compliance program may, when appropriate, be taken into account when examining whether there are any attenuating circumstances.

Nintendo argued that the Commission had violated its right to equal treatment by applying to the fine imposed on it a discount of 25% for cooperation, while applying a 40% discount to the fine imposed on John Menzies PLC. According to the Commission, the difference in treatment was justified by the fact that Nintendo started cooperating with the Commission eight days after John Menzies. In upholding Nintendo's argument, the Court observed that cooperation must be examined both from a chronological and qualitative points of view in assessing whether there is a difference in the degree of cooperation between undertakings. Therefore, "*in so far as undertakings supply the Commission, at the same stage of the administrative procedure and in similar circumstances, with similar information concerning the matters of which they are accused, the degrees of cooperation afforded by them must be regarded as comparable, with the consequence that those undertakings must be treated equally when the amount of the fine imposed on them is determined*." The Court noted that cooperation need not start on the same day for it to be deemed to have started at the same stage of the administrative procedure, and found that both companies started at the same stage of the administrative procedure. The Court also found no difference in the quality of the cooperation. It therefore concluded that a 40% discount should apply to the fine imposed on Nintendo and reduced it to Euro 119 million.

In its appeal, CD-Contact argued that the Commission violated its right to equal treatment, because it applied a 50% reduction to the fine imposed on Concentra. The Court found that the evidence put forward by the Commission showed that CD-Contact's active role in the cartel was similar to that of Concentra's by communicating to Nintendo information on parallel trade. The Court noted further that CD-Contact entered the market affected by the infringement later than Concentra and, unlike Concentra, did not conclude a formal distribution agreement with Nintendo restricting competition. In light of these findings the CFI accepted CD-contact's argument and ordered its fine to be reduced by 50% to Euro 500,000.

Cases T-116/04 *Wieland-Werke v. Commission*, T-122/04 *Outokumpu and Luvata v. Commission*, and T-127/04 *KME Germany and Others v. Commission*

On May 6, 2009, the Court of First Instance confirmed the Commission decision of December 16, 2003,[5] fining Outokumpu, KME, and Wieland-Werke for participating in a cartel in the copper industrial tubes market.

The appellants argued that the size of the market is key in determining the starting amount of the fine and that the Commission exaggerated it by taking into account not only the processing margin, but also the part of the price related to copper, which the applicants could not control. In dismissing this argument, the Court noted that the size of the affected market is not a decisive factor in assessing the seriousness of an infringement and the starting amount of the fine. Second, the Court held that the Commission need not exclude production costs when calculating the size of the market, accepting the Commission's argument that there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business, and which, therefore, cannot be excluded from its turnover when fixing the starting amount of the fine.

Wieland-Werke argued also that the Commission violated the principles of proportionality and equal treatment by imposing fines that did not reflect the differences between their respective turnovers. The Court rejected this argument, observing that that the Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to ensure, where fines are imposed on a number of undertaking involved in the same infringement, that the final amounts of the fines resulting from its calculation for the undertakings concerned reflect any distinction between them in terms of their overall turnover or their relevant turnover.

In regard to the contested 50% increase in the fine imposed on Outokumpu for repeat infringement, the Court stated that the fact that the company was relieved of a fine in previous cartel proceedings by reason of special circumstances did not prevent the Commission from making a finding of repeat infringement. The Court observed that the concept of repeat infringement implies only a previous finding of infringement of EC competition law. The Court noted that the previous cartel decision against Outokumpu was adopted when it was already involved in the industrial tubes cartel, in which it continued to participate. The Court concluded that this fact justified the fine increase.

For its part, KME challenged the Commission's assessment of the seriousness of the infringement and its differentiated treatment of the companies based on their respective market shares. The Court responded that the Commission could treat companies differently, based on their shares of the market concerned, even without proof of actual impact of the infringement on the market. Furthermore, such proof is irrelevant to the classification of the infringement as "very serious". The Court explained that cartels merit the severest fines and their concrete impact on the market is not a decisive factor in determining fine levels. In any case, the Court was convinced that the Commission satisfied the legal standard requiring specific and credible evidence indicating with reasonable probability that the cartel had an impact on the market. Specifically the Court observed that the fact that a cartel member did not always comply with the agreements is not sufficient to exclude the possibility that the cartel had a market impact.

The Court also rejected KME's argument that account must be taken of the variable intensity of a cartel while it lasted when increasing the starting amount of the fine imposed in accordance with the cartel's duration.

Finally, the Court rejected KME's argument that the Commission had ignored certain attenuating circumstances that justified reducing the amount of the fine, observing that the Commission has a degree of latitude in making an overall assessment of the extent to which fines may be reduced to reflect mitigating circumstances. The Court found no error in the Commission's exercise of its discretion in this respect.

Commission

Commission Report on the Functioning of Regulation 1/2003

The Commission has published a report on the functioning of Regulation 1/2003 (the "Regulation") five years after it was implemented on May 1, 2004.[6] Regulation 1/2003 introduced a comprehensive reform of the procedures for the enforcement of Articles 81 and 82 EC.

The report concludes that the Regulation has significantly improved the Commission's enforcement of EC competition law. The report notes that the change from the notification system, under which companies submitted agreements to the Commission for approval under the antitrust rules, to the direct application of Article 81(3) EC by national courts and authorities has been remarkably smooth in practice. This has, moreover, enabled the Commission to be more

5 Case COMP/E-1/38.240 *Industrial tubes*.

6 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L1/1).

pro-active in both implementing an effects-based approach to antitrust work and policy outside the field of cartels and in increasing the number of enforcement decisions adopted within the area of cartels. While the Commission still offers individual companies guidance where required, it increasingly offers more general guidance that is useful to numerous undertakings and enforcers.

The Commission has been proactive in using its new enforcement powers under Regulation 1/2003. Sector enquiries have become one of the Commission's key investigative tools; it has regularly employed its rights to seal and question during inspections of business premises; and it has conducted inspections of non-business premises on two occasions. The Commission has also made use of its powers to make commitments offered by undertakings binding and enforceable and to impose sanctions for non-compliance with obligations imposed in the context of investigations.

The report identifies a number of areas in which the Regulation has led to improved coherence in the application of the EC competition rules. Article 3 of the Regulation, for example, requires that national competition authorities and courts to apply Articles 81 EC and 82 EC to all agreements capable of affecting trade between Member States. This has contributed positively to the creation of a single legal standard across the EU, although the report notes that this is true in the assessment of agreements and concerted practices more than in the context of unilateral conduct, where stricter national rules may still be applied.

The introduction of the European Competition Network ("ECN") has resulted in both improved consistency and coherence in the application of the EC competition rules and greater overall levels of enforcement. According to the report, arrangements introduced by the Regulation, including work-sharing arrangements and fact-finding cooperation mechanisms, have worked well despite some limitations caused by differences between national procedures. The ECN has furthermore proven itself to be a successful forum for policy discussions. This has led to substantial, voluntary convergence of Member States' competition laws, although the report also highlights a number of areas, including fines, criminal sanctions and standards of proof, where divergence between Member States' enforcement systems persists.

The Commission also reports that stakeholders have pointed to what they perceive as uneven enforcement of the EC competition rules by national courts. Stakeholders have called on the Commission to make greater use of the tools, such as the power to make observations as *amicus curiae* under Article 15, that is has at its disposal to promote greater coherence going forward. The report also notes that there is a perception that the legal framework surrounding the Commission's cooperation with third country authorities could be clarified and reinforced. In particular, the Commission could further enhance existing levels of protection against disclosure, both in the context of private litigation in third jurisdictions and in cases where information is exchanged with third country authorities.

Finally, the Commission identifies a number of areas that merit further evaluation, including penalties for providing misleading or false replies provided during the course of interviews carried out as part of Commission inspections; the use of the power to request national competition authorities to carry out inspections on the Commission's behalf; the use of information to impose custodial sentences where that information is received from a jurisdiction where no such sanctions exist; and the need to promote, and ensure convergence of, Member State leniency programs. The report concludes that Regulation 1/2003 has, overall, significantly improved the Commission's enforcement of Articles 81 and 82 EC.

Opportunities and Barriers to Online Retailing

The Commission has published a report on opportunities and barriers to online retailing, following the Online Commerce Roundtable hosted by Commissioner Neelie Kroes in Brussels on September 17, 2008. The aim of the roundtable, whose participants included Alcatel-Lucent, LVMH, eBay, Fiat, EMI, Apple, SACEM and Which?, was to discuss how to increase the business opportunities on the Internet and to improve access by EU customers to goods and services online. A second meeting, focusing on online retailing of music, was held on December 16, 2008. The Commission's report presents the conclusions reached during these meetings on both the online retailing of goods and the digital distribution of music.

With respect to online retailing of music, the participants agreed that multi-territory licensing is required. Due to the national nature of current IP rights, online music providers are presently required to secure a number of IP rights before offering music data files to customers. Following discussions, EMI and SACEM indicated that they would continue to offer EEA-wide licenses.

Participants also considered ways to address the *de facto* exclusivity and territorial protection enjoyed by collecting societies in the licensing of mechanical and public performance rights. Participants agreed that the absence of a simple and efficient multi-repertoire, multi-territorial system is hindering the development of online markets and several parties noted that competition is required in the

provision of licensing services. Following roundtable discussions, SACEM indicated its willingness to act as non-exclusive rights manager for publishers and other collecting societies and to entrust other collecting societies with the pan-European licensing of its repertoire. EMI likewise agreed to entrust more than one rights manager to offer its repertoire for the whole EEA. However, EMI noted that some standardization of licensing and administration practices would be required.

It was further agreed that information on the ownership of rights should be shared among right holders/collecting societies, although questions regarding the funding, maintenance and control of any central database were left open. Notably, Apple indicated that if the above practices improve the conditions for clearing rights, iTunes would consider making its offering available to all European customers, including those in Eastern European countries where iTunes is not currently available.

Discussions of online retailing of goods resulted in a consensus that online sales provide all businesses with huge commercial opportunities and consumers with greater choice of goods at attractive prices. However, no consensus was reached regarding practices that limit online distribution. In particular, eBay and Which? claim that there is need for greater scrutiny of the way in which manufacturers of luxury and branded goods hinder the online sales of their selected dealers. LMVH, meanwhile, maintains that limitations on selected dealers are inherent to selective distribution networks and enhance demand. Adopting a similar stance, Fiat also argues that companies should be free to choose the mode of distribution of their goods. Finally, participants agreed that online piracy and counterfeiting, as well as regulatory barriers such as IP and consumer protection laws, continue to limit the further development of online retailing.

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