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HORIZONTAL AGREEMENTS

ECJ – Judgments

Case C-554/08 *Le Carbone-Lorraine SA v. Commission* and Case C-564/08 *SGL Carbon AG v. Commission*

On November 12, 2009, the Court of Justice of the European Union rejected appeals by Le Carbone Lorraine ("LCL") and SGL Carbon AG ("SGL") against the level of the fines imposed by the Commission for their participation in a cartel for electrical and mechanical carbon and graphite products.

In 2003, the Commission found that SGL, LCL, and others had participated in a single and continuous infringement of Article 101(1) TFEU in the market for electrical and mechanical carbon and graphite products. The infringement, which lasted from October 1988 to December 1999, consisted in fixing sales prices and other trading conditions, sharing markets, and engaging in coordinated actions against non-participating competitors. In upholding the fines on appeal, the General Court had reaffirmed the Commission's margin of discretion in assessing the appropriate level of fines in cartel cases and confirmed that the Commission need not demonstrate the precise effects of cartel conduct in establishing that a cartel did, in fact, affect trade between Member States.

In its appeal, LCL claimed that the General Court infringed the principle that companies should be fined only for acts that they have themselves committed. In particular, LCL claimed that the Commission had failed to take into account that LCL was not active in the market for carbon blocks and plates when assessing the gravity of LCL's infringement.

In rejecting LCL's claim, the Court of Justice confirmed the General Court's finding that the Commission is not obliged to examine the conduct of each individual cartel participant in assessing the effects of an infringement, but need only consider its overall impact. The company's individual role in the infringement need only be considered in the application of aggravating or attenuating circumstances.

The Court of Justice also noted that the anti-competitive effects of an infringement are, in any event, not in themselves a relevant factor for determining the appropriate level of fines under the 1998 fining guidelines.

With regard to the basic amount of the fine, SGL claimed that the Commission had breached the principles of proportionality and equal treatment in classifying the cartel participants into categories, based on market share increments of 10%, that took no account of the notable differences in their actual size. Noting, in particular, the detailed analysis undertaken by the General Court of the composition and limits of each category of undertakings, the Court of Justice rejected this claim and upheld the General Court's conclusions that this was not an unreasonable way of taking the relative importance of the undertakings into account.

LCL further alleged that the General Court had infringed the principle of equal treatment by refusing to grant LCL an additional reduction under the leniency notice, despite the fact that such a reduction had been granted to two competing companies. In particular, LCL claimed that the General Court failed to take sufficient account of LCL's close and constant co-operation with the Commission. On the latter point, although the Court of Justice explained that it did not have jurisdiction to reassess the General Court's analysis of the extent of LCL's cooperation, it nonetheless noted that LCL had itself acknowledged that its cooperation had been less valuable than the cooperation of other companies and that LCL had destroyed a number of documents regarding the period after 1999. The Court of Justice therefore rejected LCL's request for a more substantial leniency reduction.

Finally, the Court of Justice dismissed LCL's claim that the General Court had breached the principles of proportionality and equal treatment by refusing to grant LCL a reduction in its fine on grounds of serious financial difficulties, as it had done for SGL.

General Court – Judgments

Case T-58/01 *Solvay v. Commission*

On December 17, 2009, the General Court reduced the fines imposed by the Commission on Solvay as a result of its participation in a market sharing agreement and abuse of dominant position in the market for soda ash.

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The Commission had originally adopted two decisions in 1990. These decisions were annulled for procedural reasons in two judgments the General Court,[1] which the Court of Justice confirmed.[2] After curing the procedural irregularities, the Commission re-adopted its 1990 decisions on December 13, 2000 (the "2000 Decisions").[3]

The Court rejected Solvay's argument that the Commission needed to adopt a new Statement of Objections, hold a new oral hearing, and consult the Advisory Committee again, because the Commission was merely re-adopting its 1990 decisions.

In challenging the level of fines, Solvay argued that the Commission erred in its assessment of the gravity of the infringements. The Court clarified that, since the Commission merely re-adopted its original decisions, the relevant Commission fines policy that applied to the 2000 decisions was that in effect when the 1990 decisions were adopted. The Court considered that the Commission had correctly assessed the degree of severity of the infringements.

However, the Court accepted Solvay's arguments with respect to the duration of the market sharing infringement. The Court held that the evidence adduced by the Commission did not support the finding that the infringement persisted beyond 1989. Accordingly, the Court ordered the fine to be reduced by 25%.

Solvay further argued that the decision fining it for abuse of a dominant position was based on inadmissible evidence. The Commission seized the evidence during its on-site inspection on Solvay's premises. According to Solvay, the evidence was inadmissible because the Commission decision ordering the inspection referred only to suspicions of breach of Article 101 TFEU, ignoring any violation of Article 102. The Court recalled that Solvay's abused its dominant position within the framework of its contractual arrangements with its customers. These contractual arrangements were also under investigation for a suspected breach of Article 101. The Commission therefore seized the relevant documents legally. The Court opined that the Commission was not prevented from using these documents as evidence once it became clear that they also revealed violations of Article 102 TFEU.

The Court also rejected Solvay's challenge to the Commission's assessment of the abuse of its dominant position. The General Court held that the Commission was right in concluding that Solvay had abused its dominant position in the following circumstances:

- The Commission found that the price per ton for marginal quantities of soda ash purchased by Solvay's customers was lower than the average price paid for the quantities fixed contractually. The customers were thus incentivized to buy not only the contractual amounts from Solvay, but also any surplus requirements.
- The Saint-Gobain Group was promised a 1.5% rebate on its purchases across Europe irrespective of the actual purchase made by each specific Saint-Gobain subsidiary.
- The General Court recalled that exclusive supply agreements with costumers constitute an abuse of dominant position and rejected the argument that the Commission misunderstood these agreements.
- Different clauses in Solvay's supply agreements limited the customers' opportunity to change suppliers.
- Rebates and financial incentives offered by Solvay did not reflect differences in costs based on quantities supplied and were therefore discriminatory.

The Court accepted Solvay's argument that the Commission erred in increasing the fine for abuse on the basis of recidivism. The Court explained that the Commission may increase the fine where a party has already been sanctioned for "similar infringements". In this case the Commission took into account Solvay's earlier participation in several cartel cases. The Court held that these infringements were not "similar" to an abuse of dominant position. The Court accordingly ordered the fine to be reduced by 5%.

Case T-352/09 R, *Novácke chemické závody v. Commission*

On October 29, 2009, the President of the General Court issued an order dismissing the application to suspend the enforcement of the Commission decision fining Novácke chemické závody as a result of its participation in a cartel in the calcium carbide and magnesium sectors.

The Commission committed that it would not take any steps to enforce the fine as long as the case was pending, on the condition that a bank guarantee covering the principal debt and the interest was provided. Novácke filed for interim measures to suspend the enforcement of the fine.

1 Case T-31/91 *Solvay v Commission*, [1995] ECR II-1821 and Case T-32/91 *Solvay v Commission*, [1995] ECR II-1825.

2 Cases 287/95 P and 288/95 P *Commission v Solvay*, [2000] ECR I-2391.

3 Commission Decisions 2003/5/CE and 2003/6/CE of December 13, 2000.

The applicant invoked the principle of proportionality and equal treatment, the Commission's alleged failure to take into account the inability of the applicant to pay the fine, and an infringement of Article 3(1)(g) EC because the applicant's impending insolvency, due to the fine, would distort the relevant market. In claiming irreparable and serious harm, the applicant argued that the fine would cause the company to file for bankruptcy under Slovak insolvency law.

The Court dismissed the application as it failed to meet the urgency requirement for interim measures, without further looking into the existence of a prima facie case. The Court noted that the applicant lodged its petition for the commencement of insolvency proceedings in Slovakia two days after making its application for interim measures and without waiting for an answer to its application. The Slovak court declared the applicant insolvent on October 2, 2009, while the payment of the fine was due only later, on October 27, 2009. Therefore, the Court found that the harm, which was the object of the interim measures, had already occurred.

In addition, the Court noted that settled case law provides that suspension of the bank guarantee requirement (which obviates the need for full payment of the fine until the exhaustion of all appeal proceedings) can be declared only in "exceptional circumstances."

The Court also noted that the applicant failed to provide specific and precise information supported by detailed documentary evidence as to the financial situation of the parent company, which held 100% of the applicant's shares, beyond merely asserting that it did not have sufficient funds to provide the bank guarantee.

Commission decisions

Ship Classification

On October 14, 2009, the European Commission adopted a decision rendering legally binding the commitments offered by the International Association of Classification Societies (IACS) with respect to the market of classification services for merchant ships.[4]

The classification market includes a) establishing technical standards for ship construction, equipment, maintenance and inspection, supervision of plan design and construction, inspection and certification of ships against these standards ("classification work"), and b) undertaking surveys and issuing international compliance certificates against international statutory requirements set by maritime conventions ("statutory work").

On May 12, 2009, the Commission opened formal proceedings, and focused on IACS's potential failure i) to adopt objective and sufficiently clear membership criteria and to apply them in a non-discriminatory manner, and ii) to provide an adequate system for non-IACS parties to participate in the elaboration of, or to give access to, IACS's resolutions and related technical information, including independent complaint/grievance or appeal/review mechanisms.

Although IACS disagreed with the preliminary assessment, it committed to establish a single membership class and to adopt objective, transparent and non-discriminatory membership criteria for third party classification societies ("CSs"), such as: a demonstrated ability to develop, apply, maintain, publish classification rules in English of all aspects of the classification process; a demonstrated ability to provide surveys of ships under construction and periodic surveys of ships in service; a sufficient international coverage; extensive documented experience; significant in-house support stuff commensurate to third party's construction program and fleet in service; independence from clients; and compliance with IACS' Quality System Certification Scheme carried out by independent external Accredited Certification Bodies.

IACS also committed to set up and maintain a subscription-based, online forum on IACS's technical work programs open to comments and discussions between different CSs on IACS's work, coupled with an appeal mechanism to the Independent Appeal Board for parties that are denied access to the forum. All non-member CSs registered with the forum can participate in IACS working groups having access to the same information and opportunities to state its views as any IACS member, but with no voting rights. IACS will introduce a grievance and appeal mechanism to the Independent Appeal Board for any CS claiming denial of such rights.

Finally, IACS committed to make available publicly, simultaneously and in the same manner as they are made available to IACS members, all current and future versions of IACS's resolutions, and a historical file with the underlying discussions and any technical background document. CSs will be free to use such material, royalty free and without license, by embedding it in their own classification systems, notwithstanding any IP rights owned by IACS. No restrictions will be placed on members to enter into agreements with non-IACS members in relation to provision of further information. A decision not to publish an IACS resolution may be appealed. IACS will release, free of charge, a Common Structural Rules (CSR) Tracking Database as a search tool on CSR revision history and supporting materials.

4 Case COMP 39.416 – *Ship Classification*, Commission decision of October 14, 2009.

The Commission found that such commitments were proportionate and specific enough to alleviate its concerns and declined requests by third parties for more detailed arrangements.

VERTICAL RESTRAINTS

ECJ – Judgments

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

On October 6, 2009, the Court of Justice of the European Union confirmed the General Court's partial annulment of the Commission's decision that an agreement between GlaxoSmithKline ("GSK") and its authorized wholesalers in Spain infringed Article 101(1) TFEU because it put into effect a so-called dual-pricing system limiting parallel trade. Under the agreement, pharmaceutical products sold and dispensed in Spain were priced at a lower level than the same products destined for export to other Member States. The Court of Justice also upheld the General Court's finding that the Commission had failed to examine properly GSK's arguments when rejecting its request for an individual exemption of the agreement under Article 101(3) TFEU.

Contrary to the Commission's finding, the General Court had held that the object of limiting parallel trade was not, by itself, anticompetitive within the meaning of Article 101(1) TFEU. However, the General Court had upheld the Commission's finding of a violation of Article 101(1) TFEU on the basis that the agreement had an anticompetitive effect. GSK's contested this last finding before the Court of Justice. The Commission also filed an appeal claiming that the General Court had incorrectly interpreted and applied the concept of anticompetitive object within the meaning of Article 101(1) TFEU by finding that the objective of limiting parallel trade did not by itself equate to an anticompetitive object.

The Court of Justice found that agreements aimed at prohibiting or limiting parallel trade are anticompetitive by object, without requiring the demonstration of a detrimental effect on end-customers. It held that the General Court had erred in law by requiring additional proof that GSK's agreement with its Spanish wholesalers had a detrimental effect on end-customers as a prerequisite to finding a violation of Article 101(1) TFEU.

Concerning the General Court's finding that the Commission had failed to examine properly GSK's arguments when rejecting the company's request for an individual exemption of the agreement under Article 101(3) TFEU, the Court of Justice confirmed that an undertaking relying on Article 101(3) TFEU must demonstrate that the conditions for obtaining an exemption are satisfied, and that the Commission must respond with sufficiently reasoned explanations to convincing arguments and evidence put forward by the undertaking. Should the Commission fail to do so, it may be concluded that the undertaking's burden of proof has been discharged. The Court of Justice also upheld the General Court's finding that the Commission had failed to take into account certain arguments and evidence advanced by GSK in its request, particularly as regards the specific structural features of the pharmaceutical sector and the purported efficiency gains produced by the contested agreement. The Court of Justice therefore upheld the General Court's finding that these omissions effectively vitiated the Commission's examination of the company's request for exemption under Article 101(3) TFEU.

ABUSE OF DOMINANT POSITION

Commission decisions

EFIM complaint against manufacturers of inkjet printers and printer suppliers

On May 20, 2009, the European Commission rejected a complaint by EFIM against various manufacturers of inkjet printers and printer suppliers, including Hewlett Packard, Lexmark, Epson, and Canon.[5] EFIM alleged that these companies had infringed Articles 101 TFEU and 102 TFEU by illegally excluding inkjet cartridge manufacturers such as Pelikan from their inkjet cartridge aftermarkets. The Commission dismissed EFIM's Article 101 TFEU claim as lacking sufficient supporting evidence. The Commission also concluded that further investigation of EFIM's Article 102 TFEU claims would be disproportionate in light of the complexity of the required investigation and the limited likelihood of establishing an infringement.

EFIM's Article 102 TFEU claim alleged that Hewlett Packard, Lexmark, Epson and Cannon had achieved and abused their dominant positions in the printer consumables market through patenting strategies, the use of microchips, and the use of recollection programs to limit the supply of empty cartridges. According to EFIM, these strategies were designed to exclude third party cartridge (re-)manufacturers from the printer manufacturers' inkjet cartridge aftermarkets. EFIM requested that the four printer manufacturers be required to provide EFIM with information regarding the intellectual

5 Commission letter rejecting EFIM complaint, May 20, 2009, http://ec.europa.eu/competition/antitrust/cases/decisions/39391/en.pdf.

property rights protecting ink cartridges or, in the alternative, to license these intellectual property rights in order that EFIM might gain access the inkjet cartridge market.

The Commission's analysis of EFIM's allegations recalled the principles applied in the *Pelikan/Kyocera*[6] and *Info-Lab Ricoh*[7] cases. In *Pelikan/Kyocera*, Pelikan claimed that Kyocera was dominant on the market for Kyocera-compatible toner consumables even though Kyocera had no significant market power in the relevant printer market. In rejecting Pelikan's claim, the Commission concluded that the printer market and the consumables market were interrelated in such a way that competition in the printer market (the primary market) resulted in effective discipline in the consumables market (the secondary market). In particular, the Commission noted that: (i) consumers were able to make an informed choice including life-cycle pricing; (ii) consumers were likely to make an informed choice on this basis; (iii) a sufficient number of customers would alter their purchasing behavior in the primary market in the event of an apparent policy of exploitation in the secondary market; and (iv) consumers would do so within a reasonable time.

Applying the same criteria in *Info-Lab/Ricoh*, the Commission found that, like printer customers, photocopier consumers engage in life-cycle pricing, make informed choices between competing photocopiers based on price per copy, and new customers would adapt their purchasing behavior within a reasonable timeframe in response to perceived exploitation in the toner aftermarket. The Commission therefore concluded that competition in the primary photocopier market constrained Ricoh's conduct in the secondary market for toners. Thus, even though Ricoh was the sole supplier of toners compatible with its photocopiers, the Commission found that it did not have a dominant position and thus could not be required to supply empty toner cartridges.

Adopting the same analytical approach in the present case, the Commission first considered whether Hewlett Packard, Lexmark, Epson and Cannon hold dominant positions in the primary printer market. Based on market share information and evidence of the recent entry of Kodak's "EasyShare" inkjet printers, the Commission concluded that none of the four printer manufacturers is dominant in the primary market for printers.

The Commission then considered whether Hewlett Packard, Lexmark, Epson or Cannon are dominant in their respective aftermarkets for printer consumables. In particular, the Commission considered evidence produced by EFIM itself, that printer consumers make life-cycle cost comparisons based on printer manufacturers' published price per page information. Applying the *Pelikan/Kyocera* criteria, the Commission concluded that the primary market and brand-specific aftermarkets for printer cartridges are closely linked, suggesting that printer manufacturers cannot be considered dominant in their respective aftermarkets for branded consumables.

EFIM responded that the Commission was incorrect in following the *Pelikan/Kyocera* approach. However, as EFIM failed to present arguments or evidence to substantiate this claim, and given the complexity of establishing a refusal to supply abuse, the Commission held that there was insufficient Union interest for conducting a further investigation of EFIM's complaint. EFIM has lodged an appeal against the Commission's decision at the General Court.[8]

The Commission's rejection of the EFIM complaint confirms the continued relevance of the *Pelikan/Kyocera* criteria as a framework within which the Commission will assess the extent to which competition in the primary market constitutes and effective restraint on a relevant aftermarket.

GDF Suez

On December 3, 2009, the Commission adopted a decision under Article 9 of Regulation 1/2003 rendering legally binding commitments offered by the French energy company GDF Suez ("GDF") to boost competition on the French gas market.[9]

In May 2006, the Commission launched an investigation into the French energy market, conducting surprise investigations at the offices of gas companies located in Germany, Italy, France, Belgium and Austria.[10] The investigations resulted from the conclusions of the

6 Rejection of complaint *Pelikan/Kyocera*, XXVth Report on Competition Policy (1995), pp. 41-44, 140.

7 *Info-Lab/Ricoh*, Competition Policy Newsletter, No. 1, February 1999, pp. 35-37.

8 Case T-396/09 *EFIM v. Commission*, OJ 2009 C 256/27.

9 See Press Release IP/09/1872, Antitrust: Commission accepts commitments by GDF Suez to boost competition in French Market, December 3, 2010, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1872.

10 See Press Release MEMO/06/205, Antitrust: Commission has carried out inspections in the EU gas sector in five Member States, May 17, 2006, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/205.

Commission's energy sector inquiry, which identified serious competitive distortions on the EEA energy market.[11] The Commission opened formal proceedings against GDF in May 2008.[12] The Commission's investigation focused on concerns that GDF had abused its dominant market position by foreclosing competitors from access to gas import capacity into France, thereby restricting competition on downstream supply markets for natural gas in France. In particular, the Commission's investigation examined allegations that GDF had reserved long-term transport capacity to itself to the exclusion of rivals; implemented a network of restrictive import agreements; and anti-competitively limited its investment in import infrastructure capacity. Without adequate access to the network of gas transmission pipelines and liquefied natural gas terminals, new entrants into national gas markets would be restricted in their ability to compete with incumbents.

In response to the Commission's concerns, GDF offered a set of commitments that provided for a substantial restructuring of its long-term reservations on French gas import infrastructure capacity. GDF undertook to release approximately 10% of its total long-term reservations of gas import capacity into France by 2011, and to reduce its long-term reservations of capacity to less than 50% by 2014. Specifically, the commitments require GDF to make available existing and future long-term capacity (*i.e.*, capacity that can be reserved with a notice period of six months or more) in favor of third-party shippers on both the gas transmission network and LNG terminals. The capacity will be made available at several gas network entry points located in Belgium, northern France, and Germany.

In July 2009, the Commission submitted the proposed commitments to market testing, working closely with the French energy regulator to assess the feasibility and likely practical effect of GDF's proposals. The feedback provided by interested parties as part of the market test was reflected in the final commitments package offered by GDF.

The Commission considered that the commitments entered into by GDF Suez would provide an opportunity for competitors to enter the French gas market, offering consumers a greater choice of gas supplier and more competitive prices. The Commission hopes that by facilitating access to gas import infrastructure and promoting competition in the sector, the commitments will contribute to the evolution of an integrated single European energy market with lower prices and improved security of supply.

Microsoft's Browser

On December 16, 2009, the European Commission announced concessions by Microsoft in two investigations relating to alleged abuses of Microsoft's dominant position in PC operating systems designed to exclude competing products in web browsers, server software, and personal productivity applications.[13] Microsoft undertook to provide all Windows users with a choice of web browsers (the "Browser Commitment"), and to make interoperability information available (and license associated patents) for a range of server products including email and collaboration servers, Microsoft Office, and Microsoft.NET, as well as to comply with certain obligations with respect to Open Standards ("the Interoperability Undertaking").[14]

In January 2008, the Commission opened two investigations into allegations of anticompetitive conduct against Microsoft.[15] One of these investigations was triggered by a complaint filed by the European Committee for Interoperable Systems ("ECIS") alleging that Microsoft failed to disclose interoperability information across a range of software products, including its Office suite and server software, and in relation to the Microsoft .NET Framework. The other investigation concerned a complaint by the Norwegian browser developer Opera relating to Microsoft's tying of its Internet browser "Internet Explorer" ("IE") to Windows.[16]

Concerning the Browser Commitment, the Commission set out its preliminary conclusion in the statement of objections that Microsoft

11 Although knowledge acquired by the Commission during the sector inquiry informed the Commission's investigation of GDF, the investigation of GDF was not part of the sector inquiry. The final report of the sector inquiry was published on January 10, 2007, and identified a number of competitive distortions in the EEA energy market, including: high levels of market concentration; vertical integration of supply, generation and infrastructure leading to a lack of equal access to, and insufficient investment in infrastructure; and possible collusion between incumbent operators to share markets. See Press Release IP/07/26, Competition: Commission energy sector inquiry confirms serious competition problems, January 10, 2007, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/26; See Press Release MEMO/06/205, Energy sector competition inquiry – final report – frequently asked questions and graphics, January 10, 2007, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/15.

12 See Press Release MEMO/08/328, Commission opens formal proceedings against Gaz de France concerning suspected gas supply restriction, May 22, 2008, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/328.

13 See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1941&format=HTML&aged=0&language=EN&guiLanguage=en.

14 The full text of both documents can be found on the Microsoft website, http://www.microsoft.com/Presspass/press/2009/dec09/12-16Statement.mspx.

15 See http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19. The investigation also covered allegations of tying of other separate software products by Microsoft, including desktop search and Windows Live, but these elements were resolved informally.

16 These complaints were presented against a background of allegations that Microsoft had previously engaged in a series of related exclusionary practices to protect its Windows and Office monopolies against competition. See ECIS paper, *Microsoft - A History of Anticompetitive Behavior and Consumer Harm*, March 31, 2009, http://www.ecis.eu/documents/Finalversion_Consumerchoicepaper.pdf.

had abused a dominant position on the market for client PC operating systems ("OSs") by tying IE to Windows to exclude rival browsers and thereby maintain its client PC OS platform monopoly. A tying case requires the Commission to establish: (1) the existence of separate tied and tying product (2) the dominance of the undertaking on the tying market; (3) coercion; (4) foreclosure on the tied market or strategic competitive effects on another relevant market; and (5) the absence of an objective justification for the tying practice.

The Commission determined that client PC OSs and browsers were separate products, since there was independent demand and supply for the stand-alone tied product. Indeed, IE started as a browser developed by a third-party software company called Spyglass. Similarly, a number of web browser developers offer browsers independently of OSs, such as Opera, the Mozilla foundation ("Mozilla"), and Google. Microsoft itself continues to make IE available for download independently of the version of Windows run by the user. The Commission also found that Microsoft held a dominant position on the market for client PC OSs, with a near-monopoly market share in excess of 90%. Microsoft argued that since IE was supplied for free with Windows, Original Equipment Manufacturers ("OEMs") and users were not coerced to take IE. However, Microsoft's licensing model forced OEMs to license Windows with IE pre-installed, and it was technically impossible for OEMs to uninstall IE. OEMs could therefore only install an alternative browser in addition to, and not in place of, IE. Moreover, Microsoft charged OEMs and end-users a single price that included both Windows and IE. It was therefore misleading to suggest that IE was made available for "free."[17]

The Commission found that the tie likely to harm competition in the browser market, and to reinforce Microsoft's dominance in the market for OSs. In relation to the foreclosure of rival browsers, the Commission made three key findings:

- By pre-installing IE with Windows, IE benefited from a ubiquity on users' desktops that other browsers could not match. Moreover, the pre-installation of IE discouraged OEMs from installing an additional browser, since the additional browser would raise OEMs' support and testing costs, while offering similar basic functionality to the pre-installed IE. This made it harder for rival browsers to strike pre-installation deals with OEMs. The Commission found evidence showing that while users could download alternative browsers, this was a less effective distribution channel for browser vendors than pre-installation. In particular, research costs associated with selecting an additional browser, the perceived complexity of downloading and installing, and security warnings with which users were presented by Windows during the download process, were all likely to deter users from downloading an additional browser.

- The Commission noted that, in the late 1990s, the Netscape Navigator browser was eliminated from the market despite its technical superiority. Following the elimination of Netscape, Microsoft halted development of IE for almost five years. Today, industry magazines almost uniformly espouse the superiority of alternative browsers such as Mozilla Firefox, Google Chrome, and Opera. Yet, despite IE's five year innovation lag and despite the overwhelming recognition of the superiority of other browsers, IE still accounts for more than 60% of usage share. The Commission concluded that IE had not achieved and retained its substantial market share through competition on the merits, but due to the tie with Windows, which guaranteed ubiquity for IE on users' desktops. This allowed IE to obtain and maintain significant market share despite the availability of superior solutions from alternative browser vendors.

- On the basis of evidence from third parties and the Commission's technical experts, TAEUS, the Commission determined that the tie had generated indirect network effects likely to raise developers' costs and hold back the evolution of online content and applications. Many content providers and software developers operating under cost constraints write first and foremost for the most widely used browser, since this will assure the widest and most cost-effective exposure of their products. Due to IE's unmatched ubiquity, providers and developers know that all or almost all potential users have IE and are likely to run it. Moreover, since IE uses Microsoft proprietary formats and is the least compliant of the major browsers with industry-wide standards (*i.e.*, technologies used by developers to create and interpret web-based content), content providers incur additional development and testing costs if they wish to recode their offerings to run on more standard-compliant rival browsers. The Commission found that IE's entrenchment was particularly pronounced in the enterprise sector, where network restrictions prevent employees from downloading rival browsers that are superior to IE, and "*changing the web browser would require* [the network administrator] *modifying to a certain extent the source code of all internal applications that are specifically designed for use with Internet Explorer.*"[18] Indeed, strikingly, in the enterprise sector,

17 See also Case T-30/89, *Hilti v Commission* [1991] ECR II-1439; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, ¶¶ 970-71.

18 Commission's Statement of Objections, ¶ 345.

version 6 of IE (which was released in 2001) still commands the largest usage share of all browsers, even though Microsoft itself recognizes the browser's security vulnerabilities and strongly recommends that users upgrade to a newer version of IE.

Concerning platform foreclosure, in addition to its findings in relation to the foreclosure of rival browsers, the Commission concluded that the tie reinforced Microsoft's dominance in client PC OS. Browsers represent the user-side gateway to the Internet. The Internet is increasingly developing from a collection of static websites to a platform for dynamic content and fully-fledged applications that run "in the cloud," such as word processors or spreadsheet programs. Users can access and run such Internet-based applications through their browsers independently of a particular PC OS. This has the potential to increase competition in PC OSs by reducing software compatibility barriers that protect Microsoft's Windows monopoly. As noted by the Commission, both industry commentators and Microsoft personnel have suggested that the development of such rich Internet applications may ultimately marginalise the OS. For example, in a 1995 internal memo, the then Microsoft CEO Bill Gates worried that competitors could exploit browsers to: "*move the key API into the client to commoditize the underlying operating system.*"[19]

The Commission rejected Microsoft's argument that the tie was objectively justified by distribution and technical efficiencies. Indeed, internal Microsoft documents evidenced that Microsoft's tie was motivated by the competitive threat posed by browsers rather than any possible efficiency considerations. The Commission also noted that while Microsoft was correct to suggest that users will in general wish to have both an OS and a browser pre-installed on their PCs, it was not for Microsoft to determine on the user's behalf that the browser should be IE.

In the 2004 Windows Media Player case, the Commission required Microsoft to make available bundled and unbundled versions of Windows. The Statement of Objections in the browser case acknowledged that this remedy had proved ineffective, in part because of the extended period over which Microsoft had kept the tie in place, which had allowed Microsoft to generate indirect network effects that entrenched Windows Media Player. The tie in the browser case spanned an even longer period. Moreover, because Microsoft had progressively commingled OS and browser code over the last decade, removal of the IE code from Windows would have presented substantial practical difficulties. The Commission therefore developed a solution that would restore an undistorted competitive playing field in browsers without necessitating IE code removal. The principal objective of the Commission's solution is to address the distorting effects of IE's ubiquity by creating a greater opportunity for rival browsers to gain access to the user's desktop.[20] This is achieved through the following means:

Windows will present users with a screen (the "Choice Screen") listing the top five browsers with the highest EEA usage share (currently, Apple Safari, Google Chrome, IE, Mozilla Firefox and Opera). The Choice Screen will include the icons of the top five browsers in a random order and provide a short description of each browser. Users will also have the option to view additional browsers by scrolling right on the screen. From mid-March 2010, the Choice Screen will be made available via the Windows Update mechanism to both new and existing users of Windows in the EEA. Users will be able to download and install additional browsers by clicking on an "install" button that will link to the browser vendor's distribution server.

The Browser Commitment expressly provides that OEMs are free to install competing web browsers instead of or in addition to IE, set those as the default browser, and disable the IE user interface on the desktop. The end user is also able to disable the IE user interface. Moreover, Microsoft is precluded from retaliating against OEMs that support other browsers, although Microsoft retains the ability to provide OEMs with incentives to promote IE, within the limits of proportionality. Finally, a general anti-circumvention clause precludes Microsoft from attempting to circumvent the terms of the Browser Commitment. The Commission will review the implementation and effect of the Choice Screen after six months.

Concerning the interoperability undertaking, the Commission publicly stressed the importance of standards and interoperability for competitive technology markets: "*Interoperability encourages competition on the merits between technologies from different companies, and helps prevent lock-in. Standards are the foundation of interoperability.*"[21] In 2007, the General Court confirmed that dominant companies may in exceptional cases have a duty to

19 Bill Gates, "Internet Tidal Wave" memo, presented as Exhibit 20, *US v. Microsoft*, at http://www.justice.gov/atr/cases/exhibits/20.pdf. "API" refers to application programming interfaces. Browsers and OSs expose API, which software applications call upon to request the OS or browser to perform tasks on their behalf. Through the API, software applications running on different platforms or written in different languages are able to interoperate.

20 Answers to frequently asked questions on the Browser Commitment are available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/558&format=HTML&aged=0&language=EN&guiLanguage=en. The Commission has also provided a short guide to the Browser Commitment for users, at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/559&format=HTML&aged=0&language=EN&guiLanguage=en.

21 Neelie Kroes, *Being open about standards*, Speech to OpenForum Europe, Brussels, June 10, 2008, at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/317&format=HTML&aged=0&language=EN&guiLanguage=en.

disclose interoperability information where their refusal to do so could stifle innovation and lock consumers into the dominant undertaking's proprietary offerings.[22]

Against this background, the Commission launched an investigation into a complaint by ECIS that Microsoft had illegally refused to disclose interoperability information across its most widely used desktop software products, and that Microsoft intended to exploit its "*interlocking Windows and Office monopolies*" to "*supplant industry-wide open standards with proprietary de facto standards that can then be manipulated to restrict competition.*"[23] Although no Statement of Objections was issued in the interoperability case, Microsoft nevertheless proposed a set of binding undertakings intended to remedy the concerns identified by ECIS in its complaint.[24]

The Interoperability Undertaking applies to Windows PC client, Windows Server, Office, Exchange and SharePoint products. The Guiding Principles of the Interoperability Undertaking provide that Microsoft shall ensure that third-party software products can interoperate with these Microsoft products "*using the same interoperability information on an equal footing*" as Microsoft's own software products. Microsoft also pledges to "*support open, public standards,*" although its promise stops short of supporting future standards relevant to the software products covered by the Interoperability Undertaking. To enable interoperability and allow verification of Microsoft's compliance with standards, the Interoperability Undertaking requires Microsoft to provide third parties with access to architectural overview information as well as the test tools that Microsoft uses to verify the interoperability of Microsoft Software Products, which under the 2004 Decision had not been made available for workgroup servers. The provision of adequate test suites and architectural overview documents is crucial for these disclosures to be of practical utility.[25]

Monitoring faithful implementation of and compliance with the Interoperability Undertaking is critical to its success. The Commission did not, however, press Microsoft to agree to appoint a third party to oversee the implementation of the Interoperability Undertaking (or the Browser Commitment).[26] There is instead express provision that the full strength of EU competition law will remain at the Commission's disposal in the event that Microsoft should breach the terms of the Interoperability Undertaking. To enable effective public enforcement of the Interoperability Undertaking, the Commission will keep the proceedings open pending implementation of the terms of the Interoperability Undertaking. In addition, the Interoperability Undertaking provides that Microsoft will offer a warranty agreement guaranteeing the completeness and correctness of the disclosed interoperability information, which can be privately enforced either in court or in arbitration.[27]

The Interoperability Undertaking contains a template patent license, setting out standard terms and royalties for interoperability information covered by the Interoperability Undertaking that is patent-protected.[28] The Interoperability Undertaking provides that access to and use of the interoperability information shall be subject to no more than a nominal upfront fee, and that terms will be compatible with open source licenses. Whether the patent license agreement is compatible with the terms of "GPL3", the most recent model of the general public software license used by the open source developer community, will require further analysis.

MERGERS & ACQUISITIONS

Commission decisions

Electrabel

On June 10, 2009, the European Commission fined Electrabel €20 million for implementing a concentration without first notifying it to the Commission. This was the largest fine ever for failing to notify a transaction.

On December 23, 2003, Electrabel increased its shareholding in Compagnie Nationale du Rhône ("CNR"), thereby increasing its shareholding in CNR's capital to 49.95% and its voting rights to 47.92%. Prior to the transaction (on July 24, 2003) Electrabel had entered into a shareholding agreement with CDC, which is CNR's second-largest shareholder (with a capital ownership of 29.43% and 29.80% of CNR's voting rights). According to the Commission, its well-established decision-making practice clearly indicated that, through its increased shareholding of CNR, Electrabel had acquired *de facto* sole control of CNR, according to the terms of the former

22 Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, ¶ 782.

23 See ECIS, *What is the new European Commission Microsoft investigation about?*, at http://www.ecis.eu/news/documents/BackgrounderJanuary2008.pdf.

24 The full text is available at http://www.microsoft.com/presspass/presskits/eu-msft/docs/MicrosoftInteroperabilityUndertaking16Dec2009.doc.

25 See, *e.g.*, Rob Weir, *Anatomy of Interoperability* (2007), at http://www.robweir.com/blog/2007/02/anatomy-of-interoperability.html.

26 The 2007 *Microsoft* judgment raised doubts as to whether the Commission could impose a trustee on Microsoft, although it was argued that since an interoperability undertaking is a consensual arrangement, it can provide for Trustee overview on a voluntary basis.

27 See, http://www.microsoft.com/presspass/presskits/eu-msft/docs/AnnexA%20WarrantyAgreement16Dec2009.doc.

28 See, http://www.microsoft.com/presspass/presskits/eu-msft/docs/AnnexB1%20TemplateInteroperabilityPatentLicense16Dec2009.doc.

Merger Regulation. Through an analysis of shareholding voting patterns between 2003 and 2007, in conjunction with the fact that Electrabel effectively appointed two out of three members of the Management Board, the Commission found that Electrabel exercised *de facto* sole control over CNR from December 23, 2003. In addition, the Commission cited that, in a draft Form CO filing, Electrabel conceded it had acquired sole control of CNR in 2004.

In its defense, Electrabel pointed to the existence of a law that prevented a private operator from holding more than 50% of the capital or voting rights in CNR (the "Murcef Law"). The Commission responded that this law merely prevented the acquisition of *de jure* control over CNR.

In setting the fine, the Commission held that the failure to notify a concentration was a breach of one of the "*cornerstones of Community merger control.*" The fact that the transaction did not have an anticompetitive effect was, according to the Commission, irrelevant in determining the seriousness of the infringement. According to the Commission, the failure to notify a transaction "*affects the very principle of ex ante control [of notifiable transactions], which is essential if the Commission is to fulfill its mission.*" However, in determining the size of the fine, the Commission took into consideration the lack of anticompetitive effects associated to the transaction. In addition, the Commission concluded that a company of the size of Electrabel, with "*vast resources and significant previous experience of Community merger control*" must have known that the transaction was notifiable. As a mitigating circumstance, the Commission considered the fact that Electrabel had contacted the Commission on its own initiative.

The significant size of the fine underlines the importance of a detailed assessment on the notifiability of a contemplated transaction at a Community level. In addition, the fact that this transaction affected the European energy sector, which has recently been subject to a Sector Inquiry and the imposition of large fines for alleged violations of Article 101 TFEU,[29] may have been a factor in the size of the fine imposed on Electrabel.

Second-phase decisions with Undertakings

Lufthansa/Brussels Airlines

On June 22, 2009, the European Commission cleared the merger between Lufthansa and SN Airholding ("Brussels Airlines"), subject to commitments. This transaction illustrates the recent trend of consolidation in the aviation industry. This decision also underlines the Commission's demanding approach with regard to the remedies required for regulatory clearance in the airline industry.

In accordance with its well-established decisional practice, in defining the relevant market the Commission used the "point of origin/point of destination" (O&D) city-pair approach. According to this methodology, every combination of a city of origin and a city of destination is considered to be a separate product market. In order to assess the competitive effects of the transaction, airport substitutability was considered by the Commission on an airport-by-airport basis to determine which airports should be included in the respective points of origin and points of destination markets. In addition, the Commission distinguished between (1) time-sensitive and non-time-sensitive passengers; and (2) ticket types reflecting this distinction. However, the Commission did not find it necessary to reach a conclusion as to the existence of separate markets for these two groups of passengers because its competitive assessment of the transaction did not require taking a firm position regarding the existence of such a distinction.

The Commission's review of the transaction established that the merger would significantly impede effective competition on four routes: (1) Brussels-Frankfurt; (2) Brussels-Munich; (3) Brussels-Hamburg; and (4) Brussels-Zurich. The existence of significant entry barriers on these routes (*e.g.*, slot constraints and hub/base advantages) meant that entry was unlikely. The efficiencies associated with the transaction were found not to be verifiable, not merger-specific, and not capable of remedying the anticompetitive impact of the proposed merger.

After the rejection of an initial set of remedies submitted in January 2009, Lufthansa submitted a more comprehensive remedy package. This set of remedies included a slot allocation mechanism that would allow new entrants to operate flights on each of the four routes identified by the Commission as being adversely affected by the transaction. The new entrant would also obtain grandfather rights over the slots, allowing it to use the slots for different city pairs once it had operated the relevant pair for a certain period. Ancillary remedies such as prorate and code-sharing agreements, interlining and intermodal agreements, and frequent flyer program access agreements were also included in the remedy package. The Commission accepted that the remedies offered by the parties were sufficient as they were likely to lead to timely entry on the problematic routes by one or several airlines.

29 See Commission Press Release IP/09/1099 of July 8, 2009: "Commission fines E.ON and GDF Suez €553 million each for market-sharing in French and German gas markets."

First-phase decisions with Undertakings

Pfizer/Wyeth

On July 17, 2009, the European Commission conditionally approved the merger between Pfizer and Wyeth.

The proposed transaction concerned a large number of markets in the sectors of human health and an even greater number of markets regarding animal health. In the area of human health, the companies' activities were largely complementary and the merger was found not to significantly impede effective competition in any of the markets affected by the transaction. However, in the animal health sector, the Commission identified a number of antitrust concerns that stemmed from the parties' high post-transaction market shares. The Commission's concerns related to potentially anticompetitive effects of the transaction in vaccines, pharmaceuticals, and medicinal feed additives.

In order to address the Commission's concerns, Pfizer proposed to divest products for each of the markets for which the Commission identified serious antitrust concerns, including a manufacturing plant in the vaccines sector. Among the modifications to the original set of remedies proposed was the extension of the scope of the vaccines divested. Instead of divesting vaccines present on the national markets identified by the Commission as being adversely affected by the transaction, the Parties were obliged to divest these products on an EEA-wide basis so as to ensure the viability of the remedies in question.

First-phase decisions without Undertakings

Sony/Seiko Epson

On September 22, 2009, the European Commission cleared Sony's acquisition of Seiko Epson's small and medium-sized TFT-LCD (Thin-Film Technology Liquid Crystal Display) business. The decision is an interesting example of the Commission examining a highly innovative and rapidly evolving product market.

The Commission's decision tested the product market definitions proposed by the parties against its conclusions in two previous decisions, where the Commission reached the conclusion that there were three possible segmentations for the TFT LCD market: (1) screen size; (2) technology used; and (3) end-use application.[30] The Commission's investigation supported the parties' contention that a segmentation by screen size was appropriate. The Commission concluded that despite evidence of separate market dynamics for small and medium-sized and large LCD screen sizes, defining the precise size threshold for the segmentation was more difficult to establish.[31] The parties submitted that it was not possible to segment the market according to the technology used to produce the displays since, among other things, customers did not specify such details and most manufacturers are able to supply all technologies. The majority of the respondents to the Commission's market investigation supported the parties' submission. The Commission nevertheless concluded that a segmentation by technology could not be excluded and left the matter open.[32] Finally, the parties submitted that the standardization of LCD displays prevented the market from being segmented by end-use application. While most respondents to the Commission's investigation supported this view, some identified specialized end-use applications *(i.e.*, cameras) where customization of LCD glass prevents significant substitution, and where suppliers are differentiated. The Commission left open the question of whether the market could be segmented by end-use application.

The Commission's review of the parties' relative positions in the overlap markets established that the parties' combined share would be below 20% in the worldwide markets for small and medium-sized displays and for small and medium-sized TFT-LCD displays, and that the combined entity would face competition both from two larger competitors and others. In the narrow market for small and medium-sized TFT-LCD displays for digital video cameras and digital still cameras, the parties' had a combined market share of 40-50% and 20-30%. The Commission's investigation found that despite having the largest share in these narrow markets, the combined entity would still face strong competition, that switching by buyers is easy and inexpensive, that buyers are large and sophisticated, and that barriers to entry for manufacturers already active in other small and medium-sized TFT-LCD display applications were low.

Merck/Schering-Plough

On October 22, 2009, the European Commission cleared Merck's merger with Schering-Plough.[33] Merck and Schering-Plough operated largely complementary human health pharmaceutical businesses. Prior to the notification of the transaction, Merck sold its 50% share in Merial, an animal health joint venture, to its JV partner, sanofi

30 Case M.3459 – Seiko Epson/Sany/Santo Epson Imaging Devices JV and Case M.5414 – Samsung SDI/Samsung Electronics/SMD.

31 Case M.5589 – Sony/Seiko Epson, para. 23.

32 Ibid.

33 See also Case M.5476 – Pfizer/Wyeth.

aventis,[34] in order to avoid potential delays in the clearance of the transaction that could have resulted from competition issues in the animal health sector. Merck's agreement with sanofi aventis provided sanofi aventis with a call option requiring Merck to merge Schering-Plough's animal health business, Intervet, with Merial, to be exercised within a certain time after completion of the Merck/Schering-Plough merger.

The parties' human health businesses overlapped most significantly in treatments for allergic rhinitis. The Commission's investigation found that in a number of countries, depending upon the product market definition, Schering-Plough drugs enjoyed a significant and leading position while Merck sold products accounting for up to a 10% share by value. The Commission conducted an extensive investigation of these markets, including surveying doctors about their prescription habits and tendencies.[35] The Commission took note, however, of the modest increment that Merck's products represented, and observed that if the market were assessed by volume instead of value the effect would be to reduce Merck's share to less than 5% in all cases. The Commission also noted the lack of close competition between Merck and Schering-Plough's respective allergic rhinitis products, considering differences in cost (Merck's product is significantly more expensive) and approved indication (in most countries Merck's product was only indicated for allergic rhinitis in asthma patients, unlike Schering-Plough's product).

STATE AID

General Court – Judgments

Case T-156/06 *Électricité de France (EDF) v. Commission*

On December 15, 2009, the General Court annulled a Commission decision declaring that certain measures implemented by the French State in favor of Electricité de France ("EDF") constituted State aid incompatible with the common market.

In October 2002, the Commission initiated an in-depth investigation under Article 108(2) TFEU to determine whether the tax-free reclassification of unused provisions created for the renewal of the French electricity transmission network as capital in EDF's balance sheet (which resulted in a €888.89 million tax advantage for EDF) amounted to illegal State aid. In December 2003, the Commission adopted the contested decision, which concluded that the tax advantage granted to EDF by the French State, EDF's sole shareholder at the relevant time, constituted State aid incompatible with the common market and ordered the French State to take the necessary steps to recover the illegal aid from EDF. On appeal, EDF, supported by the French State, submitted, *inter alia*, that the measure in question constituted a lawful capital injection by the French State in its quality of EDF's sole shareholder in an amount equivalent to the tax exemption.

The General Court recalled the well-established case law according to which any capital placed directly or indirectly at the disposal of an undertaking by the state constitutes state aid only if a market economy investor would not have made such capital available. This is the so-called market economy investor principle. In this case, the private investor test consisted in establishing whether the public intervention in the capital of EDF had an economic objective that might also be pursued by a private investor and was thus undertaken by the State in its role as an economic operator, in the same way as a private operator, or whether, on the other hand, it was justified by the pursuit of a public interest objective and must be regarded as action taken by the State in the exercise of its authority as a State.

The General Court further noted that, in order to determine whether measures taken by the State represented the exercise of State authority or whether they were the consequence of obligations that the State must assume as shareholder, it is important to look not at the form of those measures, but at their nature, and that the fact that the State has access to financial resources accrued through the exercise of State authority is not in itself sufficient justification for regarding the State's actions as attributable to the exercise of State authority.

In the circumstances of the present case, in which, the French State was both the fiscal creditor of a public undertaking and its sole shareholder, the General Court held that the restructuring of EDF's balance sheet and the capital injection it received had to be analyzed as a whole and that the fact that the capital derived in part from a fiscal debt did not preclude the measure from being examined in the light of the private investor test. The General Court concluded that, by refusing to examine the contested measures in their context and to apply the private investor test, the Commission erred in law and annulled the Commission decision.

34 Case M.5414 – Sanofi-Aventis/Merial.

35 Case M.5502 – *Merck/Shering-Plough*, para. 46.

POLICY AND PROCEDURE

Commission

World Anti-Doping Agency, the ATP Tour Inc., and the International Council of Arbitration for Sport

On October 12, 2009, the European Commission rejected a complaint by a professional tennis player alleging that the World Anti-Doping Agency ("WADA"), ATP Tour, Inc. ("ATP"), and the International Council of Arbitration for Sport ("ICAS") had violated Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") (formerly Articles 81 and 82 of the EC Treaty).[36] According to the Commission, the complaint lacked sufficient Union interest to justify further investigation. In particular, the Commission noted that an in-depth investigation would be disproportionate given the limited likelihood of establishing an infringement.

The complainant was banned from the ATP Tour for two years,[37] as a result of a positive test for hydrochlorothiazide (HCT).[38] The complainant alleged that WADA, ATP and ICAS, independently and collectively, violated Articles 101 and 102 TFEU by imposing anti-doping regulations that are disproportionate and that make no allowance for cases where prohibited substances are absorbed accidentally. In particular, the complaint alleged that the anti-doping regulations breach Article 101 TFEU by: a) failing to distinguish between performance-enhancing and performance-limiting substances (such as diuretics); b) imposing a year-long ban irrespective of the effect of the offending substance and intent of the athlete; c) imposing illegitimate penalties in cases where an athlete has already been handicapped by absorbing performance-limiting substances; d) imposing disproportionate sanctions in the absence of intent; and e) imposing an arbitration clause that prevents players from challenging anti-doping rules before national courts.

Recalling the Court of Justice's judgment in *Meca-Medina*,[39] the Commission noted that while anti-doping rules may be considered to be a decision of an association of enterprises that limits the freedom of action of athletes, they are objectively justified by the need to prevent doping in sport and do not necessarily constitute a restriction of competition that is incompatible with Article 101 TFEU. Having examined the facts of the present complaint, the Commission concluded that there was no evidence to support the allegations that sanctions imposed under the ATP rules are disproportionate and fail take into account evidence that players have absorbed prohibited substances inadvertently. To the contrary, the rules expressly stipulate that players, who can show an absence of significant fault or negligence, may have their suspension substantially reduced, while players able to establish the absence of any fault or negligence may have their suspension reduced without limit or even revoked. The Commission also rejected the claim that arbitration clauses in the ATP rules unlawfully restrict competition by limiting access to national courts. The Commission therefore concluded that it was highly unlikely that a further investigation would enable the Commission to establish an infringement of Article 101 TFEU .

The Commission also concluded that there was little likelihood that a further investigation could establish a violation of Article 102 TFEU. As a preliminary matter, the Commission held that WADA and ICAS, both of which carry out purely supervisory rather than economic activities, could not be classified as undertakings within the meaning of that Article.[40] However, while the Commission concluded that ATP does constitute an "undertaking," it was unable to see how sanctions imposed under the ATP Tour Rules could affect trade between Member States. Finally, recalling that holding a dominant position is not in itself an abuse, the Commission noted that the complainant had failed to specify how WADA, ICAS or ATP had abused their allegedly dominant positions.

More generally, the Commission noted that the complaint failed to provide any evidence of how the ATP's anti-doping rules or practices could appreciably affect the functioning of the common market. Moreover, even if the complainant's suspension did constitute an abuse of ATP's alleged dominant, that abuse lasted just 15 months and was therefore not of sufficient duration to establish a Union interest in the complaint.

Thus, taking into account i) the importance of the alleged infringement for the functioning of the common market, ii) the likelihood of establishing the existence of the alleged infringement, and iii) the extent of the investigation required to establish the alleged infringement, the Commission concluded that there was no Union interest to justify further investigation of the present complaint.

36 Case COMP/39471 Certain joueur de tennis professionnel / Agence mondiale antidopage, ATP Tour Inc. et Fondation Conseil international de l'arbitrage en matière de sport.

37 The suspension was reduced to 15 months on appeal to the Court of Arbitration for Sport.

38 HCT is a diuretic drug prohibited by the ATP rules because it can mask the presence of other, performance-enhancing substances.

39 Case C-519/04 *David Meca-Medina et Igor Majcen v Commission* [2006] ECR I-6991.

40 The Commission concluded that WADA and ICAS are not "undertakings" within the meaning of Articles 101 and 102 TFEU. While ATP organizes and markets viewing rights for the ATP Tour, both WADA and ICAS have supervisory rather than economic functions. ICAS supervises the administration and financing of the Court of Arbitration for Sport ("CAS") and AMA is a body charged with supervising anti-doping measures at a global level.

ECN Model Leniency Programme

The ECN Report on Assessment of the State of Convergence, published on October 29, 2009,[41] provides an overview of the status of Member States' convergence in relation to the Model Leniency Programme ("MLP") as of December 31, 2008, and for some countries as of October 1, 2009. The Model Leniency Programme (MLP), established by ECN on September 29, 2006, provides a soft harmonization basis of certain substantive and procedural requirements that ECN members' leniency programs should contain. The Report finds a rapid convergence, with some exceptions or deviations.

Currently 25 Member States and the European Commission operate leniency programs, five of which are in the process of revising their programs; Slovenia is in the process of introducing such a program, and Malta does not currently have one. The MLP concerns only secret cartels and corporate leniency. Overall, most leniency programs in the ECN cover secret cartels, while 15 Member States extend their respective leniency systems to a wider scope of infringements and individual leniency.

The MLP provides exclusions from immunity only for applicants that engaged in coercion, but several national programs have broader exclusions (*e.g.*, initiators are excluded in the Czech Republic, Latvia, Slovakia, Poland, Ireland, and Romania; leaders are excluded in Lithuania, Ireland, and Romania). In contrast, Finland and Italy still offer immunity to applicants that engaged in coercion.

Consistent with the MLP, the majority of leniency programs contain certain evidential threshold and substantive conditions for finding immunity (*e.g.*, requiring that the applicant ended cartel involvement; cooperated genuinely, fully, and continuously; did not destroy or disclose evidence to third parties). The Report notes some particularities in Romania, Germany, U.K., Lithuania, and France as to the obligation to end cartel involvement, and some deviations by Ireland, Germany, Portugal, Romania, Lithuania, Greece, and Poland as to the requirement not to destroy or disclose evidence.

The MLP provides that a reduction of fines can be granted in lieu of immunity, as long as it does not exceed 50% of the imposed fine. More than half of the national programs provide for such a maximum cap, while some countries foresee a higher reduction (including Portugal, Italy, Lithuania, UK, and Ireland). According to the MLP, the reduction should only be available if the evidence provided by the applicant is of significant added value, a provision that most national programs have adopted (with some exception in Latvia, Luxembourg, Poland, Estonia, and Ireland).

Regarding procedural issues, and consistent with the MLP, most programs provide for an explicit application for leniency and a decision by the respective competition authority in writing. Twenty programs provide for marker systems, according to which a marker protects the applicant's place in the queue for a given period while the applicant gathers the necessary information to qualify for immunity. The MLP introduced a uniform summary application system to national competition authorities in instances where the Commission is "particularly well placed" to deal with the case, in order to obviate the burden of multiple applications to Member States' competition authorities. The Report finds that summary applications alongside an application with the Commission are available in 23 Member States (with the exception of Cyprus, Malta, Slovenia, and Estonia).[42]

The European Ombudsman decision in the E.ON complaint

On September 25, 2009, the European Ombudsman handed down a decision rejecting a complaint made by a non-disclosed complainant against the European Commission in relation to the energy provider E.ON.[43]

Originally, the complainant filed a complaint with the German Federal Cartel office alleging that through its minority stake in the Würzburg public utility company, E.ON influenced the former to ensure it accepted E.ON's inflated prices. The complaint was rejected by the Cartel office and by all consequent review instances in Germany. The complainant filed a complaint with the Commission. The Commission rejected the complaint on grounds of competition policy. The complaint then filed a further complaint to the Ombudsman, arguing that the Commission had wrongly decided not to the open an investigation against E.ON.

In the outset of his decision the Ombudsman recalled that the Commission may, at its discretion, give differing degrees of priority to the complaints brought before it. The Commission may refer to the Community interest in order to determine the degree of priority it applies to the various complaints it receives. However, the Commission's discretion is not unlimited. It must consider attentively all facts and legal arguments which a complainant brings to its attention and to state its reasons if it decides not to continue its examination of a complaint.

41 See ECN Model Leniency Programme, Report on Assessment of the State of Convergence, October 29, 2009, http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf.

42 17 of these programs accept oral summary applications. Full leniency applications are accepted orally in 19 Member States.

43 Complaint No. 1142/2008(BEH)KM, Ombudsman decision of September 25, 2009.

The Ombudsman noted that in its decision the Commission did in fact recognize that vertical integration is a problem in the energy markets and does need to be addressed. However, the Commission considered that this issue is best addressed through merger control. The Commission has also indicated that it is using other means at its disposal to address these concerns, for example its proposal of the so-called third liberalization package. It also commenced investigations against a number of European energy companies, including major companies active on the German market.

The complainant argued that these means are insufficient to address the real competition issues in the energy markets, noting that none of these measures have had any real effect on energy prices to end consumers. In fact prices have continued to rise in a way that, according to the complainant, could not be explained by the rise in world market prices for energy.

The Ombudsman considered that the measures taken by the Commission so far may not have led to an immediate noticeable drop in prices does not mean that they were ill-judged. He was also not convinced that the measures proposed by the complainant would have actually improved competition in the German energy markets.

In conclusion, the Ombudsman found that the Commission did not commit a manifest error in exercising its discretion when deciding not to commence an investigation against E.ON on policy grounds.

The European Ombudsman decision in the Intel complaint

On July 14, 2009, the European Ombudsman handed down a decision in a complaint made by Intel in the context of the Commission's investigation into alleged abuse by Intel of its dominant position in the market for certain processing units.[44] Intel argued that the Commission infringed both the principle of good administration and Intel's rights of defense in two accounts:

The Commission failed to take minutes of a meeting with representative of Dell. Based on Dell's testimony before the American Federal Trade Commission, Intel argued that there was a reason to believe that Dell's representatives informed the Commission of exculpatory facts in relation to Intel.

In addition, the Commission encouraged Dell and AMD (the complainant in the case) to enter into an information exchange agreement which had the effect of allowing AMD to circumvent the rules which limit the right of a complainant to have access to the Commission's investigation file. According to Intel the information that Dell provided to the Commission and subsequently shared with AMD was confidential to Intel.

The Ombudsman recalled that the power of the Commission to interview the representative of Dell on the subject matter of the investigation derived from Article 19 of Regulation 1/2003 (power to take statements). The exercise of the power under Article 19 is governed by the procedures laid down in Article 3 of Regulation 773/2003. The Ombudsman considered that Article 3 does not impose an obligation on the Commission to take minutes of Article 19 interviews. Nevertheless, the Ombudsman opined that the concept of maladministration is broader than the concept of legality; the administration must always have good and legitimate reasons for choosing one course of action over the other. According to the Ombudsman the principle of good administration obliges the Commission to make proper record of an interview dealing with the subject matter of an investigation. The Ombudsman was willing to concede that in exceptional situations the Commission might not be under such obligation, for example when the information provided to the Commission in the interview was already in its possession or when the information did not in fact relate to the subject-matter of the investigation. In such cases the Commission would still be under an obligation to make a record explaining why complete minutes were not taken. In conclusion, the Ombudsman found that by failing to take adequate minutes of its meeting with Dell the Commission infringed the principle of good administration.

The ombudsman then moved to examine whether the Commission's omission breached the rights of defense of Intel. The Ombudsman noted that a party that alleges that exculpatory evidence has been withheld from it must provide specific arguments regarding the existence of the exculpatory evidence that was provided to the Commission. The Ombudsman carefully examined the agenda of the meeting with Dell and a written follow-up to the meeting prepared by Dell and concluded that it cannot be excluded that the meeting concerned evidence of a nature that was potentially exculpatory of Intel. However, in the Ombudsman's opinion establishing that the rights of defense were infringed would require a careful analysis of the entire file, carried out in conjunction with a careful analysis of the Statement of Objections and, eventually, the decision. Such a review of the file would seek to establish, *inter alia*, if there was any information, elsewhere in the file, which would clarify the precise content of the meeting with Dell. In the present inquiry, the Ombudsman has not reviewed the entire file or the statement of objections issued and thus could not have excluded that other documents may exist in the Commission's case file that would be relevant to the analysis. The Ombudsman could not have therefore

44 Complaint No. 1935/2008/FOR, Ombudsman decision of July 14, 2009; Case COMP/37.990, Commission decision of May 13, 2009, now under appeal in Case T-286/09 *Intel v. Commission* (pending).

concluded that the Commission has breached the rights of the defense of Intel.

With respect to the information sharing agreement between AMD and Dell, the Ombudsman considered that while divulging business secrets to a third party violates the right to confidentiality, it does not necessarily violate the rights of defense. According to the Ombudsman it followed that even if the Commission indeed encouraged AMD to provide Dell with information that Intel considered to be confidential, it did not violate the rights of defense of Intel. Furthermore, the Ombudsman was of the opinion that because the complainant transmitted information to the Commission in the context of an investigation, the Commission does not have the duty nor indeed the power to prevent the complainant from sharing this information with a third party, even if it is confidential to the investigated party.

However, the Ombudsman did consider that as a matter of good administration the Commission should not request, encourage, or facilitate a third party to take measures which would (even potentially) have reveal confidential information of another party. Furthermore, if the Commission intentionally disclosed to a complainant or requested a third party to disclose to a complainant confidential information, to which that complainant would otherwise not have access, this might also call into question the overall impartiality of the Commission in the context of the investigation.

In the present case the Ombudsman was not convinced that the evidence advanced by Intel proved that the Commission indeed encouraged AMD and Dell to sign an information sharing agreement. The Ombudsman decided to reject this limb of the complaint.

This is the second complaint in which the Ombudsman conducted an inquiry into questions of access to the Commission's file that are within the purview of the Hearing Office of DG Competition. In the first decision the Ombudsman rejected the Commission's argument denying the Ombudsman's jurisdiction to review the actions of the Hearing Office. The Ombudsman noted that Article 195 EC (now Article 228 TFEU) limits the jurisdiction of the Ombudsman only in relation to the EU courts. However, the Ombudsman clarified that his review does not duplicate the work of the Hearing Office but rather ensures that it observers the limits of it terms of reference.[45] This statement remains somewhat at odds with the actual investigation conducted by the Ombudsman in these complaints. It seems that the Ombudsman did not shy from substantive legal questions relating to the right of access to the Commission's file.

Although not legally binding, the review of the Ombudsman does carry significant weight with the EU bodies. As such, the Ombudsman serves as an important additional check on the conduct of DG Competition and the Hearing Office. Although the Hearing Office is entrusted with the legal power to scrutinize the actions of DG Competition,[46] this body is still part of the Commission, officially being a unit within the cabinet of the Commissioner for competition. A review conducted by the Ombudsman benefits therefore from its institutional independence and ensuing impartiality.

45 Complaint No. 1881/2006JF, Ombudsman decision of September 30, 2008, para. 48.

46 Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.06.2001, pp. 21-24.

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