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VERTICAL RESTRAINTS

ECJ – Judgments

Case C-279/06 *CEPSA, Estaciones de Servicio SA v. LV Tobar e Hijos SL*

On September 11, 2008, the European Court of Justice confirmed its case law concerning the inapplicability of Article 81 EC to restrictions between a principal and its agent, and concerning the scope of the automatic nullity of anticompetitive restrictions set forth in Article 81(2) EC.

Referring to its previous case law, and in particular *Case C-217/05 P Confederación Española de Empresarios de Estaciones de Servicio v. Compañía Española de Petróleos SA*,[1] the Court confirmed that agency agreements may fall within the scope of Article 81 EC only if the agent bears, in a non-negligible proportion, the financial and commercial risks associated with the sale of goods to third parties. The Court noted that the issue of risk must be assessed on a case-by-case basis, taking account of the real economic situation, rather than in light of the legal categorization of the agreement under national law. Several criteria are relevant, including whether the agent takes possession of the goods, whether he assumes the costs linked to the distribution of the goods, or whether he assumes responsibility for any damage caused to the goods.

The Court also specified that only the obligations imposed on a true agent concerning the sale of goods to third parties on behalf of the principal, including the fixing of the retail price, fall outside the scope of Article 81 EC. By contrast, Article 81 EC may apply to non-competition or exclusivity obligations between the principal and the agent, depending on their actual or potential foreclosure effect on the market concerned.

Finally, the Court confirmed that an entire contract will be null and void under Article 81(2) EC only if an anticompetitive clause is not severable from the rest of the agreement. To the contrary, if such a clause is severable, the consequences of the nullity for the other parts of the agreement are to be determined by national courts in accordance with the applicable national contract rules.

INTELLECTUAL PROPERTY AND LICENSING

Commission decision

CISAC

On July 16, 2008, the Commission prohibited 24 European collecting societies (members of the International Confederation of Societies of Authors and Composers, or CISAC) from limiting their ability to offer their services to authors and commercial users outside their domestic territory. The Commission's decision, which is in line with established case law,[2] closes two sets of proceedings brought in 2003 by Music Choice, concerning CISACs' model contract between members for public performance rights, and by RTL, concerning the refusal by GEMA, the German collecting society, to grant a pan-European license to RTL for its broadcasting services.

Using the CISAC model contract, authors had to use their own national society, and could not therefore deal with the collection society of their choice. Further, a broadcaster wishing to broadcast in several countries had to negotiate with the collecting society in each individual country.

The Commission required that the 24 EEA-based CISAC members:

(i) to remove/disapply the "membership clause" preventing an author from choosing/relocating to another collecting society; and

(ii) to remove/disapply any territorial restrictions (the "territorial clause") preventing a collecting society from offering licenses to commercial users outside their domestic territory.

The decision is under appeal before the Court of First Instance.

HORIZONTAL AGREEMENTS

ECJ – Opinion

Case C-209/07 *The Competition Authority v. Beef Industry Development Society and Others*

On September 4, 2008, Advocate General Trstenjak advised the European Court of Justice to hold that an agreement made by the Irish

1 2006 ECR I-11987.

2 *GEMA* (OJ 1971 L 314/15), Case 127/73 BRT *v. SABAM* ("*BRT II*") 1974 ECR 313, Case 7/82 GVL *v. Commission* 1983 ECR 483, Case 22/79 *Greenwich Film Production v. SACEM* 1979 ECR 3275, Case 395/87 *Ministère Public v. Tournier* 1989 ECR 2521, and Case 110/88-242/88 *Lucazeau v. SACEM* 1989 ECR 2811.

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Beef Industry Development Society ("BIDS") to reduce overcapacity in beef processing had the object of restricting competition in violation of Article 81(1) EC.

The total capacity of beef processing plants in Ireland exceeded the processing volume by 32%. A market study published in 1998 forecasted that overcapacity would lead to a decline in the profitability of the processing industry as a whole and proposed reducing the number of processors in the industry. A report by the Beef Task Force, established by the Minister for Agriculture and Food, endorsed the study. In 2002 the beef processors formed the BIDS with the purpose of implementing the market study and the Task Force's report by reducing the total capacity of the processing industry in Ireland by 25% in one year.

It was envisaged that some of the beef processors would enter into agreements with BIDS by which they would undertake to exit the processing industry, to decommission their processing plants and to respect a two-year non-compete clause. They would further undertake not to use land associated with the decommissioned plants for the purposes of beef processing for a period of five years and to sell the equipment used for primary beef processing to beef processors in Ireland only for use as back-up equipment or spare parts.

The exiting beef processors were to be compensated by BIDS through payments made by the remaining beef processors. The payments would have been based on the "traditional percentage kill" of each beef processor calculated according to the processor's average percentage kill in Ireland in the last three years prior to the implementation of the BIDS agreements. A levy of EUR 2 per head would have been imposed on beef processors that did not exceed their traditional percentage kill. Those exceeding their traditional percentage kill were to pay a levy of EUR 11 for each additional head above the traditional percentage kill.

The Irish Competition Authority opposed the BIDS agreements and applied to the Irish High Court for a declaration that they infringed Article 81 EC. The application was rejected by the High Court and the Irish Competition Authority appealed to the Supreme Court of Ireland. The Supreme Court of Ireland made a reference for preliminary ruling to the Court of Justice asking whether an arrangement such as the BIDS agreements is to be regarded as having as its object the prevention, restriction or distortion of competition within the common market in violation with Article 81 EC.

The Advocate General recalled that, in examining the object of an agreement, "the Community judicature has found an anti-competitive aim or tendency to exist in particular where the necessary consequences of the agreement was the restriction of competition". However the presumption of a restriction of competition by object may be rebutted by considerations relating to the legal and economic context of the agreement. The Advocate General suggested three instances where this could occur:

- When a limitation of the undertakings' independence in the market has no effect on competition, for example when it is doubtful whether the undertakings are competitors or when it is doubtful whether there is actually sufficient competition that can be restricted by the agreement;
- When the agreement is ambivalent in terms of its effects on competition. If the object of the agreement is to promote competition the necessary restriction on the undertakings' independence can be counterbalanced by the aim of promoting competition;
- When a limitation of the undertakings' independence is an ancillary arrangement that is necessary in order to pursue a primary objective that is not covered by the prohibition contained in article 81(1) EC.

In examining the elements of the BIDS agreements, the Advocate General considered that the withdrawal of processors from the market and the agreement not to use their processing plants was capable in principle of restricting competition between the remaining processors in the market. According to the Advocate General, with overall production remaining constant, greater competition would exist between participants in a market with high overcapacity. The argument made by BIDS that prices were not expected to increase on account of the economies of scale achieved through higher capacity utilization, could not rule out the existence of the restriction of competition under Article 81(1) EC, and could only be examined under Article 81(3) EC.

The Advocate General noted that the competitive process would normally ensure that the most efficient processors would remain on the market. The BIDS agreements selected the remaining processors by way of arrangement between the processors. In particular the BIDS agreements did not allow the exiting processors to decommission only their inefficient plants and to remain in the market with their efficient plants. The BIDS agreements thus interfered with the competitive process.

The Advocate General further opined that the payment of levies might result in a restriction on competition if the levies were to have an appreciable effect on the market behavior of the remaining processors. Furthermore, the calculation of the levies according to traditional percentage kill protected the traditional market shares of the remaining processors.

In relation to the restrictions on the use of land and disposal of equipment, the Advocate General considered that they were intended to prevent exiting processors from re-entering the market thus reinforcing the effect of their withdrawal from it. They may also have had the aim of deterring new entrants to the market. The Advocate General suggested that the national court should therefore determine whether there were potential entrants and whether they might have been interested in using the plants of the exiting processors.

BIDS argued that the collection of levies and the restrictions on the use of land and disposal of equipment were justified by the legitimate objective of limiting overcapacity and achieving economies of scale. The Advocate General recalled that, under the case law of the European Court of Justice, the fact that parties pursue a legitimate objective does not rule out the existence of a restriction of competition by object unless it is shown that the objective is either favorable or neutral to competition. The Advocate General held that this could not have been assumed here since the reduction of overcapacity would inevitably result in a restriction of competition.

MERGERS & ACQUISITIONS

ECJ – Judgments

C-413/06P *Bertelsmann and Sony Corporation of America v Impala*

On July 10, 2008, the European Court of Justice rendered its judgment in the appeal brought by Sony Corporation of America, Bertelsmann AG, and SONY BMG against a 2006 judgment of the Court of First Instance that had annulled the Commission's 2004 decision approving the formation of SONY BMG without conditions. (Following the CFI Judgment, the formation of SONY BMG was re-notified to the Commission and re-approved in 2007, following an in-depth investigation.) The Court concluded that the Court of First Instance had committed a number of legal errors in annulling the Commission's decision and remanded the case for reassessment to the Court of First Instance. The judgment clarifies a number of issues relating to the judicial review of the evidence and reasoning of Commission merger clearance decisions.

Most of the Commission's investigation had focused on the question whether the reduction in the number of music majors from five to four could facilitate tacit collusion among the remaining majors. Although the Commission identified initial concerns in its statement of objections, it ultimately concluded after reviewing of the parties' response that these concerns were unfounded. On appeal by Impala, an association of independent recorded music labels, the Court of First Instance annulled the Commission's decision. The Court of First Instance held that the Commission had committed manifest errors of assessment and had provided insufficient reasoning for its clearance after the Commission had abandoned its initial concerns. The Court of First Instance also criticized the Commission for relying on evidence that the parties submitted in response to the statement of objections.

The Court of First Instance's judgment implied that the Commission bears the burden of proof for prohibition and clearance decisions. On appeal, the Court confirmed that the Commission bears a symmetric burden of proof for prohibition and clearance decisions, concluding therefore that there cannot be a general presumption in favor of a clearance. Instead, the Commission must prove the factual circumstances that underpin a clearance.

Concerning the standard of proof, the Court held that the proper standard is a balance of probabilities standard: the Commission must identify the outcome that is "*most likely to ensue*" from the transaction. At the same time, the Court made clear that the balance of probability standard applies only to the Commission's prognosis of the outcome of the transaction, but not to the quality and strength of the factual evidence needed to support the Commission's prognosis. The balance of probability standard therefore does not conflict with past case law that requires "*consistent*", "*cogent*", and "*convincing*" evidence for the Commission's conclusion, reflecting a standard that goes beyond a mere assessment of whether a particular factual proposition is more likely than not.[3]

While the Court held that the Court of First Instance applied the proper burden and standard of proof, it concluded that the Court of First Instance had committed a number of errors of law in its review of the Commission's evidence and reasoning, in particular by (i) applying an excessive standard to the parties' evidence; (ii) using the Commission's statement of objections as a benchmark for reviewing the Commission's decision; (iii) misapplying the legal test for collective dominance; and (iv) qualifying the Commission's reasoning as insufficient.

3 See *e.g.* Joined Cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC)* 1998 ECR I-1375, ¶ 228; Case T-342/99 *Airtours*, 2002 ECR II-2585, ¶¶ 47 and 63; Case T-5/02 *Tetra Laval* 2002 ECR II-4381, ¶ 137.

Concerning the evidence submitted by the parties, the Court concluded that the Court of First Instance had wrongly criticized the Commission for relying on evidence that the parties had submitted in response to the statement of objections. The Court also made clear that the Court of First Instance had erred in suggesting that the parties' evidence was less reliable because it had been submitted only after the statement of objections in the exercise of the parties' right of defense.

Concerning the role of the statement of objections, the Court of First Instance had relied on observations made in the statement of objections as indicating that the conclusions set forth in the Commission's decision were unreliable. The Court of First Instance maintained that, as a result of the time limits on proceedings set by the Merger Regulation, the statement of objections was "*less provisional*" in merger proceedings than in Article 81 and 82 EC cases. The Court categorically rejected this position, making clear that the time limits of the Merger Regulation have "*no effect on the provisional nature of statement of objections*". To the contrary, the merging parties' rights of defense require the Commission to take the parties' response to the statement of objections fully into account, which may result in an outcome that is "*radically different*" from the Commission's initial position. Accordingly, the Court of First Instance could not use the statement of objection to challenge the decision's findings.

Concerning the test for collective dominance, the Court also criticized the way in which the Court of First Instance had applied the *Airtours* test for collective dominance. The Court found that the Court of First Instance had erred by reviewing the requirement of transparency in an "isolated and abstract manner". The Court noted that the Court of First Instance should not have examined mechanically each of the *Airtours* criteria without regard to its context. Instead, the Court of First Instance should have identified a "plausible theory of tacit coordination" that fits the specific market at issue and assessed the individual *Airtours* criteria with reference to that theory, which the Court of First Instance had failed to do here.

Concerning the standard of reasoning, the Court held that the Court of First Instance had erred in concluding that the Commission's decision was insufficiently reasoned. The Court confirmed that merger clearance decisions must be reasoned, despite Article 10(6) of the Merger Regulation, which provides for the clearance of a transaction in the absence of a reasoned decision. However, the Court emphasized that the Court of First Instance's review of the Commission's reasoning should have taken into account the context in which the decision was adopted, in particular the brief period left for the Commission between the reply to the statement of objections and the deadline for adopting its final decision. A proper review showed that the Commission's reasoning was adequate since it was sufficient for Impala to challenge the substance of the decision. Moreover, the Court of First Instance's judgment showed that it had understood the reasons underpinning the decision.

CFI – Judgments

Case T-212/03 MyTravel v. Commission

On September 9, 2008, the Court of First Instance rejected MyTravel's (formerly Airtours) claim against the Commission for compensation for MyTravel's alleged losses incurred as a result of the Commission's prohibition of its proposed acquisition of First Choice.[4] The Court annulled this prohibition decision in 2002, holding that the Commission had committed manifest errors in its economic assessment of the transaction and its likely effects on the market.[5]

Most importantly, the Court holds that a manifest error committed by the Commission in the economic analysis of a merger is not necessarily sufficient to trigger the Community's non-contractual liability. The Community's non-contractual liability could be triggered only if, in its assessment, the Commission failed to undertake a "careful examination of the information" provided during an investigation. This obiter thus complements the Court's judgment in Case T-351/03 *Schneider v. Commission*,[6] where the Court held that the Commission had infringed the merging parties' procedural rights by failing to state in its statement of objections the specific theory of harm on which it had relied to prohibit the notified transaction, and that such failure amounted to a breach of the parties' due process rights and thus to a sufficiently serious breach of Community law triggering the Community's liability.

Specifically, the Court repeated the three requirements that need to be satisfied for the Community's non-contractual liability to be triggered: (i) a sufficiently serious breach of a rule of law intended to confer rights on individuals, (ii) actual damages and (iii) a causal link between the unlawful conduct and the damages.

Regarding the first and most crucial of these elements, the Court held that the non-contractual liability of the Community arises if it

4 Case COMP/M.1524 *Airtours*.

5 Case T-342/99 *Airtours v. Commission* 2002 ECR II-2585.

6 Case T-351/03 Schneider Electric v. Commission, not yet reported

has committed a breach amounting to a manifest and grave disregard for the limits of its discretion by violating a party's procedural rights. Thus, the Court clarified that the concept of sufficiently serious breach only comprises those errors and mistakes, even if of some gravity, which are not compatible with the discretional and normal conduct of an institution responsible for overseeing the application of competition rules. In assessing whether errors and mistakes are compatible with such a conduct, account must be taken, in particular, of the complexity of the situation to be assessed, the margin of discretion enjoyed by the Commission and the time constraints to which it is subject. The Court therefore specified that a wrongful economic assessment is a sufficiently serious breach of law only if the reasoning was adopted without a "careful examination of the information" provided during the investigation. In other words, the substantive assessment must be so egregiously unfounded and unreasonable that it amounts to a violation of a procedural right of the parties. Accordingly, the Court held that, however incorrect the reasoning adopted by the Commission in its underlying merger decision may have been when read in the light of the Court's annulment judgment, it did not amount to a sufficiently serious breach of Community law triggering the Community's liability given that the reasoning was adopted following a "careful examination of the information" provided during the investigation.

The Court also examined MyTravel's claim alleging that the Commission had infringed its duty of diligence in refusing to consider the commitments submitted by Airtours in order to resolve the problems relating to the potential negative effects on competition identified by the Commission. The Court held that, in light of the documents produced in the case, the Commission had examined these commitments, but had found that they failed to respond to its objections clearly. It concluded that the Commission had not committed an error of assessment, let alone one egregiously unfounded and unreasonable amounting to a procedural right violation. As a result, the Court rejected MyTravel's claim also in this respect.

Mindful of the impact of a decision in favor of MyTravel on the Commission's role as a regulator of competition, namely, the risk that the Commission would shy away from legitimately exercising its competences for fear of exposure to large damages claims, the Court has set a very high standard for future claims for non-contractual damages. In particular, the Court ruled out claims purely based on Commission's errors in the economic assessment of a transaction. Only if the economic assessment has been carried out beyond any "careful examination", thereby amounting to a violation of the Parties' procedural rights, could damages be awarded. In light of this legal standard, the future claiming of damages from the Commission for non-contractual liability will prove a very considerable challenge.

Second-phase decisions without Undertakings

Case COMP/M.4942 *NOKIA/NAVTEQ*

On July 2, 2008, the Commission unconditionally cleared Nokia's acquisition of NAVTEQ, a supplier of navigable digital map databases used in navigation devices and to provide so-called "Location-Based Services". The transaction was notified shortly after the Commission received the notification of TomTom's proposed acquisition of TeleAtlas, which the Commission cleared unconditionally on May 14, 2008. TeleAtlas is NAVTEQ's only competitor on the market for navigable digital map databases offering complete coverage of Europe and North America throughout the world.

The Commission focused on three potential issues: (1) the merged entity's potential input foreclosure on the downstream market for navigation applications on mobile headsets; (2) the potential anticompetitive effects resulting from the merged entity's access to confidential information regarding competitors' acquisition of navigable map databases; and (3) the risk of coordinated effects resulting from the proposed transaction.

With respect to the issue of potential input foreclosure, the Commission assessed whether the merged entity would have the ability and incentive to pursue an input foreclosure strategy, ultimately harming consumers.

As regards the combined entity's ability to foreclose, the Commission found that the first condition required by its Horizontal Merger Guidelines, namely the existence of significant market power, was present. However, concerning the second necessary condition, namely the critical nature of the foreclosed input on the downstream market, the Commission's conclusions were two-fold. On the one hand, navigable digital map databases are considered as a largely critical input for navigation applications on mobile handsets. On the other hand, the Commission was not convinced that navigable digital map databases are a critical input for mobile handsets in general, principally due to the fact that mobile handset producers may be in a position to use more basic, non-navigable, map databases. Finally, concerning the final condition required by the Guidelines to establish the existence of an ability to foreclose, namely the absence of timely and effective counterstrategies by rivals, the Commission underlined

the importance of the long-term supply agreement between Garmin, an important downstream portable navigation device provider, and NAVTEQ. The Commission found that the terms of this long-term agreement enabled Garmin to supply, to a certain extent, foreclosed handset manufacturers and mobile network operators with NAVTEQ's databases, thereby neutralizing the combined entity's ability to foreclose rivals. In contrast, the Commission was unclear as to whether mobile network operators could exercise sufficient buyer power vis-à-vis Nokia so as to counter effectively any foreclosure strategy on the part of the post-transaction entity. Ultimately, the Commission left open whether the notifying parties would have the ability to foreclose their downstream competitors since, in any event, the Commission found that they would lack the incentive to stop supplying digital map databases to their downstream competitors.

Indeed, as regards the combined entity's incentive to foreclose, the Commission found that the trade-off between the upstream loss in sales and a downstream increase in profits would be negative for the merged entity for the following reasons: (1) navigable database maps represented a small percentage of the overall cost of mobile handset prices; (2) Nokia's competitors were unlikely to pass-on increased costs to their costumers; (3) navigable services were only one of the factors influencing customer purchasing decisions rendering the outcome of a foreclosure strategy uncertain; (4) as a result of its long-term agreement with NAVTEQ, Garmin remained an alternative source for navigable database maps; (5) as switching costs between databases were low, the combined entity could lose significant sales to its upstream competitor TeleAtlas as a result of attempted foreclosure; and (6) partial foreclosure based on the degradation of map quality would be irrational as this strategy would solely target NAVTEQ maps and not be accompanied by an increase in revenues.

The Commission set aside concerns related to the potential anticompetitive effects of the merged entity's access to its rivals' confidential information. In this respect, the Commission found that sensitive information exchanges were limited in number. In addition, the Commission noted that customers are not obliged to exchange confidential information with the Parties, such as information about feature sets in new devices. Lastly, the Commission's investigation showed that the merged entity, in order not to lose customers, would have a strong incentive not to pass on sensitive information between upstream and downstream affiliates.

Finally, the Commission concluded that there was no risk of coordinated effects, because TomTom and Nokia are not active in the same downstream market, and there was no indication of coordination between TeleAtlas and NAVTEQ on the upstream market. In addition, the upstream market does not have the structure necessary for the monitoring of any deviation from a coordinated plan.

First-phase decisions with Undertakings

Case COMP/M.5121 *News Corp/Premiere*

On June 25, 2008, the Commission approved News Corporation's acquisition of control of Premiere, subject to commitments.

News Corporation is active inter alia in the production and distribution of films (via its subsidiary 20th Century Fox), TV programs, and TV channels, in addition to pay-TV technical services, including conditional access system technology and smartcards (via its subsidiary NDS). Premiere is the leading pay-TV provider in Germany and Austria via satellite, cable, and IP-TV.

The proposed transaction concerned News Corporation's acquisition of a shareholding of approximately 24.2% of Premiere (expected to increase to around 25%). The attendance rate at Premiere's previous annual shareholders' meetings indicated that this shareholding was sufficient to control the majority of the votes.

However, pending the merger review procedure, Premiere held its 2008 annual shareholders' meeting, which had an unusually high attendance rate. The Commission nevertheless concluded that News Corporation's shareholding was sufficient to acquire de facto control of Premiere, because attendance rates at future meetings were likely to return to previous levels.

In its substantive analysis, the Commission concluded that the transaction would have a limited impact horizontally: the parties were not actual or potential competitors in the relevant markets, namely the provision of pay-TV services, the acquisition of broadcasting rights, and the provision of technical services for pay-TV. However, the transaction raised some vertical issues.

First, the merger created a vertical relationship with regards to the acquisition of broadcasting rights, integrating a TV content provider (News Corporation) and the dominant pay-TV provider (Premiere). Nevertheless, the Commission concluded that the merged entity would lack the ability and/or the incentive to foreclose content providers or content purchasers from the German market.

Secondly, the merger integrated a leading pay-TV technical services provider (News Corporation, via its subsidiary NDS) and the dominant pay-TV provider (Premiere). In particular, the Commission focused on

the impact of the transaction on third party access to Premiere's satellite platform.

The Commission noted how, before the transaction, Premiere's satellite platform was "open", insofar as Premiere had delegated the right to grant third party access to its platform to an independent entity (APS). APS had all the necessary licenses to use the same conditional access system technology as Premiere (Nagravision) and sourced from Nagravision the necessary smartcards.

However, the parties had entered recently into an agreement to switch to a new conditional access system technology provider, namely NDS. The Commission concluded that the agreement was related to the notified transaction and that, as a result of Premiere's switch to NDS, APS would no longer have been unable to grant third party access to Premiere's satellite platform. In particular, (i) APS would not have had the necessary licenses to use NDS's conditional access technology, and (ii) APS would have been dependent on NDS for the procurement of the necessary smartcards.

The parties addressed the Commission's concerns by concluding a sublicensing agreement with APS for the use of NDS's conditional access technology, and by committing to contract with APS for the supply of the necessary hardware components (smartcards) with adequate financial penalties for late delivery.

First-phase decisions without Undertakings

Case COMP/M.5155 *Mondi/Loparex Assets*

On August 20, 2008, the Commission authorized Mondi's acquisition of assets belonging to Loparex Holding.

The relevant markets were the production of (i) release-liners (silicon-covered papers, films or non-wovens used as carrier for labels); (ii) kraft paper (a type of paper used for flexible packaging such as grocery bags or industrial sacks); and (iii) extrusion coating (a technique involving the spreading of a molten web of resin over a substrate material).

The Commission focused on the release-liners market and, in particular, examined whether further segmentation was necessary. In its assessment, the Commission considered the following factors as potentially relevant: (i) the end-use applications of liners; (ii) the type of silicone used in the coating process; and (iii) the substrate on which the liners were based. The Commission ultimately dismissed the possibility of segmenting the release-liners' market on the basis of the end-use application, since different liners could be employed for similar uses, and vice versa. Similarly, the type of silicone used in the manufacturing process did not constitute a differentiating factor, given that most producers switch between more than one different kinds of silicone.

According to a large number of respondents to the market investigation, because customers commonly purchase a single specific substrate, liners with different substrates (namely paper and film) should by definition belong to different relevant product markets; in principle the same machine cannot process both types of liners. The Commission decided, nonetheless, to leave open the market definition.

By reference to a relevant product market encompassing all release liners, the Commission found no serious competitive concerns. In fact, despite being the market leader, the post-merger entity would face significant competition from a number of market players, which could easily expand their production. On the demand-side, customers could easily switch suppliers, with some of them holding strong countervailing buyer power.

In its assessment of potential market segments of both film-based and paper-based liners, the Commission concluded similarly that there were no competition concerns. With regard to the film-based liner market, the merged entity would hold a low market share and so face strong competition. As to the market for paper-based liners, the parties were assured a strong position, by reason of the significant increase in their market shares. The market remained competitive, however, in light of a number of factors, for example significant spare capacity; low barriers to entry and expansion, and strong buyer power.

Finally, although the transaction created some vertical integration, it did not give rise to any risk of excluding suppliers or purchasers, because of the parties' small market share and the presence of numerous competitors.

Case COMP/M.5188 *Mars/Wrigley*

On July 28, 2008, the Commission unconditionally cleared Mars Incorporated ("Mars")'s acquisition of Wrigley Company ("Wrigley"). The transaction concerned the production of chocolate confectionary, sugar confectionary, and gum.

The Commission left open the question whether gum and sugar confectionary were substitutes for chocolate, although the Commission's precedents in this area suggest that this should not be the case. The Commission identified only one market with any potential anticompetitive effects post-transaction, namely the non-chocolate confectionary market in the United Kingdom. However, the marginal increment in Mars's post-merger market shares (an

increase of 0-10%), and the relatively low size of the combined entity's market share (20-30%) indicated that the effect of the transaction on competition on this market would be neutral. The Commission also emphasized the existence of a number of well-established competitors on all analyzed markets.

The Commission also rejected the possibility of harmful conglomerate effects attributable to the transaction. The fact that Mars's market shares in chocolate post-merger were low and that the chocolate market had a number of well-established and credible competitors precluded the ability of the merged entity to leverage its significant market power in gum into the chocolate markets. In addition, the Commission accepted the parties' argument that gum and chocolate are not complementary products and that they are purchased for different customer end-uses, which further precluded the risk of conglomerate effects.

Case COMP/M.5238 *INEOS/BASF ASSETS*

On July 31, 2008, the Commission unconditionally cleared Ineos Group Limited ("Ineos")'s acquisition of an acrylonitrile ("ACN") plant ("BASFA") from BASF plc ("BASF"). Acrylonitrile is a chemical made from propylene that is a precursor to, among other products, nylon and synthetic rubbers.

BASF advised the Commission that, absent the acquisition, it intended to close BASFA, and presented sufficient supporting evidence, as well as evidence of its prior efforts to sell the plant. The decision, however, does not indicate that the third branch of the failing firm test had been satisfied, namely whether Ineos was the least anti-competitive party willing to purchase BASFA, or that less anti-competitive purchasers had been approached about a possible acquisition. That the Commission did not apply this branch of the test is significant because Ineos's EEA merchant market share post-transaction was between 50% and 60%, and two other ACN producers in the EEA have a market share lower than Ineos's pre-transaction.

The parties' failing firm defense seems to have influenced the Commission's analysis of the transaction. Notably, the decision does not analyze at all whether coordinated effects would be more likely in the ACN market post-transaction. The Commission also did not analyze whether Ineos's plan to reduce ACN imports into the EEA from the United States would, in tandem with the acquisition, increase its ability and/or incentive to raise prices, either unilaterally or in coordination with its two EEA competitors. Finally, the Commission did not analyze whether Ineos had any incentive to restrict supply by running BASFA at a reduced production capacity while at the same time restricting imports for the purposes of maintaining or increasing price levels.

In addition, both Ineos and BASF are producers of a downstream product, acrylonitrile-butadiene-styrene ("ABS"). The decision suggests that Ineos and BASF control between 60% and 70% of the market for ABS in the EEA, and that both enjoy security of ACN supply: Ineos through its own facilities, and BASF through a long-term supply agreement with Ineos. Interestingly, the Commission failed to analyze whether Ineos had an incentive to restrict ACN supply to competing ABS manufacturers other than BASF in order to gain market share downstream.

ABUSE OF DOMINANT POSITION

ECJ – Judgment

Joined Cases C-468/06 to C-478/06 *Sot. Lélos Kai Sia EE (and Others) v. GlaxoSmithKline AEVE*

On September 16, 2008, the European Court of Justice clarified the application of Article 82 EC to a dominant company's reduction of customary supplies to wholesalers aimed at restricting parallel trade.

The proceedings were unusual in that they involved the opinions of two Advocates General, who, four years apart, took opposite views on whether the highly regulated nature of the pharmaceutical sector justifies supply limitations by dominant companies aimed at restricting parallel trade. The Court ruled that the degree of State regulation of the pharmaceutical sector does not preclude the application of Article 82 EC in such circumstances. However, it tempered this finding by recognizing that dominant pharmaceutical companies may protect their commercial interests in "*a reasonable and proportionate way*" against orders "*of significant quantities of products that are essentially destined for parallel export*". More specifically, the judgment holds that:

- A dominant pharmaceutical company cannot refuse to satisfy ordinary orders of existing wholesalers "*for the sole reason*" that these wholesalers export part of their purchases to other Member States.
- A dominant pharmaceutical company may refuse to meet an order that is "*out of the ordinary*" even if the refusal is openly designed to restrict parallel trade.
- An order is out of the ordinary if it is "*out of all proportion*" to the volume previously ordered "*by the same wholesalers to meet the needs of the [local] market*". Two factors are therefore relevant for

assessing whether orders are "*out of the ordinary*": (i) "*the size of those orders in relation to the requirements of the [local] market*"; and (ii) "*the size of those orders in relation to the previous business relations*" of the parties. In case of a dispute, the matter must be resolved by the national courts.

The judgment only addresses the circumstances in which a refusal to supply existing customers "*for the sole reason*" that they engage in parallel trade amounts to an abuse. The judgment's finding that even in these circumstances a refusal may potentially be justified implies a *fortiori* that no violation of EC competition law should arise if:

- A dominant company refuses to supply an existing customer with quantities in excess of those ordinarily purchased by that customer.
- A dominant company refuses to supply a new customer.

Finally, this also suggests that no violation of EC competition law should arise if a dominant company refuses or reduces supplies to an existing customer for reasons other than to restrict parallel trade that are objective and substantiated, such as, *e.g.*, preventing disruptions of supply chains or responding to declining local demand.[7]

Having ascertained that Greek wholesalers were selling surplus amounts of certain pharmaceuticals in Germany and in the United Kingdom, GlaxoSmithKline ("GSK") sought, through its Greek subsidiary GSK AEVE, to restrict exports by first suspending supplies of the relevant products to these wholesalers, and then resuming supplies, but only in quantities sufficient to satisfy domestic demand. Greek wholesalers affected by these decisions, as well as some Greek associations of wholesalers and pharmacists, started proceedings before the Greek Competition Commission and civil jurisdictions, alleging that GSK AEVE's sales policy constituted an abuse of a dominant position under EC and Greek competition law.

The Greek Competition Commission referred to the Court a number of questions concerning the interpretation of Article 82 EC. In these proceedings, Advocate General Jacobs in 2004 took the view that an undertaking's reduction of supplies aimed at restricting parallel trade could be objectively justified in light of the highly regulated nature of the pharmaceutical sector. For procedural reasons, the Court however declined to address the Greek Competition Commission's questions.[8]

Proceedings in the Greek civil courts continued in parallel. After the Athens Court of First Instance found the wholesalers' allegations unfounded, an appeal was brought before the Athens Court of Appeals, which decided to ask the Court the same questions concerning the interpretation of Article 82 EC that the Greek Competition Commission had unsuccessfully raised. On April 1, 2008, Advocate General Ruiz-Jarabo Colomer advised the Court to qualify the limitation of supplies as abusive, contrary to Advocate General Jacobs's opinion four years before.

The Court cited its judgments in *Commercial Solvents and United Brands*[9] for the principle that the refusal by a dominant company to meet the orders of an existing customer is abusive where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor.

Addressing the issue of whether a refusal to meet orders aimed at restricting parallel trade can be considered anti-competitive, the Court found that:

- There may be an effect on competition in the Member State where the refusal takes place ("*if the refusal impedes the activities of those wholesalers in that first Member State*");
- There may also be an effect in the destination market if the refusal "*leads to the elimination of effective competition from [the wholesalers] in the distribution of the products*" in these destination markets;
- The curbing of parallel trade has been found anti-competitive in other sectors (*i.e.*, motor vehicles);
- In the field of Article 81, the Court has on several occasions held as anti-competitive agreements aimed as partitioning national markets.

The Court found that there are no grounds for treating restrictions to parallel trade in pharmaceuticals differently. In particular, the Court rejected GSK's argument that parallel trade in pharmaceuticals "*in any event brings only few financial benefits to the ultimate*

7 This is however without prejudice to the potential application of stricter national competition laws, including provisions concerning economically dependent undertakings. See recital 8 and Article 3(2) of Council Regulation No 1/2003.

8 Case C-53/03 *Syfait and Others* ("*Syfait*") 2005 ECR I-4609. The ECJ found that it lacked jurisdiction because the Greek Competition Commission did not meet the prerequisite that it be a court or tribunal.

9 Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano Spa and Commercial Solvents Corp v Commission* [1974] ECR 223 and Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207.

consumers". To the contrary, in the Court's view, "*parallel exports…open up in principle an alternative source of supply [in the destination markets], which necessarily brings some benefits to the final consumer of these products*". According to the Court, these "benefits to the final consumer" result from (i) the general price pressure that parallel imports exert in the destination market; and the (ii) the additional choice that parallel imports represent for entities that purchase through public procurement procedures.

GSK AEVE also argued that State intervention in the pharmaceuticals sector "*prevent[ed] the manufacturers of medicines from developing their activities in normal competitive conditions*". The Court rejected this argument on the following grounds:

- State regulation leaves some room to the law of supply and demand;
- Manufacturers participate in price negotiations with the authorities.

The Court thus held, first, that restrictions to parallel trade of pharmaceuticals are liable to impede competition; second, that the fact that national price regulations may generate incentives for parallel trade in pharmaceuticals does not as a general matter justify measures to curb parallel trade.

The Court nevertheless recognized that State intervention "*is one of the factors liable to create opportunities for parallel trade*", as a result of which a dominant company should be allowed "*to take steps that are reasonable and in proportion to the need to protect its own commercial interests*". In particular, it may be legitimate to refuse to supply wholesalers involved in parallel exports where their orders are "*out of the ordinary*", by reference to (i) "*the previous business relations between the pharmaceutical company and the wholesalers concerned*"; and (ii) "*the requirements of the [national market] concerned*".

The Court indicated that orders could be considered "out of the ordinary" if they involve "*quantities which are out of all proportion to those previously sold by the same wholesalers to meet the needs of the market in [the Member State concerned]*".[10] It is for national courts to decide on a case-by-case basis whether specific orders are "ordinary" (and must be satisfied by an undertaking in a dominant position) or "out of the ordinary" (and can be rejected by an undertaking in a dominant position).

The Court's judgment is the latest in a series of judgments concerning measures taken by pharmaceutical companies faced with parallel trade in their products. Whereas *GSK AEVE* addresses the relationships between a dominant pharmaceutical company and its wholesalers under Article 82 EC, other cases have focused on the application of Article 81 EC to relationships between non-dominant pharmaceutical companies and their wholesalers.

In *Bayer (Adalat)* (2000), the Court of First Instance found that a non-dominant pharmaceutical company's unilateral limitation of supplies did not constitute an agreement, and was therefore not prohibited under Article 81 EC.[11] In *GlaxoSmithKline (Spain)* (2006), the Court of First Instance annulled a Commission decision finding that GSK violated Article 81 EC by operating a dual pricing system under which it applied the price set by Spanish regulation to supplies intended for the Spanish market, while pricing supplies destined for exportation at a higher level.[12] Although the Court confirmed that GSK's dual pricing system infringed Article 81(1) EC, the CFI found that the Commission had not properly examined GSK's arguments for exemption under Article 81(3) EC. The Court in particular criticized the Commission for failing to properly examine arguments concerning the impact of parallel trade on research and development, an issue that the Court of Justice expressly left open in *GSK AEVE*. The Court of First Instance's ruling in *GlaxoSmithKline (Spain)* was appealed and (as noted above) is now pending before the Court of Justice.[13]

Although the Court adopted a somewhat nuanced position on the obligation of dominant companies to supply parallel traders, the judgment may signal an end to the "regulatory holiday" enjoyed by pharmaceutical companies over the last few years with regard to practices that are designed to limit parallel trade. Parallel traders are likely to test the limits of the duty to supply established by this judgment, and the Commission, following a period of "benign neglect", may well show a renewed interest in this area. In a press release welcoming the judgment, the Commission indicated that it *understood the judgment to confirm "the Commission's antitrust policy, namely that the protection of parallel trade in the pharmaceutical sector is within the scope of EC competition law"*.

10 The Greek and French versions of the judgment use a slightly different wording, which is closer to "out of proportion" than "out of all proportion"; our reading of the Greek and French versions would suggest a lower standard for the assessment of the "out of the ordinary" character of an order.

11 Case T-41/96 *Bayer v. Commission* 2000 ECR II-3383. The CFI's ruling was upheld by the ECJ in 2004.

12 Case T-168/01 *GlaxoSmithKline Services v. Commission* 2006 ECR II-2969.

13 Cases C-501/06 P, C-519/06 and C-515/06, not yet reported.

Since the judgment leaves a number of open questions, it is not excluded that further litigation will arise in this area, including on issues such as (i) the precise delineation between ordinary and extraordinary orders; (ii) the relevance of inter-brand competition from alternative products; (iii) the appropriate terms of supply; (iv) the relevance of any impact on R&D costs; and (v) the definition of dominance in the pharmaceutical industry.

Case C-49/07 *Motosykletistiki Omospondia Ellados NPID ("MOTOE") v. Elliniko Dimosio (Greek State)*

On July 1, 2008, the European Court of Justice analyzed the compatibility with the EC Treaty of a national rule that entrusts an organization with the power to grant authorizations for motorcycle events, while the organization is itself at the same time active in organizing and commercializing such events.

Article 49 of the Greek Road Traffic Code provides that in order to obtain permission for the organization of a motorcycle competition in Greece, an application must be made to the Greek Minister for Public Order. The Ministry will give authorization only after receiving the consent of the Automobile and Touring Club of Greece ("ELPA"), which is the official representative of the International Motorcycling Federation ("FIM") in Greece. In addition to being responsible for the authorization of motor sporting events, ELPA also organizes and markets such events.

MOTOE, a non-profit making entity active in the organization of motorcycling competitions, applied to the Greek Ministry for authorization to hold a number of motorcycle races. The Ministry referred the application to ELPA, which for several months failed to give its consent. Faced with an implicit rejection, MOTOE filed a complaint before the Administrative Court of First Instance in Athens, alleging, among other things, that Article 49 of the Greek Road Traffic Code infringes Articles 82 and 86 EC. The court rejected the complaint. MOTOE then lodged an appeal to the Administrative Appeal Court in Athens, which decided to refer two questions to the ECJ, asking whether (i) ELPA is an undertaking within the meaning of Articles 82 and 86 EC; and (ii) if so, whether the relevant provisions of the Greek Road Traffic Code are compatible with the EC Treaty.

On March 6, 2008, Advocate General Kokott gave her an opinion. She argued that the particular characteristics of sport do not prevent the application of competition law even where entities are entrusted with a power by the government. Moreover, she pointed out that legal provisions allowing sports organizations to regulate activities in which they themselves participate generate a conflict of interest and may lead to abuse. She stressed the fact that the way the authority exercises its authority does not necessarily lead to an abuse. However, the risks of abuse render the law incompatible with the Treaty and in particular Article 82 EC in combination with Article 86 EC.

In its judgment, the Court first held that, while some of ELPA's activities fall within the exercise of public authority, this does not prevent it from being considered an undertaking in respect of the remainder of its activities. Once it has been established that an activity consists in offering goods or services on a given market (*i.e.* constitutes an economic activity for the purposes of Community law) the fact that an activity has a connection with sport or that the organization does not have a profit motive does not hinder the application of the rules of the Treaty. Since ELPA is not only taking part in administrative decisions authorizing the organization of motorcycling events, but also in organizing such events (including entering into sponsorship, advertising and insurance contracts), the Court concluded that ELPA is engaged in economic activity, and must be considered an undertaking for the purposes of Community law and thus subject to Articles 82 and 86 EC.

While leaving the final appraisal to the referring court, the ECJ also provided necessary guidance, "in the spirit of cooperation with national courts", both in relation to the definition of the relevant markets and the tests to be applied under Article 82 and 86 EC.

The Court concluded that the organization of motorcycling events and the commercial exploitation (sponsorship, advertising and insurance) of such events are not interchangeable but complementary, suggesting that these activities belong to different product markets. The Court also reminded the national court that an undertaking can be put in a dominant position "when it is granted special or exclusive rights enabling it to determine whether and […] in what conditions other undertakings may have access to the relevant market." Moreover, echoing the opinion of the Advocate General, the Court pointed out that the fact that the conduct relates to a single Member State does not preclude the possibility that trade between Member States might be affected.

As regards Article 86 EC, the Court held that the power to give consent to applications for authorization to organize motorcycling events must be considered as a special or exclusive right within the meaning of Article 86(1). Moreover, since that activity cannot be classified as an economic activity, it cannot constitute a service of general economic interest under Article 86(2) EC, even if it is granted by an act of public authority. Also, since ELPA's activities in the organization and commercial exploitation of motorcycling events had

not been entrusted on ELPA by an act of public authority, they could not constitute a service of general economic interest.

The Court also recalled that Articles 82 and 86(1) EC are infringed when a measure by a Member State gives rise to a risk of an abuse of a dominant position, noting that undistorted competition can be guaranteed only if equality is secured between the various economic operators. The role of ELPA in authorizing competitions gives it power to deny other operators access to the relevant market and to set the conditions in which events are organized. This means that ELPA has an obvious advantage over its competitors in the markets for organizing and marketing such competitions. Moreover, this is compounded by the fact that the rule that grants ELPA the power to authorize competitions does not provide for any restrictions, obligations or review.

Following the Advocate General's opinion, the Court held that a national provision infringes Articles 82 and 86 EC when it entrusts an entity which organizes and commercially exploits motorcycling events with the power to authorize the organization of such events, without that power being subject to restrictions, obligations, and review.

ECJ – Opinions

Case 113/07 – *SELEX Sistemi Integrati v. Commission*

On July 3, 2008, Advocate General Trstenjak rendered an opinion on whether an international organization entrusted with state prerogatives and missions of public policy can be considered as an undertaking under the Community competition rules. According to the Advocate General, the Court of First Instance was correct in concluding that Articles 81 and 82 EC apply to certain activities of an organization but not to others, where those activities (i) are separable from the activities undertaken in the exercise of public authority and (ii) constitute economic activities. However the Advocate General questioned some of the assessments of the Court of First Instance and advised the European Court of Justice to change the grounds of the Court of First Instance's judgment without reversing it.

Eurocontrol is an international organization, of which Member States and other states are signatories, in the field of air navigation and air traffic management ("ATM"). Three areas of Eurocontrol's activities were at issue in this case: (i) the activity of regulation, standardization and validation, including the definition and adoption of standards and technical specifications in the field of air navigation; (ii) Eurocontrol's research and development tasks which aim at coordinating national policies on research in the area of air navigation and at spearheading research development actions in this sector, and pursuant to which Eurocontrol acquires and has develops prototypes of ATM equipment and systems with a view to defining and validating standards; and (iii) the assistance provided, upon request, by Eurocontrol to administrations of its contracting parties particularly in the field of planning, specification and creation of ATM systems and services.

In October 1997, SELEX, a company active in the area of air traffic control management, filed a complaint with the Commission alleging that Eurocontrol had infringed Article 82 EC. The Commission rejected the complaint on February 12, 2004, concluding that none of Eurocontrol's activities could be regarded as economic activities, and that Eurocontrol could not, therefore, be deemed an 'undertaking' capable of infringing Article 82 EC.

SELEX appealed the Commission's decision. In a judgment rendered on December 12, 2006, the Court of First Instance rejected the Commission's contention that Eurocontrol does not qualify in all circumstances and with respect to all its activities, as an undertaking capable of infringing competition law. The Court instead analyzed each of the activities in order to assess whether they were separable from those activities undertaken as part of Eurocontrol's public service remit, and whether they were economic activities within the meaning of the established case law. On this approach, an entity may be considered as an undertaking under Article 82 EC in connection with certain activities while it may remain outside the scope of application of competition rules in connection with other activities.

The Court of First Instance concluded that Eurocontrol's standardization and R&D activities (including management of intellectual property rights in this field) were of a non-economic nature. The Court also dismissed the applicant's claim that the activity of acquiring prototypes of ATM systems could be disassociated from that of standardization. Moreover, the Court recalled that, since economic activity consists in offering goods and services, the nature of any purchasing activity must be determined according to whether the subsequent use of the purchased goods amounts to an economic activity. Eurocontrol did not use the prototypes for such purposes. However, the Court found that Eurocontrol's activity of providing advice and technical assistance to national administrations was an economic activity. Despite the fact that this assistance might serve the public interest, the Court held that the relationship with the protection of safety in the field of air navigation was very indirect. Moreover, the Court pointed out that

private undertakings could also offer this service on a market. The Court nevertheless rejected SELEX claims that Eurocontrol had abused a dominant position in this area.

SELEX lodged an appeal before the European Court of Justice. The Advocate General agreed with Court of First Instance that one and the same entity can qualify as an undertaking under Article 81 and 82 EC for certain activities but not for others, provided that the activities are economic in nature and can be distinguished from the entity's activities undertaken as a public authority.

However, the Advocate General considered that Eurocontrol's advice to national administrations for ATM systems may not be separated from the exercise of its public authority and from its goal of assuring the harmonization of air traffic control systems. In this respect, the Advocate General rejected the Court of First Instance's argument that the fact that the service is optional, and was offered at the request of the national administrations, indicated otherwise. Moreover, the Advocate General challenged the Court's finding that there is a market for this kind of technical advice, on which also private specialized firms could be active. Therefore, the Advocate General suggested that the Court should modify the grounds of the Court's judgment in this respect.

As regards Eurocontrol's task of developing and adopting standards and specifications, the Advocate General shared the Court's view that these activities are not of economic nature. However, according to the Advocate General, a distinction cannot be made between the actual adoption of standards for air traffic security (which the Court held was a clearly legislative activity) and Eurocontrol's activities in the preparation and development of standard specifications, stating that it was clear from the founding convention and the intention of the contracting parties that Eurocontrol was entrusted with both activities, and that they both are central to the exercise by Eurocontrol of its public authority in the general interest. The Advocate General nevertheless agreed with the Court's contention that an economic activity requires that there be a "market". In this case, the lack of evidence of supply and demand for standardization activities indicates the absence of a market.

The Advocate General also agreed with the Court's conclusion that Eurocontrol's purchases of ATM prototypes do not qualify as economic activity. Eurocontrol is using the acquired prototypes to promote the creation of a uniform European air control system, and not as an input for a product that is offered on a market.

Finally, the Advocate General agreed with the Court's finding that Eurocontrol's activities in the area of research and development and the management of intellectual property rights are not of economic nature. The fact that Eurocontrol grants royalty-free licences to intellectual property rights acquired by Eurocontrol as part of its development activities is an indication that the activity is non-economic and undertaken as part of the general aim of promoting technical development in this area.

Case C-202/07 P *France Telecom SA v. Commission*

On September 25, 2008, Advocate General Mazák advised the European Court of Justice to set aside the Court of First Instance's judgment confirming the Commission's finding that Wanadoo Interactive ("WIN"), now France Télécom, had abused its dominant position on the French market for retail broadband Internet services by charging predatory prices.

Interestingly, the Advocate General states that the possibility of recoupment of losses should be a condition for establishing predatory pricing, and that dominant undertakings should be entitled to align their prices with that of their competitors, where this is not aimed at strengthening or abusing their dominance.

Concerning recoupment, the Court of First Instance, referring to the European Court of Justice's holding in *Tetra Pak II*,14 held that the Commission need not demonstrate that a dominant undertaking had a realistic chance of recouping its losses, regardless of whether its prices were below average variable costs ("AVC").

The Advocate General argued that the Court had stated that its finding in *Tetra Pak II* was expressly limited to the circumstances of that particular case, and that the case law requires proof of possible recoupment. He cited *Akzo*,[15] where the Court observed that "a dominant undertaking has no interest in applying such prices [below AVC] except that of eliminating competitors so as to enable it subsequently to raise its prices." Moreover, referring to the Court's judgment in *Hoffmann-La Roche*,[16] which defines the concept of an abuse, he asserted that without a showing of possible recoupment, dominant undertaking are likely engaged "in normal competition"

14 Case C-333/94 P *Tetra Pak v. Commission* 1996 ECR I-5951.

15 Case C-62/86 *AKZO v. Commission* 1991 ECR I-3359.

16 Case 85/76 *Hoffmann-La Roche v. Commission* 1979 ECR 461.

17 Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports v. Commission* 2000 ECR I-1365.

and consumers should not be harmed. In addition, the Advocate General quoted Advocate General Fennelly's opinion in *Compagnie Maritime Belge*[17] who had stated that the Court in *Tetra Pak II* did not seem to "have gone as far" as Advocate General Ruiz-Jarabo Colomer, who had recommended in his opinion in that case that the Court "should not lay down the prospect of recouping losses as a new prerequisite for establishing the existence of predatory pricing contrary to Article 82 EC."

Concerning the right of a dominant undertaking to align its prices on those of its competitors, the Advocate General agreed with the Court of First Instance that the case law does not accord dominant undertakings an absolute right to align prices. However, he noted that the Court had not conducted a factual analysis as to whether Wanadoo had aligned its prices to meet competition, or, to the contrary, to strengthen and abuse its dominant position. He cited *Tetra Pak II*, arguing that the special responsibility of dominant incumbents should be assessed on a case-by-case basis, "in the light of the circumstances of each case which show a weakened competitive situation." Pricing below AVC by dominant undertakings should be allowed where it is objectively justified, "by showing that such pricing was not part of a plan to eliminate its competitor".

CFI – Judgments

Case T-271/03 *Deutsche Telekom v. Commission*

On April 10, 2008, the Court of First Instance confirmed a Commission decision of May 21, 2003,[18] which fined Deutsche Telekom ("DT") for engaging in abusive margin squeezing in the German telecommunications markets. DT appealed the Court's judgment before the European Court of Justice on June 26, 2008.

The Commission found that DT provided (i) wholesale access services to its competitors by renting connections to its telecommunications infrastructure (local loop); and (ii) retail access services to its customers that use DT infrastructure for narrowband (analogue and ISDN) and broadband connections. Wholesale access charges were approved by the National Regulatory Authority ("NRA"), but retail access charges for narrowband connection were subject to a lighter form of regulation, namely a price cap that applied to a basket of services. Retail access charges for broadband connections were not subject to ex ante regulation, but the NRA could conduct an ex post review. The Commission found that, between 1998 and 2001, DT's charges for wholesale access services to be paid by its competitors were above the retail access charges to be paid by its customers. Since competitors could not charge customers more than DT charged customers, competitors could never make a profit. Even in 2002, DT's competitors could not cover the costs of providing retail services. Thus, the Commission concluded that DT pricing policy amounted to an abuse of its dominant position in the wholesale and retail access markets.

The Court's judgment clarifies (1) the relationships between competition law and regulation; and (2) the law on margin squeeze under Article 82 EC. The Court held that dominant companies may rely on regulation as a defense under Article 82 EC only when they can show that it deprives them of any pricing freedom. The Court found that DT had scope to increase its retail access price within the regulatory framework, and that it could therefore have ended the price squeeze. If necessary, DT could have applied to the NRA for authorization to alter its prices in order to eliminate the margin squeeze. Thus, DT could not argue that the NRA had approved its wholesale charges to escape liability for its conduct under Article 82 EC. The Court added that the NRA's finding that DT's prices did not infringe competition law did not bind the Commission. NRAs operate under national telecommunications law, which may have different objectives from EC competition law. In any event, the Court reiterated its consistent case law that the Commission is not bound by a decision of a national body, even one entrusted with the application of competition rules.

Concerning the assessment of margin squeezes under Article 82 EC, the Court held that the correct test is whether "the [dominant firm] itself, or an undertaking just as efficient as the [dominant firm] would have been in a position to offer retail services otherwise than at a loss if it had first been obliged to pay wholesale access charges as an internal transfer price, […]." A price squeeze would be abusive if the dominant firm would have made a loss. The Court confirmed the validity of the Commission's approach, which was based solely on an analysis of DT's costs and prices, disregarding the situation of competitors. The Court also confirmed that margin squeeze calculations must consider the situation of competitors for the particular service in question, in this case the provision of retail access for broadband connections. The Commission had assessed the squeeze by comparing wholesale and retail access charges. It had not taken account, however, of competitors' sales of other retail services even though they involved access to the incumbent's network. The Court rejected DT's argument that retail call revenues should have been included because competitors could use them to

18 OJ 2003 L 263/9.

compensate for losses on retail access services and thus help cover wholesale charges.

Finally, the Court noted that the Commission must demonstrate the anticompetitive effects in terms of "possible barriers that [the dominant undertaking]'s pricing practices could have created for the growth of competition on that market [the downstream market for retail access services]," adding that these effects derive "in principle" from the existence of a margin squeeze. The Court nevertheless went on to assess the actual foreclosure effects in this case.

Commission decision

Case COMP / E-1/38.133 *Prokent-Tomra*

The Commission published its decision of March 29, 2006, in which it imposed a € 24 million fine on seven subsidiaries of Tomra for abusing its dominant position on the market for reverse vending machines ("RVMs") in five countries of the European Economic Area ("EEA"), namely the Netherlands, Sweden, Norway, Austria and Germany. The Commission's investigations were triggered by a complaint from Prokent, one of Tomra's competitors.[19] Tomra has appealed against the decision.

Tomra's main activity in the EEA consists of the supply of RVMs that are used for the collection of empty drinks containers and for giving refunds. Tomra produces both high-end and low-end machines and sells them to supermarkets. High-end or "through-the-wall" machines are usually connected to a backroom in which the drink containers are further handled. Low-end, or "stand-alone" machines are simpler, cheaper and require less space. Prokent was a supplier of RVMs and related products and services before its bankruptcy.

The Commission found that Tomra had a dominant position on the overall market for high-end and low-end machines for retail outlets regardless of the precise relevant geographic market, *i.e.* at the EEA level or in any of the countries concerned. It based its finding on a series of factors including Tomra's high markets shares relative to its competitors. In addition, its competitors were all small, some of which had left the market quickly. Furthermore, the Commission said that there was no substantial countervailing buyer power and Tomra did not establish that it was a bidding market.

As regards the abuse, the Commission held that Tomra had designed a strategy to preserve its dominance, in particular by preventing market entry and keeping competitors small. This strategy was based on several practices that the Commission said were anticompetitive: (i) exclusivity and preferred supplier agreements or arrangements, (ii) agreements containing individualized quantity commitments leading to de facto or partial exclusivity and, (iii) individualized retroactive rebate schemes.

With respect to the impact of those practices, the Commission found that Tomra's policy and practices were designed to, were capable of, and were likely to restrict market access for competitors in RVMs in the five EEA countries. The Commission found that those practices also had an impact in the EEA as a whole. The Commission dismissed Tomra's argument according to which the competitive structure of those markets was due to the difference between Tomra's innovative and sophisticated machines and the simpler products of its rivals.

Exclusive agreements have by their nature the capacity to foreclose, which was exacerbated by the long-life cycle of the products. The Commission relied on the fact that Tomra was dominant and that exclusivity obligations applied to a not unsubstantial part of the market demand.

The Commission found that the arrangements contained quantity targets that constituted individualized commitments that were different for each customer and corresponded either to the customer's entire requirements or to a large proportion of them, or even exceeded them.

The rebate schemes were mostly individualized and corresponded to customers' total requirements. Customers were entitled to retroactive bonuses or discounts if they reached or exceeded a given purchasing target at the end of a given reference period. They provided a strong incentive for buying exclusively from Tomra.

The Commission asserted that in the present decision, it considered the likely effects of Tomra's practices on the RVMs market. To assess the effects of Tomra's practices, the Commission referred to the stable market share of Tomra in each national market and in the EEA. Tomra sold more machines in years when more of the total demand was covered by its exclusionary agreements. When the customers were not restrained by the exclusionary agreements, they purchased larger numbers of competing machines. The demand on the market is non recurrent and linked to the adoption of national legislation introducing mandatory deposit systems. Although entry into the RVM market is not impossible or exceedingly costly, the RVM markets continued to be monopolistic.

The Commission considered that Tomra had not proved cost-saving based on economies of scale. Individualized targets showed that the

19 OJ 2008 C 219/11.

practices were not based on cost savings. The Commission also dismissed Tomra's arguments that the customers themselves had requested rebates and quantity discounts in return for exclusivity.

The Commission rejected Tomra's economic arguments, arguing in particular that Tomra's conclusions (i) were based on off equilibrium assumptions, (ii) that they violated individual rationality on the incumbent side and (iii) on the competitor side and, (iv) a distinction had to be made between ex ante and ex post analysis. In particular it rejected the assertion that less than a third of the rebate schemes could have been potentially exclusionary, arguing that the assumptions on which this was based were unreasonable.

The Commission thus concluded that Tomra's practices constituted a "pattern of practices" since they contributed to the same strategy and had similar effects. The Commission disregarded the fact that some practices affected only a smaller proportion of the demand in certain years and countries.

STATE AID

ECJ – Judgments

Case C-521/06 *Athinaiki Techniki v. Commission*

On July 17, 2008, the European Court of Justice rejected an order by which the Court of First Instance dismissed as inadmissible an action seeking the annulment of a Commission decision of June 2, 2004 to take no further action on a complaint concerning an alleged incompatible State aid granted by the Greek State to the successful bidder (the Hyatt Regency consortium) in the context of a procedure initiated by the Greek Government for the award of a public contract with a view to disposing of 49% of the capital of the Mont Parnès Casino. The Court of Justice referred the case back to the Court of First Instance.

After a preliminary review of the complaint, the Commission concluded that there were insufficient grounds for continuing to examine the case and decided to close the file. The Commission informed the applicant, which brought an action for annulment before the Court of First Instance against the Commission's decision to refrain from further investigating its complaint, arguing that it had not been offered the opportunity to submit comments in its capacity as an interested party pursuant to Article 6 of Regulation 659/1999 EC (the "Regulation"). The Court ruled the application inadmissible, reasoning that the Commission did not adopt any decision within the meaning of the Regulation, since the letter addressed to the applicant did not define the Commission's final position on the compatibility with the common market of the measure forming the subject matter of the complaint. According to the Court, the letter simply informed the applicant that the Commission considered that it had insufficient information to pursue the case.

ON appeal, the European Court of Justice noted that an action for annulment pursuant to Article 230 EC must be available against all measures adopted by the Community institutions, whatever their nature or form, which are intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.

The Court considered that, by deciding not to further pursue the investigation and to close the file, the Commission did establish its position on the applicant's request seeking a finding of infringement of Articles 87 EC and 88 EC, since it prevented the applicant from submitting its comments in the context of a formal investigation procedure pursuant to Article 88(2) EC. The Commission's decision thus produced legal effects, which were capable of affecting the company's interests. The Court thus concluded that the contested act constituted a Commission decision open to challenge by the applicant under Article 230 EC.

Joined Cases C-434/06 to C-434/06 *Union Generalde Trabajadores de la Rioja*

On September 11, 2008, the European Court of Justice rendered a judgment on the compatibility with EC State aid rules of certain tax measures adopted by the Basque Countries of Vizcaya, Alava, and Guipúzcoa. The issue was whether the tax measures at stake should be considered as "selective" measures favoring only "certain productions or undertakings" within the meaning of Article 87 EC and, thus, whether they constituted State aid insofar as the other conditions laid down by this provision appeared to be met.

The Court referred to its earlier judgment in Case C-88/03 *Portugal v. Commission* of September 6, 2006,[20] where it held that measures adopted by a local authority within a Member State granting a benefit to all companies located within such authority's territory are not to be considered as "selective" if the local authority is sufficiently autonomous from the central government of the relevant Member State. The Court also recalled the three-pronged test set forth in that judgment to determine whether a local authority is sufficiently autonomous from the central government for its territory to be considered as the benchmark to assess the selectivity of any measure

20 2006 ECR I-7115.

adopted by such authority, namely: (i) the autonomy of the local authority must be acknowledged at the constitutional level within the Member State (*institutional autonomy*); (ii) the central government must not have the ability to influence the local authority's decision-making process (*procedural autonomy*); and (iii) the financial consequences of the local authority's measures should not be compensated by the central government (*financial autonomy*).

The Court held that the *institutional autonomy* criterion was clearly met by the relevant local authorities, whose political and administrative status was clearly distinct from that of the central government. The Court further held that the relevant local authorities also had the required degree of decision-making autonomy from the central government for the *procedural autonomy* requirement to be met. Finally, the Court essentially deferred to the national judge the assessment of whether the *financial autonomy* criterion was met.

CFI Judgment

Case T-266/02 *Deutsche Post v. Commission*

On July 1, 2008, the Court of First Instance annulled a Commission decision finding that certain transfers of financial resources from the Federal Republic of Germany to Deutsche Post amounted to unlawful State aid.

On July 2, 1994, private parcel delivery company UPS Europe lodged a complaint before the Commission against Deutsche Post arguing that Deutsche Post: (1) was abusing its dominant position on the market for door-to-door parcel delivery services in breach of Article 82 EC by charging below-cost prices; and (2) financed such loss-making predatory activity, *inter alia*, via public resources granted to it by the German Federal Government in breach of Article 87 EC.

On June 19, 2002, the Commission adopted a decision finding that Deutsche Post used State resources originally granted to it to finance its public service obligations in the door-to-door parcel delivery service sector to cover the costs deriving from its below cost pricing policy in the sector. The Commission concluded that Deutsche Post derived an unjustified advantage within the meaning of Article 87 EC from the transfer of such resources (approximately EUR 570 million) and that such transfer constituted unlawful State aid, since all other conditions provided for by Article 87 EC were met.

The Court upheld Deutsche Post's claim that the Commission had erred in finding that the State resources transferred to the company conferred upon its recipient an unjustified advantage and constituted unlawful State aid, because it had not checked whether the relevant State resources transferred to Deutsche Post actually exceeded the costs incurred by the company to meet its public service obligations.

Commission Legislative Developments

New State Aid Block Exemption Regulation

On August 6, 2008, the Commission adopted Regulation (EC) No 800/2008 providing for a new General Block Exemption for State Aid (the "GBER"). The GBER consolidates for the first time in a single Regulation all existing sector-specific State aid instruments adopted by the Commission until present (regional aid, aid for small and medium-sized enterprises, research & development aid in favor of SMEs, training and employment aid), while also including five new categories of aid, namely: environmental aid, innovation aid, research and development aid for large companies, aid in the form of risk capital, and aid for enterprises newly created by female entrepreneurs. Pursuant to the GBER, Member States may implement State aid measures falling within the scope of the block exemption without prior notification to the Commission.

The key substantive changes introduced by the GBER can be summarized as follows:

- The increase in the notification threshold for investment and employment aid for SMEs up to EUR 7.5 million, as well as for training aid up to EUR 2 million, below which Member States need not notify aid grants.
- The inclusion of environmental aid within the scope of the block exemption, which may e granted without notifying the Commission.
- The inclusion of aid in the form of risk capital within the scope of the block exemption, with a view to encouraging Member States to use this type of aid more intensively.
- The extension of the scope of the GBER to encompass research and development aid for large companies and no longer only for SMEs, as well as the inclusion of innovation aid for both large companies and SMEs within the scope of the block exemption.
- The clarification and simplification of the existing rules on employment aid, as well as the introduction of substantially increased aid possibilities in favor of disabled workers, with higher aid intensities and a higher notification ceiling.

POLICY AND PROCEDURE

CFI Judgments

Case T-276/04 *Compagnie Maritime Belge v. Commission*

On July 1, 2008, the Court of First Instance rejected Compagnie Maritime Belge ("CMB")'s appeal against a Commission decision fining it for violations of Articles 81 and 82 EC.

In 1992, the Commission found that the practices of the members of the Central and West African Shipping Line Conference ("CEWAL") that operated between Zaire (now the Republic of Congo) and various Northern European ports infringed Articles 81 and 82 EC and fined them €10 million, including a fine of €9.6 million on CMB (the "Original Decision").[21] The Court of First Instance[22] and the Court of Justice[23] rejected CMB's appeals against the Original Decision in relation to the findings of fact and the determination of infringements. However the Court of Justice annulled the fine on the procedural ground that the Statement of Objection was not addressed to CMB. In April 2004, the Commission adopted a new decision,[24] based on the findings in the Original Decision, fining CMB €3.4 Million (the "New Decision"). CMB appealed the New Decision.

CMB argued that the New Decision was taken in violation of the period of limitation set in Regulation 2988/74. It argued in the alternative that the delay of four years in the adoption of the New Decision after the European Court of Justice had delivered its judgment in the appeal was unreasonable.

The Court pointed out that Regulation 2988/74 set a period of limitation of five years in cases of infringement. The period of limitation starts running from the day on which the infringement ceases and is interrupted by any action of the Commission for the purpose of the preliminary investigation or proceedings in respect of the infringement. Each interruption starts the time running afresh up to a total period of 10 years. However the 10 years limitation period is suspended for as long as the decision of the Commission is the subject of proceedings pending before the Courts. The Court found that the limitation period never ran uninterrupted for five years since the termination of the violation in November 1989 until the initiation of the procedure for the adoption of the New Decision,. For that purpose the fact that CMB was not mentioned in the 1990 Statement of Objection did not mean that the period of limitation continued running in relation to it since an interruption of the period of limitation applies in relation to all participants in the violation concerned. Furthermore, the Court found that in the 15 years between the termination of the infringement and the adoption of the New Decision, the 10 years period of limitation was interrupted for seven years while the appeals against the Original Decision were pending before the Courts. The Court therefore concluded that the New Decision did not violate Regulation 2988/74. As for the reasonableness of the delay in adopting the New Decision, the Court held that delays that respect the periods of limitation set in Regulation 2988/74 could not be qualified as unreasonable.

CMB further criticized the Commission for not reexamining in the New Decision the findings of infringement made in the Original Decision thus denying from CMB the possibility of contesting in the appeal the base on which the New decision was founded.

The Court explained that the guarantee of legal stability and good administration of justice requires that judicial decisions in regard to which all rights of appeal have been exhausted not be called into question. As a consequence those points in the Original Decision that were not affected by its partial annulment by the Court of Justice became definite and could not have been reexamined by the Commission.

CMB also contended that the fine in the New Decision was disproportionate. According to CMB the violations were not serious; the infringement was novel; CMB ceased the infringement many months before the Statement of Objection was served, and finally, in taking under consideration the first year of infringement for the purpose of increasing the fine, the Commission was acting contrary to its practice and the Fining Guidelines.

The Court rejected CMB's position, noting that the Commission considered the infringements to be serious already in its Original Decision and that CMB did not contest that characterization in its appeals against its Original Decision. The Court further noted that, in its Original Decision, the Commission rejected the argument on the novel character of the infringement and was supported on this point by both Courts in the appeals. In relation to the cessation of infringement, the Court held that this cannot be considered as an attenuating circumstance and is anyway taken under consideration

21 Cases IV/32448 and IV/32450 *CEWAL and Others*, Commission decision of December 23, 1992.

22 Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie Maritime Belge and others v Commission* [1996] ECR II-1201.

23 Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge and others v Commission* [2000] ECR I-1365.

24 Case COMP 32.450 *CEWAL and Others*, Commission decision of April 30, 2004.

for the purpose of the calculation of the fine when considering the duration of the infringement. Finally, the Court recalled its interpretation of the Fining Guidelines that a fine cannot be increased on grounds of the duration of the infringement only in relation to infringements that persisted for less than a year. Infringements that persisted for longer than one year may be subjected to an increase of the fine for reason of their duration starting with the first year.

Finally, CMB argued that it was the practice of the Commission in decisions concerning the maritime transport sector to base the fines on the worldwide turnover of the undertaking concerned in the previous financial year to the year of the decision imposing the fine. According to CMB the Commission diverged from this practice without offering an objective and non-discriminatory explanation. CMB considered that the choice of the year 1991 rather than 2003 as the base for the calculation of the fine was particularly arbitrary.

The Court held that the Commission is not obliged to base its calculations on the turnover of the undertaking concerned in determining the level of the fine. Furthermore, the Commission is not tied by its earlier decisions, even less so when the decisions cited by CMB pre-date the Fining Guidelines. The Court asserted that the Commission in fact enjoys wide margins of discretion in fixing the level of fines. The Court concluded that the Commission did not err in detracting from its earlier practice in calculating the fine imposed on CMB.

Case T-99/04 *AC-Treuhand v. Commission*

On July 8, 2008, the Court of First Instance dismissed AC Treuhand's appeal against a Commission decision fining it EUR 1000 for its participation in a cartel in the market for organic peroxides. The Commission's decision held that, from 1971, certain organic peroxide producers participated in a cartel in the European market for organic peroxides supplied to the plastics and rubber industry. AC Treuhand's involvement commenced in 1993, when it began organizing meetings for, and concealing evidence of, the cartel. The Court upheld the Commission's finding that AC Treuhand's conduct amounted to an infringement of Article 81(1), even though the undertaking was not itself active in the organic peroxide market and it had only acted as a facilitator of the cartel.

AC Treuhand had argued that the Commission breached its rights of defense and its right to a fair trial by failing, prior to the notification of the statement of objections, to disclose the basis and extent of the accusations against it. However, the Court explained that the Commission's administrative procedure is comprised of two separate stages: a preliminary investigation stage and an *inter partes* stage. In order to safeguard the effectiveness of the preliminary investigation, the Commission is not required to inform undertakings of all the essential evidence on which it will rely until the adoption of the statement of objections at the beginning of the *inter partes* stage. It is only at this stage, therefore, that an undertaking that is subject to an investigation is able to rely in full on its rights of defense. The Court thus dismissed this element of AC Treuhand's appeal as unfounded.

Notwithstanding the above, the Court noted that the Commission should have informed AC Treuhand of the alleged infringements of Article 81 EC involved in the investigation and of the possibility that the Commission might impute unlawful conduct to it, during the investigation stage of its proceedings. It concluded, however, that the Commission's omission was not sufficient to justify the annulment of the decision in this case since AC Treuhand had submitted no concrete evidence to demonstrate it had adversely affected the undertaking's ability to defend itself during the *inter partes* stage of proceedings.

AC Treuhand also argued that the Commission's decision failed to make the appropriate distinction between perpetration and complicity for the purposes of Article 81 EC. As it was not a contractual member of the cartel and, moreover, was not active in the market in which the restriction of competition took effect, AC Treuhand maintained that its role was limited to simply facilitating those cartel arrangements implemented by the organic peroxide producers. As such, it claimed, it was merely complicit in the cartel rather then an active perpetrator of the infringement and should not, therefore, have been held liable for the infringement perpetrated by the organic peroxide producers.

The Court held that any restriction of competition might be classified as an "agreement between undertakings" if it is the result of a concurrence of wills of at least two parties. Provided there is an element of joint intention, therefore, the fact that an undertaking is not active in the market on which the restriction of competition takes effect cannot preclude its liability for the entire infringement. Nor can the fact that an undertaking only participated in the cartel in an accessory or passive way exclude its liability for the entire infringement. The extent of an undertaking's involvement should only be taken into account in determining the level of any penalty imposed. On this basis, and in light of its further conclusion that AC Treuhand's conduct amounted to active participation in the cartel arrangements between 1993 and 1999, the Court also dismissed this

limb of AC Treuhand's appeal and upheld the EUR 1 000 fine imposed by the Commission.

The Court's decision thus confirms that the Commission can hold independent undertakings acting as mere facilitators of cartel arrangements liable for infringements of Article 81, even if those undertakings are not contractual parties to any formal cartel agreements and are not themselves active in the market on which the restrictive agreement takes effect. However, to the extent that AC Treuhand's liability in this case was based on "active" involvement in the cartel, the Court's judgment fails to clarify at what point a company, which is present on a separate market and offers only passive assistance to a cartel, would be considered to demonstrate a "joint intention" with the cartel participants for the purposes of Article 81. This question is of particular importance for service providers such as hotels, restaurants and golf clubs, for example, to the extent that they often play host to cartel meetings. For these industries, the judgment leaves unanswered the important question of whether mere knowledge of the anti-competitive nature of activities conducted on their premises could be sufficient to be liable to fines as passive participants of Article 81.

Finally, to the extent that the Commission's decision constituted a departure from its usual decisional practice,[25] the Court's confirmatory judgment is likely to encourage the Commission to target independent facilitators more consistently and aggressively in future.

Case T-53/03 *BPB v. Commission*

On July 8, 2008, the Court of First Instance handed down judgments in appeals brought by BPB, Saint-Gobain Gyproc, Lafarge and Knauf against a Commission decision fining them for participation in a cartel in the plasterboard market. The infringement consisted of various elements, including: a meeting between BPB and Knauf in London in 1992; exchanges of sales volumes from 1992 onwards regarding the German, French, UK and the Benelux countries; exchanges of sales volumes and parallel price rises in the UK; meetings between 1996 and 1998; and exchanges of information on price increases in Germany during the same period. This conduct, which the Commission concluded constituted a single, continuous infringement of Article 81, took place between 1992 and 1998,[26] and was intended to stabilize prices and market shares in the UK, Germany, France and the Benelux countries. The Commission imposed fines of EUR138.6 million, EUR 85.8 million, 249.6 million and 4.32 million on BPB, Saint-Gobain Gyproc, Lafarge and Knauf respectively.

BPB claimed that the Commission had breached its rights of defense by relying on evidence from an anonymous source, which it failed to disclose before the publication of the decision. Lafarge and Knauf made similar claims, each alleging that the Commission's failure to grant access to other parties' responses to the Statement of Objections constituted a breach of their rights of defense, since the Commission had relied on these documents in finding an infringement. The Court concluded that the failure to disclose certain incriminating evidence should not affect the validity of a decision, provided that the Commission supports its findings with other evidence known to the defendant. Moreover, the Court confirmed that there is no general right to access other parties' replies to the statement of objections; parties need only be granted access to documents that they can prove contain inculpatory evidence relied on by the Commission.

BPB and Lafarge also argued that the Commission had erred in characterizing the various, isolated acts by the plasterboard manufacturers as constituting a single, continuous infringement. BPB additionally submitted that the Commission's characterization was undermined by the substantial gaps between the different elements of the infringement and the fact that only a limited number of manufacturers took part in certain meetings and exchanges. The Court rejected these claims on the basis that an infringement of Article 81(1) EC may result from a series of isolated acts if one or several elements of that series violate Article 81(1) EC. Having examined the evidence, it found that the Commission's conclusion was justified by the fact that the individual acts in question had an identical object and the agreements and concerted practices clearly formed part of an overall plan to influence competition in the plasterboard markets in the UK, France, Germany and the Benelux countries. The Court also dismissed BPB's additional arguments, explaining, first, that a gap of several months between acts is immaterial where those actions have an identical object and form part of an overall plan, and secondly, that an undertaking's limited role in an infringement should be taken into account in calculating the fine imposed but not in determining the existence of an infringement.

25 With the exception of its 1980 Italian cast glass decision[25], the Commission's decisional practice to date has consistently ignored the role of independent facilitators when attributing liability for cartel infringements.

26 Gyproc was only involved from 1996

With regard to the calculation of the fines imposed, both BPB and Lafarge appealed the 50% increase imposed by the Commission for repeated infringement. BPB argued that the increase imposed for recidivism was excessive in light of the limited scope of its subsidiary's involvement in the Cartonboard cartel. However, the Court concluded that the limited nature of BPB's involvement in the earlier cartel was irrelevant to the increase imposed in the plasterboard decision, since it is the finding of a prior infringement rather than the scope of any previous involvement or the size of any previous fine imposed that determines the appropriate increase for repeated infringement.

Lafarge, meanwhile, argued that as a 100% increase had already been imposed for deterrence, the further 50% increase for recidivism constituted a double penalty since such increases are also justified primarily by their deterrent effect. The Court rejected this argument on the basis that the Commission should have complete discretion in determining the factors to be taken into account in setting the appropriate fine and was therefore entitled to take repeated infringement into account as an aggravating factor.

BPB and Lafarge further submitted that the Commission should not be entitled to increase the fine on grounds of repeated infringement where the first offence is contemporaneous with the second. In BPB's case, the Commission's Cartonboard decision was handed down four years before the end of the Plasterboard cartel. BPB therefore argued that the aggravating factor should only be applied to the Plasterboard fine for anti-competitive conduct that took place after the Cartonboard decision. However, having considered the particular circumstances of the case including the fact that BPB was involved in the plasterboard infringement for four years after the cartonboard decision, the Court concluded that the Commission was justified in imposing a significant increase since the fine imposed in the earlier decision had apparently failed to have the intended deterrent effect.

In the case of Lafarge, a fine had not yet been imposed for the company's contemporaneous involvement in a cement cartel at the time the Commission imposed its fine for the plasterboard cartel. On this basis, Lafarge argued that the alleged cement infringement should not have been taken into account by the Commission as an aggravating factor in assessing the level of the fine to be imposed in the Plasterboard case. However, the Court rejected this claim on the basis that the Commission should have complete discretion in identifying aggravating factors and, moreover, in assessing any increase that should be applied to the fine as a result.

The appeals of Saint-Gobain Gyproc, Lafarge and Knauf were dismissed in their entirety. However, the Court reduced the fine imposed on BPB from EUR 138.6 million to EUR 118.8 million to reflect a further 10% reduction under the Leniency Notice in recognition of the extent to which its cooperation "substantially strengthened the Commission's arguments concerning the existence of an overall plan and, consequently, made it possible to substantially increase the amount of the fines in respect of the gravity of the infringement."

Commission Legislative Developments

Commission's Guidelines on the Application of Article 81 EC Treaty to Maritime Transport Services

On July 1, 2008, the European Commission adopted its Guidelines on the application of Article 81 EC Treaty to maritime transport services (the "Guidelines").[27] The Guidelines constitute the latest stage of the Commission's on-going effort to reform the competition rules applying to the maritime transport sector, which, on October 18, 2008, also saw the repeal of the liner conference block exemption under Council Regulation 4056/86.[28] This exemption previously allowed shipping lines meeting in liner conferences to fix rates and other conditions of carriage. However, absent this safe harbor, liner companies will now be required to self-assess whether such conferences are compatible with EC competition rules. The Guidelines explain the principles the Commission will follow when defining markets and assessing various horizontal agreements between competing liner shipping, cabotage and tramp vessel services for the purposes of Article 81 EC.

According to the Guidelines, liner shipping involves the transport of cargo, chiefly by container, on a regular basis to ports of a particular geographic route, generally known as a trade. Other general characteristics of liner shipping are that timetables and sailing dates are advertised in advance and services are available to any transport user. Tramp vessel services involve the transport of goods in bulk or in break bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply of demand. It is mostly the

27 Commission Guidelines on the application of Article 81 of the EC Treaty to maritime transport services SEC (2008) 2151 final, July 1, 2008.

28 Council Regulation (EEC) No 4056/86 of December 22, 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, [1986] OJ L 378/4.

unscheduled transport of one single commodity, which fills a vessel. Cabotage involves the provision of maritime transport services including tramp and liner shipping, linking two or more ports in the same Member State.

The Guidelines explain that most shipping transport agreements will be subject to scrutiny under Article 81, owing to the international nature of the services in linking ports between two or more Member States and their likely impact on the market for the provision of transport and intermediary services.

Concerning the definition of the relevant product markets, the Guidelines state that previous Commission decisions and Court judgments concerning liner shipping services have concluded that "containerized" and "break bulk" liner shipping services constitute separate markets. However, they further note that it may, in certain circumstances, be appropriate to define a narrower product market limited to a particular type of product transported by sea. With respect to the geographic market, the Guidelines note that case law has, to date, consistently identified the relevant market as limited to a range of ports in Northern Europe or the Mediterranean.

Concerning tramp shipping, the Guidelines merely set out the relevant factors for product and geographic market definition given the lack of precedents in this area. These include the main terms of an individual transport request, the type of contract (voyage charter, contract of affreightment, and/or time charter), the type of cargo, and/or the type and/or size of the vessel. Factors such as chains of substitution between vessel sizes, the reliability of the service provider and regulatory requirements may also be relevant. Finally, with respect to the relevant geographic market, the Guidelines suggest that the first orientation should be the loading and discharging ports or regions specified in individual service contract, but that other factors, including the seasonality of certain trades, vessel repositioning, ballast voyages and trade imbalances should also be considered.

In contrast to agreements that have the object of restricting competition, the Guidelines generally note that horizontal agreements whose sole object and effect is to bring about technical improvements or cooperation, or which implement environmental standards will not fall foul of Article 81 EC. In order to assess whether an agreement has the effect of restricting competition, the Guidelines identify the following factors: prices; costs; quality; frequency; differentiation of the service provided; innovation; marketing and commercialization of the service. On this basis, the Guidelines further examine three types of information exchange of particular relevance to maritime transport services, *i.e.*, technical agreements, exchanges of information and pools.

With respect to technical agreements, the Guidelines state that horizontal agreements whose object and effect is to implement technical innovation or cooperation may not fall foul of Article 81 EC on the ground that they do not restrict competition.

However, the Guidelines explain that exchanges of information between competing liner shipping companies, which facilitate the implementation of an anticompetitive practice or which, in its own right, removes the degree of uncertainty as to the operation of the relevant market such that competition is restricted, may constitute an infringement of Article 81 EC. On this basis, the Guidelines state that the actual or potential anti-competitive effects of individual information exchange arrangements must be examined on a case-by-case basis, taking into account the structure of the market (including the level of concentration of the market and the structure of supply and demand) and the characteristics of the information exchanged.

With regard to market structure, the Guidelines note that restrictive effects on competition are more likely to occur and be sustainable in highly concentrated markets in which a small number of companies operate with symmetrical costs and stable market shares. With respect to the characteristics of the information exchanged, the Guidelines identify the following types of information exchange most likely to constitute and infringement of Article 81 EC:

- Exchanges of commercially sensitive information, including information on prices or capacity;
- Exchanges of individual, as opposed to aggregated, data (although the latter may also be problematic in concentrated markets where parties are able to recognize information specific to each of its competitors);
- Exchanges of recent or future data, especially concerning prices or output; and

The Guidelines note that exchanges of publicly available information and historic information are unlikely to be problematic. They also suggest that the frequency of the exchanges will be significant.

Finally, in relation to information exchange between liner shipping companies, the Guidelines note that such exchanges may, notwithstanding their anticompetitive effects, lead to efficiencies such as better investment planning and capacity usage. However, they emphasize that these benefits must outweigh the restrictive effects according to the criteria set out in Article 81(3) EC if the

arrangement is to benefit from an individual exemption from antitrust enforcement.

The last arrangement examined in the Guidelines are pool agreements in tramp shipping, by which a pool of similar vessels under different ownership are brought together and operated under a single administration. The Guidelines specify certain pool agreements, which will not fall under the prohibition of Article 81, including pool agreements between participants that are not actual or potential competitors and pools whose activity is of minor importance and that will therefore not appreciably affect trade between Member States. By contrast, they note that pool agreements limited to joint selling will fall under Article 81 EC to the extent that they generally have the object and effect of coordinating the pricing policy of participants. Other pool agreements, which do not have as the object or effect of restricting competition, will require more detailed examination of, *inter alia*, structural factors in the relevant market such as market concentration, market entry barriers, buyer power and the nature of the services in question.

As noted above, information exchanges falling within the scope of Article 81(1) EC may be eligible for an individual exemption if they fulfill the four cumulative criteria set out in Article 81(3) EC, namely the undertakings involved must be able to demonstrate improvements to services or efficiency gains (such as better utilization rates), show that consumers will receive a fair share of the efficiencies generated, prove that these efficiencies could not have been brought about by means less restrictive of competition than the pool arrangement and, finally, confirm that the pool does not allow participants to eliminate competition in a substantial part of the market concerned.

The repeal of Council Regulation 4056/86 will almost certainly have a significant impact on the maritime transport industry, not least insofar as shipping companies are now required to self-assess the compatibility of their existing pool or cooperation arrangements with Article 81. It remains to be seen whether it will result in the dissolution or restructuring of existing liner conferences and shipping pools, which have for so long benefited from the protection of the block exemption contained in that regulation. Whether or not this turns out to be the case, the Guidelines will nonetheless provide useful guidance for companies active in maritime transport services, despite leaving open certain questions regarding market definition and or the competitive assessment of shipping pools in the tramp shipping services sector. Shipping companies will have to wait for the Commission's first enforcement actions for further clarification of such outstanding issues.

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