Annual review of EU Competition Cases 2017

January 2018

McDermott Will & Emery

For more information, please contact your regular McDermott lawyer, or:

BRUSSELS

Jacques Buhart
jbuhart@mwe.com

Philip Bentley
pbentley@mwe.com

Wilko van Weert
wvanweert@mwe.com

Mélanie Bruneau
mbruneau@mwe.com

Andrea Hamilton
ahamilton@mwe.com

David Henry
dahenry@mwe.com

Mai Muto
mmuto@mwe.com

Antoine de Rohan Chabot
aderohanchabot@mwe.com

Caroline Ruiz Palmer
cruizpalmer@mwe.com

PARIS

Jacques Buhart
jbuhart@mwe.com

Sabine Naugès
snauges@mwe.com

Lionel Lesur
llesur@mwe.com

Laurent Ayache
layache@mwe.com

Matthieu Adam
madam@mwe.com

Charlotte Michellet
cmichellet@mwe.com

Elena Chutrova
echutrova@mwe.com

MUNICH

Boris Uphoff
buphoff@mwe.com

Richard Gräbener
rgraebener@mwe.com

DÜSSELDORF

Christian Krohs
ckrohs@mwe.com

Daniel von Brevern
dbrevern@mwe.com

Patryk Wcislo
pwcislo@mwe.com

Carina Kant
ckant@mwe.com

Marianne Thurm
mthurm@mwe.com

FRANKFURT

Pauline Walde
pwalde@mwe.com

For more information about McDermott Will & Emery visit www.mwe.com

Table of Contents

1 Cartels and Restrictive Agreements

2 Abuse of Dominant Position

3 Merger Control

4 State Aid

5 Legislative and Policy Developments

Cartels and Restrictive Agreements

Case T-577/14, Gascogne Sack Deutschland and Gascogne v European Union

For the first time ever, the EU is ordered to pay damages to companies as a result of the excessive length of the proceedings before the GCEU

Judgemnt of the GCEU of 10 January 2017 – Case T-577/14 – *Gascogne Sack Deutschland GmbH and Gascogne v European Union (represented by the CJEU),* Intervener: *European Commission*

This was an action for damages for loss allegedly suffered by the applicants as a result of the excessive length of the proceedings before the GCEU in rendering its judgments of 16 November 2011 in Case T-72/06, *Groupe Gascogne SA v Commission* (EU:T:2011:671) and Case T-79/06), *Sachsa Verpackung v Commission GmbH* (EU:T:2011:674),

These judgments rejected claims for annulment or reduction of the fine imposed by the Commission in the industrial bags cartel case and were upheld on appeal by the CJEU's judgments sof 26 November 2013 (Case C-40/12 P, *Gascogne Sack Deutschland Gmbh, formerly Sachsa Verpackung GmbH v Commission*, and Case C-58/12 P, *Groupe Gascogne SA v Commission*).. The CJEU noted, however, that "*the length of the proceedings before the General Court, which amounted to approximately 5 years and 9 months, cannot be justified by any of the particular circumstances of the present case*". The CJEU stated also that the two companies could bring actions for damages seeking compensation for any loss which they may have suffered as a result of the excessive length of the proceedings before the GCEU.

In light of the CJEU's observations, Gascogne Sack Deutschland GmbH and Gascogne e lodged a joint action before the GCEU seeking damages from the European Union.

By its judgment of 10 January 2017, the GCEU partially upheld the claims by awarding damages of €47,064.33 to Gascogne for the material harm suffered and damages of €5 000 to each of the two companies for non-material harm.

The GCEU first recalled that the non-contractual liability of the EU and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions relating to (i) the unlawfulness of the conduct of which the institutions are accused; (ii) the fact of damage and; (iii) the existence of a causal link between that conduct and the damage complained of.

The unlawfulness of the conduct

The GCEU first recalled that Article 47 of the EU Charter of fundamental rights states that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*".

In the present case, the GCEU noted that the length of the procedure before the GCEU in Cases T-72/06 and T-79/06 (i.e., 5 years and 9 months) could not be justified by any of the particular circumstances of those cases.

In particular, the GCEU noted that a period of 3 years and 10 months elapsed between the end of the written procedure and the opening of the oral part of the procedure. The GCEU further stated that although cases in the competition law field are generally more complex than other cases, a period of 15 months between those two parts of the procedure is appropriate. The GCEU noted, however, that where several actions for annulment are brought against the same Commission decision, this period can be extended by a month per action.

Therefore, in this case, in light of the fact that 12 actions for annulment had been brought against the Commission decision, the procedure should have lasted 26 months in total (i.e., 15 plus 11 months).

The GCEU further noted that the degree of factual, legal and procedural complexity of the case as well as the conduct of the applicants did not justify a longer period.

The GCEU concluded that the time-lapse of 46 months between the end of the written procedure and the opening of the oral part was not justified and therefore that the rights of the applicants under Article 47 of the EU Charter of fundamental rights had been violated.

The actual damage suffered and causal link

The GCEU recalled that the non-contractual liability of the EU and the exercise of the right to compensation for

damage suffered depend on the proof that the damage for which compensation is sought be actual and certain.

The Gascogne companies claimed that they had suffered material damage as a result of the excessive length of the procedure.

- The Gascogne companies argued that the procedure had deprived them of the opportunity to find a new investor sooner. However, the GCEU considered that the Gascogne companies did not bring evidence that such loss of opportunity had caused them actual and certain damage.
- Furthermore, at the time of their action for annulment ,the Gascogne companies had , decided not to pay the fine immediately but to provide a bank guarantee to the Commission. The Gascogne companies thus argued that they had suffered actual and certain material damage as a result of the fact that, during the unjustified period of inactivity of the GCEU, they still incurred costs in relation to this bank guarantee. The GCEU dismissed this plea for Gascogne Sack Deutschland but considered, on the other hand, that Gascogne could not have anticipated the excessive length of the procedure at the time of the provision of the bank guarantee and was entitled to expect its action to be decided within reasonable time limits. Therefore, the GCEU upheld this claim, noting that the causal link between the excessive length of the procedure and the damage was established.

The GCEU therefore awarded Gascogne damages amounting to €47,064.33 as compensation for the material damage suffered as a result of the failure to adjudicate within a reasonable time in Cases T-72/06 and T-79/06, consisting in the payment of additional bank guarantee costs.

The Gascogne companies further argued that they had suffered non-materiel loss. Indeed, the applicants argued that the failure to adjudicate within a reasonable period placed impacted the two companies' reputations and ability to take management decisions.

The GCEU rejected the claim that the employees and managers of the companies had suffered non-material loss principally because the applicants had not brought substantial evidence of such loss.

However, the GCEU considered that the excessive length of the procedure placed the two companies in a state of uncertainty that went beyond the uncertainty that normally results from court procedures. The GCEU concluded that such state of prolonged uncertainty necessarily had an influence on the planning of decisions to be taken and on the management of the Gascogne Companies.

The GCEU awarded each of the two companies damages of €5,000 as compensation for non-material loss.

Finally, the GCEU ordered that the amount of €47,064.33 awarded to Gascogne be increased by interest from 4 August 2014, the date of introduction of the claim for damages, until 10 January 2017, the date of judgment, In addition, all amounts ordered to be paid to the two companies are to be increased by default interest from the date of judgment to the date of payment.

This is a landmark case because it is the first time that damages have been awarded against the EU for the excessive length of court proceedings. It is striking also that the CJEU itself suggested to the claimants that they possibly had a legally founded action in damages. The CJEU's suggestion was no doubt motivated by Member States' reticence to appoint additional judges to handle the growing number of cases. Another interesting facet of the case is the fact that the GCEU sets out guidance on how to determine what is a reasonable period for the CGEU to complete the various stages of a case.

The European Union, represented by the CJEU, has filed an appeal asking that the GCEU's judgment be set aside and that the claims by the two companies be dismissed in total (Case C-138/17). The two companies have also filed an appeal asking for an increase in the amount of damages (Case C-146/17).

Case C-411/15 P, Timab Industries (Hybrid settlements)

THE CJEU CONFIRMS THE LEGALITY OF THE COMMISSION'S APPROACH TO HYBRID SETTLEMENTS JUDGMENT OF 12 JANUARY 2017 – CASE C-411/15 P – *TIMAB INDUSTRIES, CIE FINANCIÈRE ET DE PARTICIPATIONS ROULLIERS (CFPR) V EUROPEAN COMMISSION*

This case follows on from the Commission's Animal Feed Phosphates cartel decision pursuant to which fines totalling €176 million were imposed on a number of producers of animal feed for price-fixing and market-sharing throughout the EEA.

During the investigation into the infringement, all companies involved engaged in settlement discussions with the Commission with a view to obtaining a 10% reduction in the fine that would otherwise have been imposed had they not settled with the Commission. However, during the settlement process Timab, a subsidiary of the Roulliers Group, decided to withdraw from the settlement procedure. The Commission therefore followed the standard administrative infringement procedure against Timab – despite the fact that it had entered into settlements with the other companies involved in the cartel. This was the first time, therefore, that the Commission rendered a decision in a so-called "hybrid" case i.e. where some parties settle but others do not.

During the initial settlement discussions, several meetings were held between the Commission and Timab, during which evidence of the infringement was discussed. On the basis of the evidence available, the Commission informed Timab that a fine in the range of €41 to €44 million would be imposed on it. However, in its final decision of 20 July 2010, the Commission levied a fine of nearly €60 million.

Timab challenged the Commission's decision before the GCEU in Case T-456/10. On appeal to the CJEU, the Commission's decision and the GCEU's review of that decision were upheld in their entirety.

Timab raised a number of pleas. The pleas that are of interest are those arising out of the fact that Timab withdrew from the settlement procedure after having had certain discussions with the Commission under that procedure. These please are:

- The GCEU infringed the principle of no self-incrimination; and
- The GCEU infringed the principle of legitimate expectations.

Timab's plea that the GCEU infringed the principle of no self-incrimination

Timab argued that the information communicated by it in its leniency application and in the settlement procedure could not be characterised as admissions.

The CJEU observed that, according to the case law, "the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel that undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.[1]

Going a step further, however, the CJEU also observed that "while the Commission cannot compel an undertaking to admit its participation in an infringement, it is not thereby prevented from taking account, when setting the amount of the fine, of the assistance given by that undertaking, of its own volition, in order to establish the existence of the infringement".[2]

In the present case the CJEU noted that the statements made by Timab in its leniency application were purely voluntary. There was no evidence that the Commission had attempted to influence Timab's choices. The Commission could therefore rely on these statements without infringing the right to no self-incrimination. The Commission did not rely on statements made in the settlement discussions. Consequently the ground of appeal alleging infringement of the right to no self-incrimination was rejected.

Timab's plea that the GCEU infringed the principle of legitimate expectations.

Timab argued that its legitimate expectations had been infringed because the Commission imposed a fine larger than the top of the range mentioned in the settlement discussions.

The CJEU made it clear that the Commission was not bound by the range of fines it had first proposed to Timab during the settlement procedure since the Commission had relied on tools specific to this procedure at that time. The CJEU held that, outside the settlement procedure, the Commission is only bound by the contents of its statement of objections which does not set forth a range of fines. Consequently, Timab could not have a legitimate expectation that the fine that would be imposed on it in the standard investigation procedure would fall within the range of fines proposed by the Commission during the settlement procedure. In addition, the CJEU stated that once Timab had withdrawn from the settlement procedure, the Commission was free to rely on new elements of evidence unearthed during the standard investigation procedure to set the amount of the fine. This was justified by the fact that the settlement procedure and the standard investigation procedure are independent and separate from one another.

[1] See judgment of 14 July 2005, *ThyssenKrupp* v *Commission*, C-65/02 P and C-73/02 P, EU:C:2005:454, paragraph 49.

[2] *Loc.cit.*, paragraph 50.

With this case, the CJEU confirms that the Commission has a considerable margin of discretion to revise a proposed fine upwards concerning companies that have withdrawn from a settlement procedure. Therefore, when contemplating whether to engage in settlement talks with the Commission, companies should carefully assess their exposure to fines under both the settlement and standard procedures. They should furthermore take into account the fact that prior admissions made during a settlement procedure may affect their defence in the standard procedure.

Case C-351/15 P, Commission v Total SA and Elf Aquitaine SA ("Arkema judgment)

A COMMISSION LETTER REQUIRING PAYMENT OF DEFAULT INTEREST WHEN THE PRINCIPAL AMOUNT OF THE FINE WAS PAID WITHIN THE DEADLINE IS A CHALLENGEABLE ACT.

Case C-351/15P, *Commission v Total SA and Elf Aquitaine SA*, EU;:C:2017/27 (19 January 2017)

Arkema France, was fined €219,131,250 for its participation in the *Methacrylates* cartel.[3] As parent company for the whole of the duration of the infringement, Elf Aquitaine was held jointly severally liable for €181,350,000 while Total, a parent company for part of that duration, was held jointly and severally liable for EUR 140.400.000. Arkema paid the full amount of the fine within the time limits, but all three companies challenged the Commission's decision before the CGEU. Arkema succeeded in obtaining a reduction of its fine to €113.343.750.[4] The challenges by Total and Elf Aquitaine and Elf Aquitaine were rejected in their entirety.[5]

Arkema did not appeal against the CGEU's judgment so that became final. The Commission therefore reimbursed Arkema the balance of the fine, €105,787,500, plus interest.

By two letters issued in June and July 2011 the Commission requested Elf Aquitaine and Total to pay the balance of the fine, €105,787,500, plus interest. It appears that the Commission was relying on the fact that the joint and several liability of these two companies was not reduced by the GCEU. Elf Aquitaine and Total objected that the fine had been discharged fully by Arkema. They nevertheless paid the amount claimed by the Commission and filed a challenge before the CGEU.

The CGEU considered that the challenge by Elf Aquitaine and Total to the Commission's letters was inadmissible in so far as it was directed against the principal amount demanded because the GCEU's reduction in Arkema's fine left unchanged the liability imposed on these two companies by the *Methacrylates* decision. The Commission's letters did not purport to change this.

On the other hand, the challenge to the request to pay default interest was admissible because Arkema paid the fine in full within the deadline. Any liability to pay default interest could not therefore arise from the *Methacrylates* decision but only from the Commission's letters. The CGEU annulled the Commission's letters in so far as they requested the payment of default interest. At no stage had there been any delay in payment by any of the parties concerned. The basis for any claim for default interest was therefore lacking.

The Commission appealed to the CJEU.

The Commission argued that its letters did not produce legal effects and so Elf Aquitaine and Total had no standing to challenge them.[6] The CJEU rejected this argument. Arkema had paid the fine in full satisfaction of the liability of itself and so it had also discharged the potential liability of Elf Aquitaine and Total. In addition, it is clear from the case law that where the liability of a parent company is derived purely from that of its subsidiary, the liability of the parent company cannot exceed that of its subsidiary.[7] The CGEU was therefore correct in holding that the Commission could not justifiably demand interest from Elf Aquitaine and Total in respect of a fine imposed on Arkema which had been paid in full. In these circumstances, the Commission's letters were not merely confirmatory of the obligations deriving from the *Methacrylates* decision; they sought to modify the pecuniary obligations of Elf Aquitaine and Total. The GCEU was correct, therefore, in treating those letters as challengeable acts.

---

[3] COMP/F/38.645

[4] *Arkema France and others v Commission*, T-217/06, EU:T:2011:251.

[5] *Total SA and Elf Aquitaine SA v Commission*, T-206/06, EU:T:2011:250

[6] This would normally be the case for letters about the modalities of payment of a fine and the calculation of interest. See, for example, the judgment of the CGEU of 12 May 2016 in *Trioplast Industrier v Commission*, T-669/14, EU:T: , reported in McDermott Will & Emery *Competition Review 2016.*

[7] *Commission v Tomkins*, C-286/11P, EU:C:2013:29, paragraphs 37, 39, 43 and 49; *Total v Commission*, C-597/13P, EU:C:2015:615, paragraph 38, reported in McDermott Will & Emery *Competition Review 2015.*

The result of this case is that Elf Aquitaine and Total obtained a CJEU judgment relieving them of any liability to pay default interest but not officially relieving them of liability to pay the principal amount. The CJEU did observe, however, that the liability of Elf Aquitaine and Total was derived purely from that of Arkema, and so their total liability could not exceed that of Arkema.[8]

Case C-637/13 P, Laufen Austria v Commission

WHERE A COMPANY IS ACQUIRED BY ANOTHER COMPANY DURING THE COURSE OF A CARTEL, THE GROUP TURNOVER OF THE LATTER CANNOT BE TAKEN INTO ACCOUNT FOR THE PURPOSE OF APPLYING THE 10% CEILING TO THE PORTION OF THE FINE CORRESPONDING TO THE FIRST COMPANY'S SOLE RESPONSIBILITY PRIOR TO ITS ACQUISITION BY THE SECOND COMPANY.

Judgment of the CJEU of 26 January 2017, Case C-637/13 P, *Laufen Austria v Commission*.

This case illustrates the application of the principles set forth by the CJEU in *YKK and others v Commission* according to which the turnover of a parent company cannot be taken into account for the purpose of applying the 10% ceiling to the portion of the fine corresponding to the period for which its subsidiary was not "a subsidiary" and so was held solely responsible for the infringement. The case also provides a useful explanation of how the principle of equal treatment is respected by the Commission's Fining Guidelines 2016.

On 23 June 2010 the Commission imposed fines totalling €662 million on 17 bathroom equipment manufacturers for participation in a price-fixing cartel. The undertakings concerned coordinated their prices and rebates, and exchanged price-sensitive information. The cartel covered Austria, Belgium, France, Germany, Italy and the Netherlands from 16 October 1992 to 9 November 2004.

The Commission imposed a €32 million fine on Laufen Austria, for €17.7 million of which it was jointly and severally liable with Roca Sanitario. Roca Sanitario acquired Laufen, Austria on 29 October 1999. Laufen Austria brought an action for annulment of the Commissions's decision before the GCEU but the action was dismissed in its entirety.

Laufen Austria appealed to the CJEU. In its appeal, Laufen Austria claimed that the GCEU had breached its obligation to state reasons and had infringed the principles that penalties must be specific to the offender, the principles of personal responsibility, proportionality, equal treatment and the protection of legitimate expectations by:

i) taking into account the total turnover of Roca Sanitario in calculating the 10% ceiling, including for the period in which Laufen Austria was held solely liable for the infringement in question, that is to say, prior to the company's acquisition by Roca Sanitario on 29 October 1999; and

ii) failing to act upon its finding that the participation in the infringement that was imputed to Laufen Austria was of lesser gravity than that of other members of the cartel and should, in particular, have (*i*) adjusted the multipliers for the "gravity of the infringement" and the "additional amount" and (*ii*) reduced the basic amount of the fine.

Regarding the first ground of appeal, the CJEU held that the GCEU erred in law in finding that the turnover of the Roca Group could be taken into account for the purpose of applying the 10% ceiling in the period for which Laufen Austria was held solely responsible for the infringement.

The CJEU recalled previous case law[9] stating that the concept of an "undertaking participating in the infringement" for the purposes of the 10% limit must necessarily be the same as for the application of Article 101 TFEU. Moreover, the CJEU recalled that the objective of the 10% ceiling is, *inter alia*, "to ensure that the imposition of a fine higher in amount than that ceiling should not exceed the capacity of an undertaking to make payment at the time when it is identified as responsible for the infringement and a financial penalty is imposed on it by the Commission".

The CJEU further explained that the second subparagraph of Article 23(2) of Regulation No 1/2003[10] requires that the 10% ceiling should be calculated on the basis of the turnover in the business year preceding the Commission decision imposing a penalty for an infringement. Such a

---

[8] Where two parties – not subsidiary and parent - are held jointly and severally liable, but only one of them obtains a reduction in the fine, the consequences would be different. See, for example, *Fresh Del Monte Produce Inc v Commission, (Intervener, Internationale Fruchtimport Gesellschaft Weichert GmbH & Co. KG)*, C-293/13P and C-294/13P, EU:C:2015:416, reported in McDermott Will & Emery *Competition Review 2015.*.

[9] Judgment of the ECJ of 4 September 2014, *YKK and Others v Commission*, Case C-408/12 P.

[10] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU (OJ 2003 L 1, p. 1).

requirement is fully respected where that ceiling is determined solely on the basis of the turnover of the subsidiary, in respect of the fine which is imposed exclusively on it, in relation to the period prior to its acquisition by the parent company. It follows that, in such circumstances, the structural changes in the undertaking responsible as an economic entity are in fact taken into account in the calculation of the fine.

Accordingly, the CJEU held that, "inasmuch as a parent company cannot be held responsible for an infringement committed by its subsidiary prior to the acquisition of that subsidiary, the Commission must take account, for the purpose of calculating the 10% ceiling, of the subsidiary's own turnover in the business year preceding the year in which the decision penalising the infringement was adopted".

Consequently the CJEU held that the GCEU's judgment must be set aside because "it held that the Commission did not make an error in taking the Roca group's turnover into account for the purposed of applying the 10% ceiling to the period in which Laufen Austria was held solely liable for the infringement." Since the CJEU did not have before it the turnover of Laufen Austria in the year preceding the Commission's decision, it referred the case back to the CGEU for it to give judgment on Laufen Austria's claim for a reduction of the fine (the first ground of appeal).

The second ground of appeal, on the other hand, was rejected by the CJEU. The CJEU first held that even if it was established that the appellant did not belong to the "hard core" of the cartel, this would not, in any event, show that the GCEU should have held that multipliers for the "gravity of the infringement" and for the "additional amount" at a rate of 15% were not appropriate or too high, since such a rate was justified by the very nature of the infringement at issue, namely the implementation of coordinated price increases. Moreover, 15% is the lowest rate on the scale of penalties prescribed for such infringements under the 2006 Guidelines.[11]

In addition, the CJEU recalled that the taking into account, by virtue of the principle of equal treatment, of differences between the undertakings that have participated in a single cartel (in particular with regard to the geographic scope of their respective involvement) for the purpose of assessing the gravity of an infringement need not necessarily occur when the multipliers for the "gravity of the infringement" and for the "additional amount" are set but may occur at another stage in the setting of the fine, such as when the basic amount of the fine is adjusted in the light of mitigating and aggravating circumstances. Moreover, differences between undertakings are also taken into account by means of the value of sales that is used in calculating the basic amount of the fine because "that value reflects for each participating undertaking, the scale of its involvement in the infringement …"

Therefore, the CJEU held that since it was undisputed that the basic amount of the fines imposed on Laufen Austria was determined by reference to the value of the sales it made in Austria (i.e., the territory of the infringement), the Commission could set the multipliers at 15% of that value without infringing the principle of equal treatment. Nonetheless, the CJEU noted that the GCEU's reasoning in respect of Laufen Austria's second ground of appeal was vitiated by errors of law but that the operative part was well founded on other legal grounds. It was not therefore necessary to set aside the GCEU's judgment but to substitute the grounds for that judgment, in application of the principles set out in the case law.[12]

Case C-613/13 P, Commission v Keramag Keramische Werke and others

THE CJEU CLARIFIES THE RULES ON CORROBORATING EVIDENCE IN CARTEL INVESTIGATIONS, IN PARTICULAR, THE FACT THAT IT IS POSSIBLE FOR ONE LENIENCY STATEMENT TO CORROBORATE ANOTHER CASE C-613/13 P, *COMMISSION V KERAMAG KERAMISCHE WERKE GMBH AND OTHERS*

In the *Bathroom Fittings* cartel the Commission imposed a fine on the Keramag group of companies. These companies challenged the Commission's decision before the GCEU. The GCEU reduced the fine on the grounds that the participation of certain members of the Keramag group in the infringement had not been established to the requisite standard. In particular, the CGEU considered that certain evidence provided by Ideal Standard, a leniency applicant had not been sufficiently corroborated. The Commission appealed against the CGEU's findings. The CJEU upheld the Commission's appeal in part, set aside part of the CGEU's judgment and referred this part back to the CGEU

[11] The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

[12] Case C-30/91, *Lestell v Commission*, EU:C:1992:252, paragraph 28 and Cases C-120/06 P and C-121/06 P, *FIAMM and others v Council and Commission*, EU:C:2008:476, paragraph 187.

for reconsideration. The Keramag group's cross-appeal was dismissed in its entirety and need not be considered further.

The Commission's appeal succeeded on certain interesting aspects of the rules about corroborating evidence in cartel cases.

For the purpose of considering the probative value of certain statements made by Roca in its leniency application, the GCEU relied exclusively on recital 586 of the Commission's decision, which summarised Roca's reply to the statement of objections. The GCEU considered that it could not rely on those statements (as reported in the recital) in the absence of evidence corroborating them. The CJEU disagreed. The CGEU could not deny that the statements made by Roca in the context of its leniency application had any value whatsoever without considering the statements themselves. The GCEU therefore infringed the obligation to state reasons and the rules applicable to the taking and appraisal of evidence.

The CJEU also observed that there is no rule in the EU legal order that corroborating evidence cannot be of the same nature as the evidence corroborated, that is to say, that one leniency statement cannot corroborate another. It follows that, by finding that the Commission was required to adduce additional proof on the erroneous theory that one leniency statement cannot corroborate another, the GCEU erred in law.

In another part of its judgment, the CGEU considered a chart provided by Ideal Standard as an annex to its leniency application. Since the chart was undated, did not mention the names of the competitors or any maximum or minimum prices, and contained nothing to link it to a meeting of 25 February 2004, the GCEU considered that it could not corroborate the allegation that prices were fixed at that meeting. The CJEU was of the view that the GCEU imposed requirement in respect of the chart which, if they had been fulfilled, would have meant that the chart by itself would have constituted sufficient evidence that prices had been fixed. However, the chart was put forward by the Commission only as a piece of corroborating evidence. The CGEU failed to consider whether the evidence viewed as a whole could be mutually supporting, and failed to have regard to the case law. This case law shows that:

- Even if the Commission discovers evidence showing unlawful contact between traders, such as minutes of a meeting, it normally be only fragmentary and sparse, so that it is often necessary to reconstitute details by deduction, Case C204/00P, *Aalborg Portland Cement*
- The existence of anti-competitive practices must, in most cases, be inferred from a number coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement – Case C-634/13P, *Total Marketing Services*
- The Commission must produce firm, precise and consistent evidence. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement – Case C-407/08P, *Knauf Gips*.

Case C-90/15 P, Hansen & Rosenthal KG and H&R Wax Company Vertrieb GmbH v Commission

THE CJEU REJECTS ALL CRITICISMS OF THE GCEU MADE IN A CHALLENGE TO THE COMMISSION'S DECISION IN THE PARAFFIN WAX CARTEL - JUDGMENT OF 16 FEBRUARY 2017 – CASE C-90/15 P – *HANSEN & ROSENTHAL KG AND H&R WAX COMPANY VERTRIEB GMBH V EUROPEAN COMMISSION*

One of the grounds of challenge in this case is particularly interesting. It is the argument that Article 49, paragraph 1, of the EU Charter on Human Rights read together with Article 52(3) of the same and Article 7(1) of the European Convention of Human Rights requires that there should be a legal framework adopted by the EU legislator for the Commission to fix the amount of fines for infringements of Article 101(1) TFEU. The CJEU rejected this argument on the grounds that the Commission's discretion in fixing fines is limited by the constraints it has set on itself, and these are subject to review by the EU courts.

By Decision C(2008) 5476 final of 1 October 2008, the Commission fined Hansen & Rosenthal and H&R Wax Company Vertrieb for participating in a cartel for paraffin wax in the European Economic Area in violation of Article 101 TFEU.

These two companies brought an action for annulment, which was dismissed by the GCEU.

On appeal to the CJEU, these two companies – "the Appellants" – argued that the GCEU had breached (1) the principle of the presumption of innocence and the right to a

fair trial, (2) Article 101 TFEU, (3) the principle of the legality of criminal offences and penalties and Article 31 of Regulation 1/2003, and (4) the principle of proportionality. All of these arguments were rejected by the CJEU.

The judgment of the GCEU breached the principle of the presumption of innocence and the right to receive a fair trial

The Appellants argued notably that the GCEU had breached the principle of the presumption of innocence by finding that "overall" the Commission had proven the Appellants' participation in the cartel. Moreover, the Appellant argued that the GCEU should have assessed the lawfulness of the contested decision under Article 23 of Regulation 1/2003 and not solely with regard to the arguments raised by the Appellant itself, because the Commission is not a "jurisdiction".

The CJEU dismissed these arguments.

First, the CJEU recalled that the burden of proof indeed lies on the Commission to prove the existence of an infringement of competition rules. However, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence so that the Commission bears the burden of proving that that circumstance was not capable of affecting the probative value of that evidence.

Second, the CJEU recalled that it is for the Commission to prove the infringements of competition rules found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. Moreover, the CJEU considered that failure by the GCEU to review the whole of the contested decision of its own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the GCEU – which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts – should be obliged to undertake of its own motion a new and comprehensive investigation of the file.

The judgment of the GCEU breached Article [101](1) TFEU

The appellants argued that the GCEU violated Article 101 when it found that the date on which the Appellants' participation in the infringement commenced was the date of hire by one of them of two employees who already had knowleged about the cartel.

First, the CJEU recalled that, as regards an infringement extending over a number of years, the fact that direct evidence of an undertaking's participation in the infringement during a specified period has not been produced does not preclude that participation from being regarded as established also during that period, provided that that finding is based on objective and consistent indicia.[13]

On the facts, after examining several elements of proof relative to the involvement of two individuals in the cartel, the GCEU considered that the Appellants' participation in the cartel began on the date that the two individuals entered into employment with one of the Appellants. The functions undertaken by these two individuals enabled them to influence the market conduct of their employer in accordance with the anti-competitive arrangements in question. The CJEU considered that, in so finding, the CGEU did not enlarge the scope of Article 101 TFEU.

The CJEU rejected the argument raised by the Appellant that the GCEU had based its reasoning on the sole assertions of two other undertakings, according to which certain meetings had had an anticompetitive object. The CJEU considered that the GCEU had in fact engaged in a reasonable appraisal of the evidence relating to the existence of the cartel.

The judgment of the GCEU breached the principle of the legality of criminal offences and penalties and article 31 of Regulation 1/2003

The Appellants argued that the GCEU had wrongfully rejected their argument that the fixing of the fine constituted a violation of the principles that offences must have a statutory basis and that essential decisions require the legislature's approval. The Appellants argued that the only way to fill the gap in the relevant legislation was for the EU legislator to establish a legal framework for the calculation of the amount of the fine in cartel cases.

The CJEU first recalled that although Article 23(2) of Regulation No 1/2003 leaves the Commission a discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Moreover, the exercise of that discretion is also limited by rules of conduct which the Commission has imposed on itself in the Leniency Notice and Guidelines and is fully subject to review by the EU Courts.

[13] See Case C-634/13 P, Total Marketing Services v Commission, EU:C:2015:614, paragraph 27.

The CJEU therefore dismissed this ground of appeal in its entirety.

The GCEU breached the principle of proportionality

The CJEU finally rejected the argument of the Appellant according to which the coefficient applied to the value of sales in order to determine the basic amount of the fine breached the principle of proportionality. The CJEU noted that the GCEU had reviewed the reasons relied upon by the Commission in determining such a coefficient and the Applicants had failed to demonstrate that the CGEU had underwritten the fixing of a disproportionate amount of the fine having regard to the gravity of the infringement.

Case C-615/15 P - Samsung SDI Co. Ltd and Samsung SDI (Malaysia) Bhd v Commission

THE CJEU UPHOLDS THE LEGALITY OF THE FINES IMPOSED ON SAMSUNG SDI AND SAMSUNG SDI (MALAYSIA) FOR THEIR PARTICIPATION IN THE CARTEL ON THE MARKET FOR TUBES FOR TELEVISION SETS AND FOR COMPUTER MONITORS

Judgment of the Court of 9 March 2017 in Case C-615/15 P - *Samsung SDI Co. Ltd and Samsung SDI (Malaysia) Bhd v Commission*

By decision of 5 December 2012, [14] the Commission imposed fines totalling approximately €1.47 billion on seven undertakings which had participated in one or two separate cartels on the market for cathode ray tubes ('CRTs') between 1996/1997 and 2006. The two cartels constituted two separate and continuous infringements and concerned, on the one hand, the market for colour cathode ray tubes for computer monitors (colour display tubes, "CDTs") and on the other hand, the market for colour cathode ray tubes for television sets (colour picture tubes, "CPTs").

The Commission found that Samsung SDI had participated in the CPT cartel directly and through its subsidiaries Samsung SDI Germany and Samsung SDI (Malaysia), and that it had participated in the CDT cartel directly and through its subsidiary Samsung SDI (Malaysia).

By application on 14 February 2013, Samsung SDI, Samsung SDI Germany and Samsung SDI (Malaysia) brought an action before the GCEU). That action sought, as regards the infringement in relation to CPTs, primarily, the annulment of the decision at issue in so far as it concerned the three applicant companies and, in the alternative, a reduction of the fine imposed on them. As regards the infringement in relation to CDTs, the action sought the reduction of the fine imposed on them.

The GCEU noted, as a preliminary point, that Samsung SDI Germany had been dissolved on 1 August 2014. It therefore concluded that there was no need to rule on the action in so far as it concerned that company. Then, it rejected the other pleas in law. Therefore, Samsung SDI and Samsung SDI (Malaysia) brought an appeal to the CJEU. In support of their appeal, they relied on four grounds of appeal, alleging that the GCEU:

i) breached the obligation to state reasons and infringed the Commission's Guidelines on the method of setting fines,[15] in that it rejected their argument that the sales of products to which the CPT cartel did not relate should have been excluded from the fine calculation without addressing that line of argument;

ii) breached the obligation to state reasons and the principle of equal treatment, in that it rejected, without stating reasons, their argument that the Commission could not set an end date for their participation in the CPT cartel subsequent to the dates set for the other parties to that cartel;

iii) erred in law, in that it approved the taking into account, in the calculation of the fine, of CDT sales to Samsung Electronics Co. Ltd ('SEC'), even though those sales were negotiated in South Korea, and

iv) erred in law in examining their line of argument relating to the Commission's refusal to grant them the maximum leniency reduction of 50% of the amount of the fine, in respect of the CDT cartel.

The CJEU dismissed the appeal in its totality.

Regarding the first ground, the CJEU found that the appellants misread the judgment in so far as the GCEU had considered that the infringement had related, throughout its duration, to all CPTs. Therefore, it was not required to annul or amend the fine, since this was calculated on the basis of the sales of all CPT types throughout the duration of the infringement. Moreover, the CJEU noted that the GCEU in no way found that the various types and sizes of

[14] Commission Decision of 5 December 2012, *TV and Computer Monitor Tubes*, Case COMP/39.437.

[15] Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines on the method of setting fines').

CPT were not the subject of a cartel during the entire duration of the cartel taken into account by the Commission but merely noted that CPTs were the subject to various degrees of contacts between undertakings, and that they formed part of an overall plan, with the result that the Commission was entitled to characterise them as a single infringement.

As regards the second ground, the CJEU held that the GCEU had found in its judgment that both Samsung and another undertaking (LPD) participated in the cartel until the end date. The fact that the Commission chose not to include LPD in the procedure that led to the adoption of the decision at issue because it had been declared bankrupt and was under administration, was irrelevant since it did not mean that that undertaking did not continue to participate in the cartel. The CJEU further held that an undertaking subject to fines cannot request the annulment or reduction of that fine on the ground that another co-cartelist not penalised in respect of a part, or all, of its participation in that cartel.

As to the third ground of appeal, the CJEU held that the GCEU had been correct in finding that, regardless of the location where negotiations had taken place, the place of delivery had had a real impact on the level of sales made by Samsung. This was due to the fact that the tubes were delivered directly from the warehouses managed by Samsung, which are located in the EEA, to the counter party's warehouses in the EEA. It was therefore appropriate to take all deliveries made in the EEA into account when calculating the fine. TheECJEU further noted that, if it accepted Samsung's arguments, an undertaking would be able to escape liability for its participation in a cartel by conducting all negotiations outside the EEA.

This decision is in line with the past case law, and notably with the judgment of 9 July 2015, *InnoLux v Commission*,[16] where the ECJ held that point 13 of the Guidelines on the method of setting fines, which refers to the concept of "value of sales", pursues the objective of adopting as the starting point for the calculation of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it.

Finally, regarding the last ground, the CJEU pointed out that only when it considers that the level of the fine is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the GCEU had erred in law. In this case, Samsung had not alleged that the fine imposed was disproportionate and the CJEU could not substitute its own assessment for that of the GCEU.

Case C-162/15 P, Evonik Degussa v Commission

THE CJEU RULES ON THE AIM OF THE HEARING OFFICER'S TERMS OF REFERENCE UNDER DECISION 2011/695 AND ON THE PUBLISHABLE CONTENT OF LENIENCY APPLICATIONS MADE UNDER THE 2002 LENIENCY NOTICE – *EVONIK DEGUSSA V COMMISSION*, CASE C-162/15 P

This case arose out of the Commission's decision to publish a more complete non-confidential version of the Hydrogen Peroxide and Perborate ("PHP") Decision[17] which was of direct concern to Degussa as a participant in the hydrogen peroxide and perborate cartel together with 16 other companies. Degussa was the first leniency applicant, thus gaining full immunity from fines. The Commission published its first non-confidential version of the PHP Decision in the course of 2007. In 2011, the Commission wanted to publish a more extensive version of the non-confidential version and asked Degussa to identify the information in respect of which it maintained its claims for confidential treatment. After Degussa had singled out such information, the Commission agreed to keep confidential only the information that would directly or indirectly enable identification of the source of the information communicated under the 2002 Leniency Notice as well as the names of Degussa's collaborators. Degussa objected to this decision and referred the matter to the hearing officer pursuant to Decision 2011/695.[18] The hearing officer rejected Degussa's claims regarding confidential treatment. Degussa challenged the hearing officer's decision before the GCEU which, in turn, rejected Degussa's claims.

Upon appeal, the CJEU ruled that the decision of the GCEU had to be annulled in so far as it deemed it correct for the hearing officer to decline competence to answer Degussa's objections to the publication of the information on the basis of the observance of the principles of protection of legitimate expectations and equal treatment. The other arguments put forward by Degussa relating to the confidential nature of the information were dismissed in their entirety.

[16] Judgment of the ECJ of 9 July 2015, *InnoLux v Commission*, C-231/14 P.

[17] Decision C (2006) 1766, OJ 2066 L353, p.54.

[18] Decision on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29–37.

As regards Degussa's successful claim, the GCEU had ruled that the protection of legitimate expectations and equal treatment were not rules intended to afford specific protection against public disclosure of information. The CJEU observed that the aim of Article 8 of Decision 2011/695:

> *"is to provide, on a procedural level, for the protection of information required by EU law which has come to the Commission's knowledge in the context of proceedings applying the competition rules."*

Moreover, the CJEU went on to observe:

> *"That protection must be understood as relating to any ground which could justify protecting the confidentiality of the contested information".*

The CJEU came to this conclusion based on the unrestrictive language of the Article and the aim of the hearing officer's terms of reference, which is to safeguard the effective exercise of procedural rights. Ruling only on some of the grounds would run counter to such terms of reference. Although Degussa's other claims were rejected, the reasoning of the CJEU is instructive, and so is examined below.

Degussa argued that the GCEU erred in considering the information in question as neither confidential nor protected against publication. The GCEU reached its conclusion based on the fact that the information provided was more than five years old. The CJEU sustained the GGEU's objection to Degussa's claim. Information which is more than five years old must, as a general rule, be considered historical and so loses its confidential nature, unless the party proves that the information constitutes an essential element of its commercial position or that of interested third parties. Degussa was unable to prove this essentiality and so it had to be considered that the information had lost its confidential nature. Furthermore, the information was not found to be protected by professional secrecy as Degussa had no interest worthy of protection concerning the information communicated to the Commission in support of its application for leniency.

Then Degussa claimed, *inter alia*, that the contested information included '*verbatim* quotations' and 'extracts' from the statements it made as leniency applicant and that such information is protected by Article 8 of the European Convention on Human Rights (ECHR) and by Article 7 of the Charter of Fundamental Rights of the European Union.

In addressing this claim, the CJEU affirmed that there was a difference between (i) "the publication, in the form of *verbatim* quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency" and (ii) "the publication of *verbatim* quotations from that statement itself". The CJEU explained that:

> *"whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances."*

The CJEU observed that GCEU's judgment did not endorse an unauthorised use of the contested information. In addition, the CJEU specified that the protection afforded by Article 8 ECHR and Article 7 of the Charter cannot prevent the publication of information in case of infringement of EU Law. Furthermore, Degussa did not put forward any argument supporting the statement that the divulgation of the contested information could have consequences in respects of the right to respect for private life.

Finally, Degussa argued that publishing the contested information would be contrary to the assurances granted by the 2002 Leniency Notice. The CJEU explained that the aim of the 2002 Leniency Notice is to protect statements made with a view to obtaining leniency but this protection does not have the object or effect of "prohibiting the Commission from publishing the information relating to the elements constituting the infringement of Article 101 TFEU which was submitted to it in the context of the leniency programme and which does not enjoy protection against publication on another ground". Degussa's claim was therefore rejected.

This judgment is helpful because it makes a clear distinction between quotations which it is lawful for the Commission to reproduce *verbatim*, subject to compliance with rules on protection of confidential information, i.e., quotations from statements made in support of the leniency application, and those that cannot be reproduced in any circumstances, i.e., statements from the leniency application itself. Furthermore, the judgment confirms that there is no blanket protection of confidentiality by the mere fact of participating in the Leniency Programme.

Case C-469/15 P, FSL Holdings and

others v Commission

JUDGMENT OF THE CJEU IN *FSL HOLDINGS AND OTHERS V COMMISSION* (CASE C-469/15) ILLUSTRATES (1) THE COMMISSION MAY RELY ON DOCUMENTS TRANSMITTED BY THE AUTHORITIES OF A MEMBER STATE UNLESS SUCH TRANSMISSION WAS ILLEGAL UNDER NATIONAL LAW; AND (2) THE WELL-ESTABLISHED PRINCIPLE THAT PRICE FIXING AGREEMENTS CONSTITUTE RESTRICTIONS OF COMPETITION 'BY OBJECT' WITHOUT IT BEING NECESSARY TO EXAMINE THEIR EFFECTS.

FHS Holding and Firma Léon Van Parys, two public limited companies incorporated under Belgian law, and Pacific Fruit Company Italy, a public limited company incorporated under Italian law, import, market and sell bananas in Europe under the brand "Bonita". These undertakings, together with the banana exporter Chiquita Brands International ("Chiquita"), were found by the Commission to have participated in a price-fixing cartel in infringement of Article 101 TFEU. The infringement consisted in the coordination of the undertakings' pricing strategies for the marketing and sale of bananas in Greece, Italy and Portugal.

Chiquita applied for and was granted immunity from fines.

FHS, Van Parys and Pacific Fruit were fined and so they challenged the Commission's decision before the GCEU. The GCEU found that the Commission had failed to take into account an interruption of the infringement of about five months. The GCEU therefore annulled the Commission's decision in so far as it was based on that period of five months, and reduced the fine on these three companies as a consequence.

These three companies considered that it was not enough just to reduce the fine. They lodged an appeal with the CJEU requesting that the GCEU's judgment be set aside and that the Commission's decision be annulled in its entirety. In their appeal, the three companies relied on four pleas, all of which were rejected by the CJEU. The CJEU's ruling on the first and fourth pleas are of particular interest.

The ruling on the first plea shows that the Commission can use, as evidence, documents transmitted by any authority of a Member State, not just a competition authority, on condition that the transmission was legal under the law of that Member State. The ruling on the fourth plea reminds us of the well-established principle that price fixing agreements are particularly serious restrictions of competition and so the Commission's analysis of the economic and legal context may be limited to that which is strictly necessary in order to establish the existence of a restriction 'by object' without it being necessary to examine the effects.

On the use of the documents transmitted by the Italian authorities, the appellants argued that the CGEU (1) breached an essential procedural requirement – because the documents had been obtained illegally, and (2) violated the rights of the defence – because the Commission waited almost two years before informing the appellants that it was in possession of the documents.

The documents had been seized by the Italian authorities during an unrelated tax inspection in the home of one of Pacific Fruit Company's employees. The CJEU found that the GCEU had properly addressed the appellants' criticism of the legality of the use of these documents. The lawfulness of the transfer of the information by the Italian authorities was a matter of Italian law over which the courts of the European Union had no jurisdiction. The GCEU had observed that the transfer of the information had not been declared unlawful by an Italian court. The documents in question could be rightfully used by the Commission pursuant to Article 12(1) of Regulation 1/2003, according to which the Commission and the national competition authorities are encouraged to supply one another with information. It cannot be inferred from the dispositions of Article 12 of Regulation 1/2003 that "they give expression to a more general rule preventing the Commission from using information transmitted by national authorities other than the Member States' competition authorities on the sole ground that that information was obtained for other purposes."

On the alleged violation of the rights of the defence, the CJEU recalled the case law according to which "the Commission was not under an obligation to inform the undertaking concerned before the notification of the statement of objections that it was in possession of evidence since it is the notification of the statement of objections, on the one hand, and access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure that the rights of the defence are observed and that the undertaking concerned is able to rely in full on its rights of defence after that notification" (see, *inter alia*, judgment of 25 January 2007, *Dalmine v Commission*, C‑407/04P, EU:C:2007:53, paragraphs 58 and 59).

The CJEU noted that the Commission's statement of objections mentioned expressly "the fact that it was relying on documents transmitted by the Italian authorities" and that "the Commission had transmitted those documents to the

appellants several months before that statement". The CJEU also observed that the GCEU found that "the appellants did not put forward any reasons as to why the fact of not having known about those documents during the investigation stage might have had an impact on their subsequent ability to defend themselves during the stage which followed the notification of the statement of objections".

In the light of these considerations the CJEU rejected the appellants' argument that their rights of defence had been infringed. The second ground of appeal was therefore rejected in its entirety.

In their fourth ground of appeal, the appellants criticised the GCEU having held that the Commission was entitled to conclude that the parties' conduct had the object of preventing, restricting or distorting competition in the internal market. The CJEU recalled the case law according to which "… the concept of restriction of competition 'by object' must be interpreted narrowly and can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. Certain forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, *inter alia*, judgments of 26 November 2015, *Maxima Latvija*, C‑345/14, EU:C:2015:784, paragraph 17, and of 20 January 2016, *Toshiba Corporation v Commission*, C‑373/14 P, EU:C:2016:26, paragraph 26)."

The CJEU observed that "the Commission found that the appellants had taken part in a price-fixing cartel and that that assessment of the facts and evidence was not called into question by the General Court in the judgment under appeal". Next, the CJEU observed that price fixing agreements "represent particularly serious restrictions of competition" and so "the analysis of the economic and legal context of which the practice forms part may therefore be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object" (see, by analogy with market-sharing agreements, judgment of 20 January 2016, *Toshiba Corporation v Commission*, C‑373/14 P, EU:C:2016:26, paragraph 29). Thus the GCEU had not erred in its legal assessment and so the fourth ground of appeal was rejected.

Case C-516/15 P, Akzo Nobel NV and others v Commission

A PARENT COMPANY MAY BE HELD JOINTLY AND SEVERALLY LIABLE FOR THE CONDUCT OF ITS SUBSIDIARIES EVEN IF THE LIMITATION HAD EXPIRED IN RESPECT OF THOSE SUBSIDIARIES - *AKZO NOBEL NV AND OTHERS V COMMISSION* - C-516/15 P - JUDGMENT OF 27 APRIL 2017

On 27 April 2017, the CJEU dismissed an appeal lodged by the Dutch chemical company Akzo Nobel against a judgment of the GCEU of 15 July 2015, considering that a parent company may be held liable for the conduct of its subsidiaries even if the limitation period had expired in respect of those subsidiaries.

This case arose out of the Commission's decision to fine 11 suppliers of heat stabilisers a total of EUR 173 million for their participation in two cartels from 1993 until 2000. Among those suppliers, the Dutch company Akzo Nobel and its subsidiaries were fined a total of EUR 20.5 million for their involvement.

In order to assess the amount of the fines, the Commission divided up the participation of Akzo Nobel and its subsidiaries into three distinct infringement periods : before June 1993, between June 1993 and October 1998, and between October 1998 and March 2000.

During the course of the appeal proceedings brought by Akzo and its subsidiaries, the GCEU considered that the subsidiaries should not have been fined for their behaviour during the first infringement period because the limitation period of 10 years after the offence took place had expired. As a consequence, the CGEU annulled the fines imposed by the Commission on Akzo Nobel's subsidiaries but dismissed the parent company's claim that it should also benefit from the annulment of the fine.

Akzo Nobel therefore challenged the GCEU's judgment before the CJEU. Akzo Nobel's argument was that the annulment of fines imposed on its subsidiaries should have led to the annulment of its own fine because this was imposed only as a result of its subsidiaries' direct involvement in the infringement, which means that Akzo Nobel's liability was purely derivative. The liability of a parent company cannot exceed that of its subsidiaries.

In December 2016, the Advocate General issued his opinion considering that if the imposition of fines on subsidiaries is time-barred, this must also apply to their parent company since the liability of a parent company should be treated in the same way as the liability of its subsidiaries. As a broad statement of principles he said, "…while it is well established that the Commission can legitimately adopt a

unitary approach, based on the functional concept of 'undertaking' at the stage of attributing liability for anticompetitive behaviour, it must understand all the implications of that approach at the stage of imposing penalties for that behaviour, including when the question whether the Commission's power to impose penalties is time-barred is at issue."

The CJEU did not follow the Advocate General's argument. After reviewing the case law, the CJEU ruled that "the fact that penalties can no longer be imposed on certain companies because the limitation period has expired does not preclude another company, which is considered personally responsible and jointly and severally liable with those companies for the same anti-competitive behaviour and in respect of which the limitation period has not expired, from having proceedings instituted against it".

Moreover, the CJEU said that this conclusion was not altered by the fact that Akzo Nobel's liability arose "exclusively from the direct participation of its subsidiaries in the cartels." The anti-competitive activities in question were "nevertheless regarded as having been carried out by Akzo Nobel itself, since it formed an economic unit within the meaning of the case-law of the European Union, with [the two subsidiaries]".

This case is to be added to the long list of cases that explain how the principle of parental liability is applied alongside other principles of EU law. The CJEU reviewed some of these cases in paragraphs 58 to 63 of its judgment. At first sight, the CJEU's judgment does not sit comfortably with the principle that, "a parent company whose liability is entirely derivative from that of its subsidiary must, in principle, benefit from any reduction in the liability of its subsidiary which had been imputed to it" – See Case C-597/13 P, *Total v Commission*. EU:C:2015:613). It would seem that the CJEU makes an unspoken distinction between considerations which reduce the liability of the economic entity, as in *Total v Commission*, and factual elements which bar the Commission from proceeding against certain legal entities, as in *Akzo Nobel NV v Commission*.

40153 Amazon – Commitment Decision

COMMISSION ACCEPTS AMAZON'S COMMITMENTS CONCERNING MOST FAVOURED NATION CLAUSES IN E-BOOK PROBE – COMMISSION DECISION OF 4 MAY 2017 IN AT. 40153 *E-BOOK MFNS AND RELATED MATTERS (AMAZON)*

On 4 May 2017, the Commission adopted a second commitment decision in the e-book sector. The first commitment decision concerned concerted practices among Company and five major international publishers whereby they jointly forced Amazon to switch from a wholesale model to an agency model with a view to raising retail prices of e-books in the EEA or to preventing the emergence of lower prices for e-books in the EEA.[19] This time, it concerns potential abuses of a dominant position by Amazon. In both cases, the use of certain "most favoured nation" (MFN) or "parity" clauses was at the centre of the issue.

BACKGROUND

In 2012 and 2013, the Commission made commitments offered by Company and the five publishers to meet the Commission's concerns regarding their potential concerted practices in breach of Article 101 TFEU legally binding. The Commission was concerned, among other things, that a retail price MFN clause included in each of the agency agreements between Company and the five publishers strongly incentivised them to force Amazon to switch from a wholesale model to an agency model. The retail price MFN clause provided that, in the event another retailer were to offer a lower price for a particular e-book, the publisher had to lower the retail price of that e-book in Company's iBookstore to match that other lower retail price. As a consequence, the five publishers undertook not to enter into, for a period of five years, any agreement for the sale of e-books in the EEA that contained a retail price MFN clause, a wholesale Price MFN clause, a commission/revenue share MFN clause, or a business model MFN clause.[20]

Even before switching to an agency model in 2010, Amazon included MFN clauses related to selection concerning catalogue and availability date in its wholesale e-book distribution agreements covering the EEA. After the switch, it started to include MFN clauses related to agency price, agency commission and business model. Since then, Amazon typically included in its e-book agency and wholesale agreements MFN clauses related to: business model (e.g. print and e-book bundles, subscription models);

[19] Commission Decision of 12 December 2012 in Case No COMP/39847 – *E-Books* and Commission Decision of 25 July 2013 in Case No. COMP/39.847 – *E-Books*.

[20] For Penguin, a commitment with respect to a business model MFN clause is excluded.

selection with respect to catalogue, availability date, and feature; an agency, reseller or wholesale price; promotion; and an agency commission in the case of agency agreements.

In agreements with the five publishers who could not introduce MFN clauses because of their commitments described above, Amazon included notification provisions instead of MFN clauses.

Against this background, on 11 June 2015, the Commission initiated proceedings against Amazon. On 9 December 2016, the Commission adopted its Preliminary Assessment.

COMMISSION'S PRELIMINARY CONCERNS

In its Preliminary Assessment, the Commission expressed the view that Amazon might be abusing or might have abused its dominant position in the relevant markets for the retail distribution of English and German language e-books to consumers in the EEA through MFN clauses and notification provisions.

Those MFN clauses required, in essence, e-book suppliers (i) to notify Amazon more favourable or alternative terms offered to any other retailers and (ii) to offer Amazon equivalent terms.

Notification provisions required e-book suppliers to notify Amazon more favourable or alternative terms offered to any other retailers but did not require them to offer equivalent terms. However, once notified by an e-book supplier, Amazon typically requested from that e-book supplier equivalent terms and explicitly threatened to punish it if it did not accede to such request.

The Commission was concerned that those MFN clauses and notification provisions were capable of reducing, or likely to reduce the competitiveness of retailers, thereby reinforcing Amazon's potentially dominant position in the relevant markets. The Commission also considered that they could lead to less innovation as well as fewer choices and higher prices for consumers.

COMMITMENTS

To address these concerns, in accordance with Article 9(1) of Regulation (EC) No 1/2003, Amazon proposed to cease to enforce or otherwise rely upon any of the MFN clauses or of the notification provisions contained in agreements with e-book suppliers for the sale of e-books to consumers in the EEA. It also proposed not to include any of the MFN clauses or of the notification provisions in any new agreements with e-book suppliers for the sale of e-books to consumers in the EEA. The duration of both commitments is five years.

The Commission found that these commitments adequately address its concerns identified in its Preliminary Assessment and made them binding on Amazon. A breach of the commitments could trigger the reopening of the proceedings.

COMMENT

As the divergent outcomes of investigations by several national competition authorities into MFN clauses used by online travel agents in their contracts with hotels show, there is a lack of clarity as to the legal status of MFN clauses – whether they should be prohibited outright or they may be allowed under certain conditions. The Commission's commitment decisions in the e-book sector are not helpful in this regard. One could argue that since the Commission allows the publishers and retailers to include MFN clauses again in e-book agreements after a period of five years, it does not prohibit MFN clauses outright. In any case, it is clear that the use of MFN clauses will require caution especially when they are used by parties that enjoy a high level of market power.

Case T-480/15, Agria Polska sp.Z.o.o. and others v Commission (Rejection of complaints)

GCEU DISMISSES COMPLAINT FOR LACK OF EU INTEREST - JUDGMENT OF 16 MAY 2017 IN CASE T-480/15 *AGRIA POLSKA SP. Z O.O. AND OTHERS V COMMISSION*

On 16 May 2017 the General Court of the European Union delivered its judgment in Case T-480/15 (Agria Polska spo z ooea v Commission) with respect to the possibility of the European Commission to reject a complaint for lack of an European Union interest.

In July 2010, Agria Polska along with other companies active in the parallel importation of plant protection products (PPPs), brought an action before the Polish competition authority (UOKiK) alleging that manufacturers and distributors of PPPs (including BASF, Dow, Dupont, Monsanto, and Syngenta) had infringed Articles 101 and 102 TFEU. These complainants claimed that the manufacturers and distributors of PPPs infringed competition law by pursuing a campaign of "vexatious" claims to the Austrian and Polish authorities and by engaging in unlawful lobbying of government officials with the intention of eliminating Agria Polska from the market.

The UOKiK dismissed the complainants' action because the one-year limitation period under Polish law for instituting proceedings relating to a breach of competition law had expired. So, on 30 November 2010 the plaintiffs filed a complaint with the Commission.

On 19 June 2015 the Commission rejected the complaint, stressing that "*it had limited resources and that, in the present case, the thorough investigation which should have been carried out [under Articles 101 and 102 TFEU], potentially concerning the activities carried out over a period of seven years by 18 entities located in four Member States, would have been too complex and time-consuming even though the probability of establishing an infringement seemed limited in the present case*". The Commission also found that the national court and national competition authority were better placed to handle the matters complained about. The complainants challenged the Commission's rejection before the GCEU.

On 16 May 2017 the GCEU dismissed the complainant's challenge, stressing that the Commission is responsible for defining and implementing competition policy in the EU and for that purpose has discretion as to how it deals with complaints. The CGEU must assess whether it is clear from the contested decision that the Commission balanced the significance of the impact which the alleged infringement may have on the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of ensuring that Articles 101 and 102 TFEU are complied with.

In this case, it was not obvious that the Commission would have been able to establish that the behaviour of the manufacturers and distributors of PPPs could be regarded as forming a cartel within the meaning of Article 101 TFEU or an abuse of a collective dominant position within the meaning of Article 102 TFEU.

Indeed, the GCEU agreed with the Commission's decision that there was insufficient EU interest to justify opening an investigation because the likelihood of an infringement seemed limited, the scope of the investigations needed would probably be disproportionate in light of that limited probability and the national authorities and courts seemed to be in a better position to deal with the issues raised. Moreover, the national authority's rejection of a complaint due to expiry of a limitation period under national law cannot have the effect of compelling the Commission to open an investigation.

Case T-673/15, Guardian Europe v European Union

FOR A SECOND TIME THIS YEAR THE EU IS ORDERED TO PAY DAMAGES TO A COMPANY AS A RESULT OF THE EXCESSIVE LENGTH OF THE PROCEEDINGS BEFORE THE GCEU - CASE T-673/15 *GUARDIAN EUROPE SÀRL V EUROPEAN UNION*

On 7 June 2017 the GCEU awarded Guardian Europe Sárl ("Guardian") damages of €654,523.43 as compensation for direct material loss caused to the company by the GCEU's failure to give judgment within a reasonable time in Case T-82/08, *Guardian Industries and Guardian Europe v Commission* (EU:T:2012:494).

The background of the dispute is that Guardian was fined by Commission Decision C(2007) 5791 of 28 November 2007 for participation in the flat glass cartel. Although Guardian was the smallest flat glass producer and its participation in the cartel was the shortest, it received the highest fine of all the participants. The disproportionately large amount of the fine resulted from the fact that, in its calculations, the Commission did not take into account internal sales made between entities owned by same undertaking. Guardian did not benefit from this because it only made external sales. Guardian challenged this unequal treatment before the GCEU. The GCEU rejected Guardian's claim in proceedings that were unusually long, with a delay of 41 months between the closure of the written procedure and the opening of the oral procedure (Case T-82/08). However, upon appeal to the CJEU, Guardian obtained a reduction in fine of € 44,400,000 from €148,000,000 to €103,600,000 (Case C-580/12 P).

In the present case Guardian claimed damages under three heads:

- infringement by the Commission of the principle of equal treatment when it imposed fines by Decision C(2007) 5791
- infringement by the GCEU of the principle of equal treatment when it rejected Guardian's challenge to the fines in Case T-82/08
- infringement by the GCEU of the obligation to adjudicate within a reasonable time

It succeeded on the third of these but failed on the other two

The GCEU observed that whether the length of proceedings is reasonable depends, in particular, on the complexity of the dispute, the conduct of the parties and supervening procedural matters. Account should be taken of the complexity of competition cases, the multilingual environment in which the Court of Justice operates and the limited terms of office of the judges. The reasonableness of the period for delivering judgment cannot be assessed on the basis of a fixed amount of time.

The GCEU considered that

> "a period of 15 months between the end of the written part of the procedure and the opening of the oral part of the procedure is, in principle, an appropriate length of time for dealing with cases concerning the application of competition law such as Case T‑82/08. Next, the parallel processing of connected cases cannot justify, in the present case, extending the interval between the end of the written part of the procedure and the opening of the oral part of that procedure. Lastly, the degree of factual, legal and procedural complexity in Case T‑82/08 is no justification for longer proceedings in this instance. In that regard, it should be noted in particular that, between the end of the written part of the procedure and the opening of the oral part of the procedure, the procedure was neither interrupted nor delayed by the Court's adoption of any measure of organisation of procedure."

The GCEU concluded that "the fact that 41 months elapsed between the end of the written part of the procedure and the opening of the oral part of the procedure shows that there was a period of unjustified inactivity of 26 months." On the other hand, the GCEU could not find evidence of unjustified inactivity before the written procedure was closed or after the oral procedure was opened. The GCEU found that there was "a sufficiently direct causal link between the infringement of the obligation to adjudicate within a reasonable time in Case T-82/08 and the loss sustained by [Guardian] because of paying additional bank guarantee costs during the period by which that reasonable time was exceeded. It therefore awarded Guardian damages of €654,523.43, being the interest actually paid by Guardian in the 26 months preceding judgment in case T-82/08. In addition, the GCEU awarded "compensatory" interest on this sum calculated by reference to monetary depreciation according to Eurostat statistics over the period commencing 26 months before judgment of the GCEU in Case T-82/08 and ending with judgment in the present case, T-673/15. As from the date of the latter judgment, these amounts bear default interest at the rate set by the ECB for its main refinancing operations, increased by two percentage points until the date of actual payment.

However the Court dismissed the claim for compensation for the loss of profit. Guardian did not itself bear the burden linked to the payment of the fine imposed by the Commission. This burden was carried by Guardian's seven operating subsidiaries pursuant to an agreement. Therefore Guardian could not claim that payment of the fine had deprived it of the opportunity of investing and earning profits.

AT.40018 Car battery recycling

COMMISSION FINES THREE COMPANIES IN THE CAR BATTERY RECYCLING BUSINESS FOR FIXING PURCHASE PRICES OF SCRAP BATTERIES – DECISION AT.40018

The Commission found that four companies active in the battery recycling business, Campine (Belgium), Eco-Bat Technologies (UK), Johnson Controls (US) and Recylex (France), had been part of price fixing a cartel, from 2009 to 2012, in Belgium, France, Germany and the Netherlands. The cartel was unusual given that the undertakings involved pushed to lower the prices of the scrap batteries as opposed to raising the prices at which they resold the recycled products, in this way hampering the normal functioning of the market.

Battery recycling undertakings sell the lead extracted from scrap material to battery manufacturers who, in turn, produce new batteries. The scrap material is usually extracted directly from old vehicles (automotive batteries) or bought in warehouses, scrapyards *et similia* by scrap collectors who, then, sell the material to the scrap dealers who, normally, act as intermediaries between the collectors and the recycling companies. The European market for scrap material is highly atomised, consisting of a large number of dealers/collectors operating at local/regional level and a few bigger players at national level. This market is of great impact since in the EU as many as 99% of automotive lead-acid batteries are recycled every year. The price of scrap lead-acid batteries, traded on the London Metal Exchange (LME), fluctuates based on global demand and supply and trading. The prices of primary lead and of recycled lead are based on the LME. There is no formal connection between the LME prices and scrap battery prices but the latter generally follow the former.

Two of the undertakings participating in the cartel, Eco-Bat Technologies, Recylex and Johnson Controls are active both in the collection of scrap material as well as in the recycling of it. Furthermore, Eco-Bat Technologies and Recylex are both suppliers of recycled lead of Johnson Controls. The undertakings put into place their illegal conduct through bilateral and multilateral contacts, relating to prices, future market conduct and negotiation with suppliers, pursuing a single economic aim and anti-competitive object. In order to reduce prices or to maintain them at a certain level, the undertakings acted as follows:

- reached agreements with the suppliers;
- exchanged information on prices offered to specific suppliers and on price evolutions and purchasing intentions;
- agreed on maximum price levels and target prices;
- insured that the prices would not go below a certain level as to encourage suppliers to sell to third parties.

They also exchanged information concerning future market conduct, stock levels, activity level and expected purchases. By so doing, they coordinated to lower the price of the scrap material purchased in order to increase their profit margin, thus negatively affecting small and medium-sized battery collectors and scrap dealers.

In order to determine the amount of the fines, the Commission used as benchmark the value of the purchases and increased it by 10%, so as to o to avoid under-deterrence given the fact that the prices were artificially lowered by the undertakings concerned. Johnson Controls, in 2012, came forward to the Commission unveiling the existence of the cartel, thus receiving full immunity from fines under the 2006 Leniency Notice. Campine received a 5% reduction for its minor role it played in the illegal behaviour. Eco-Bat Technologies and Recylex received a reduction in the fines following their cooperation with the EC during the investigation. As a result, Eco-Bat was fined €32,712,000 (50% reduction), Recylex €26,739,000 (30% reduction) and Campine 8,158,000.

The Commission also encouraged any person or company who has been affected by the cartel to seek an action for damages

Cases C-85/15 P etc , Feralpi and others v Commission

THE CJEU ANNULS A COMMISSION DECISION FOR INFRINGEMENT OF AN ESSENTIAL PROCEDURE REQUIREMENT ARISING OUT OF THE TRANSITION FROM THE COAL AND STEEL TREATY REGIME TO THE EUROPEAN UNION REGIME - CASE C-85/15 P, *FERALPI V COMMISSION*, JOINED CASES C-86/15 P AND C-87/15 P, *FERRIERA VALSABBIA AND OTHERS V COMMISSION,* CASE C-88/15 P, *FERRIERE NORD V COMMISSION* AND CASE C-89/15 P, *RIVA FIRE V COMMISSION.* .

These five cases before the CJEU illustrate the well-established principle that failure of the Commission to comply with an essential procedural requirement will lead to annulment of its decision without it being necessary for the undertaking concerned to demonstrate that “such infringement might have influenced the course of the proceedings of the decision at issue”. The novelty of these cases was the fact that the Commission initiated the proceedings under the Coal and Steel Treaty but adopted its decision after the date of expiry of that Treaty, 23 July 2002. The Commission therefore applied the procedural rules of the European Union as from that date. The CJEU ruled, in effect, that this was not good enough. A hearing of the parties had been held prior to 23 July 2002 to which the Member State representatives were not invited, since this was not required under the Coal and Steel Treaty regime. However, under the European Union regime, the Member State representatives have to be invited to a hearing of the parties. Since the Commission adopted its final decision under the European Union regime it should have organised a new hearing of the parties to which Member State representatives were invited. It did not do this and so there was an infringement of an essential procedural requirement leading to annulment.

Feralpi, Ferriera Valsabbia and others, Ferriere Nord and Riva Fire, companies active in the manufacture of reinforcing steel bars in Italy, were involved in a Commission cartel investigation. In late 2000, the Commission carried out verifications which led to the issuing of a statement of objections on 26 March 2002 (under Article 47 CS) and an additional (“supplementary”) statement of objections on 12 August of the same year. The undertakings were granted time to make comments and two hearings were held: one on 13 June 2002, to which Member State competition authorities were not invited and another on the following 30 September to which the Member State competition authorities were invited. At the end of the procedure, the Commission issued Decision C(2002) 5087 on 17 December 2002, which found that the undertakings were fixing prices in the market for concrete reinforcing bars and coils. The decision was based solely on the relevant provisions of the European Coal and Steel Community Treaty (ECSC Treaty), which expired on 23 July 2002. No

mention was made of the provisions of Regulation (EEC) No 17/62.

The undertakings challenged the Commission's decision before the GCEU. In October 2007 the GCEU annulled the decision on the grounds that it was based on the provisions of the Coal and Steel Treaty but this treaty was no longer in force on the date of the decision.

In 2008 the Commission informed the undertakings of its intention to re-adopt the decision by changing the legal basis but re-using the evidence presented in the statement of objections and in the supplementary statement of objections. The Commission adopted its new decision on 30 September 2009, with the same outcome as seven years earlier. Feralpi and the other undertakings concerned all brought separate challenges against the decision before the GCEU, which dismissed them. The parties appealed to the CJEU, claiming *inter alia* that the Commission should have issued another statement of objections prior to adopting its new decision.

The CJEU held that the GCEU erred in law by holding that the Commission was not obliged to organise a new hearing in accordance with EU procedural rules (Article 14 of Regulation No 773/2004). The CJEU therefore set aside the GCEU's judgment and proceeded to give judgment itself. It ruled that there was an infringement of an essential procedural requirement for failure to hold a hearing at which the parties could have had the opportunity to develop their arguments (based on Articles 12 and 14 of Regulation 773/2004). Therefore the Commission's decision had to be annulled.

The core of the issue is the change occurred in the legislation at the basis of the Commission's procedure and the annulment of the 2002 Commission decision. The CJEU first analysed whether a new statement of objections had to be issued, as argued by the appellants. The procedure followed by the Commission in 2002 in issuing the statement of objections is the same as that prescribed by Regulations 773/2004 and 1/2003, applicable in the second phase of the case. Furthermore it is established case-law that the annulment of EU measures does not necessarily affect the preparatory acts. So the CJEU was of the view that the statement of objections issued under the Coal and Steel Treaty could still be validly used. However, the CJEU had also to establish whether the Commission gave the parties an opportunity to develop their arguments at an oral hearing. This aspect was also affected by the change in legal regime. Pursuant to Regulations 773/2004 and 1/2003 the competition authorities of the Member States had to be invited to hearings of the parties, whilst under the Coal and Steel regime this was not a requirement. The competition authorities were not invited to the first hearing held on 13 June 2002, when the substance of the case was discussed, but only to that of the following 30 September at which only the consequences of the expiry of the ECSC Treaty were addressed. It follows that the parties were denied their right to develop their argument in a hearing with the competition authorities present, which amounts to an infringement of an essential procedural requirement.

Case C-671/15, Président de l'autorité de la concurrence v APVE

CJEU CLARIFIES THE SCOPE OF EU AGRICULTURAL EXEMPTIONS – PRESIDENT OF THE AUTORITÉ DE LA CONCURRENCE V ASSOCIATION DES PRODUCTEURS VENDEURS D'ENDIVES (APVE) E.A. - C-671/15 - JUDGMENT OF 14 NOVEMBER 2017

By a judgment issued on 14 November 2017, the CJEU held that agreements on price and quantity between endive producers may be allowed under certain conditions, namely, (i) if they are implemented within the same producer organisation (PO) or association of producer organisations (APO) and (ii) if they are proportionate to the objectives assigned to that PO or APO.

This case began in 2012 when the French competition authority imposed a fine of almost EUR 4 million for concerted practices on prices and quantities as well as exchange of information implemented from 1998 to 2012 by French POs and APOs in the endive sector. The sanctioned entities contested the fine, arguing that their practices did not fall within the prohibition of anti-competitive agreements, decisions and concerted practices under EU law and were exempted by the common agricultural policy (CAP). The Paris Court of Appeal overturned the fines. The President of the French Competition Authority appealed on point of law to the French *Cour de cassation* (Supreme Court). The *Cour de cassation* asked the CJEU to rule on the following preliminary questions of EU law:

> 1. Can agreements, decisions or practices of [POs], [APOs] and professional organisations which could be classified as anticompetitive under Article 101 TFEU escape the prohibition laid down in that article on the sole ground that they could be linked to the responsibilities assigned to those organisations under the common organisation of

the market [concerned], even if they are not covered by any of the general derogations provided for in turn by Article 2 of Regulation [No 26] and [No 1184/2006], and by Article 176 of Regulation No 1234/2007 [...]?

2. If so, must Article 11(1) of Regulation No 2200/96, Article 3(1) of Regulation No 1182/2007 and [the first paragraph of] Article 122 of Regulation No 1234/2007, which include, among the objectives assigned to [POs and APOs], those of stabilising producer prices and adjusting production to demand, particularly in terms of quantity, be interpreted as meaning that practices whereby those organisations or their associations collectively fix minimum prices, concert on the quantities placed on the market or exchange strategic information escape the prohibition of anticompetitive agreements, decisions and practices in so far as they are aimed at achieving those objectives?'

In its preliminary ruling the CJEU followed the opinion given by Advocate General Nils Wahl in April 2017 who considered that exemptions to competition law must be "strictly circumscribed". The CJEU acknowledged that the CAP takes precedence over EU competition law, with the result that the EU legislature may exclude from the scope of competition law certain practices which, outside the scope of the CAP, would be regarded as anticompetitive. However, this is a legislative exclusion from the scope of application of Article 101(1) TFEU rather than a derogation or exemption from the application of this disposition, and it and it is subject to conditions.

First, the practices in question must remain solely within a PO or an APO duly recognised as such by a Member State. As a consequence, coordination or concertation can only be implemented between producers that are members of the same PO or APO because only responsibilities assigned to POs or APOs can justify these practices. It follows that both practices implemented between several POs or APOs and practices involving not only such POs and APOs but also other types of entities cannot escape the prohibition of Article 101(1) TFEU. This is all the more important because, in the present case, five of the endive producers were "unrecognszed groups" that were not responsible for objectives under CAP.

This condition makes sense when one considers POs and APOs as equivalent to "undertakings". Indeed, it is a well-established competition law doctrine that agreements, decisions and concerted practices within the same undertaking do not fall within the prohibition of Article 101(1) TFEU.

In fact, the CJEU's judgment does no more than apply the single economic entity doctrine in the context of agricultural issues where the "basic elements" are not undertakings but POs and APOs.

Textually, the CJEU's ruling on the first question was as follows:

> "… practices that relate to the collective fixing of minimum sale prices, a concertation on quantities put on the market or exchanges of strategic information, such as those at issue in the main proceedings, cannot escape the prohibition of the agreements, decisions and concerted practices laid down in Article 101(1) TFEU if they are agreed between a number of producer organisations or associations of producer organisations, or are agreed with entities not recognised by a Member State in order to achieve an objective defined by the EU legislature under the common organisation of the market concerned, such as professional organisations not having the status of producer organisation, association of producer organisation or interbranch organisation, within the meaning of EU legislation".

Second, only practices that are "actually strictly connected" to the pursuit of the objectives assigned to the PO and APO in line with the CAP can fall outside the prohibition of Article 101(1) TFEU.

Textually, the CJEU's ruling on the second question was as follows:

> " practices that relate to a concertation on prices or quantities put on the market or exchanges of strategic information, such as those at issue in the main proceedings, may escape the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU if they are agreed between the members of the same producer organisation or the same association of producer organisations recognised by a Member State and are strictly necessary for the pursuit of one or more of the objectives assigned to the producer organisation or association of producer organisations concerned in compliance with EU legislation."

The CJEU's judgment illustrates the fact that there are limits to the application of competition law within the agricultural sector and specifies that these limits must be interpreted very strictly in order to avoid cartel conduct being authorised by rules whose sole objective is enable agricultural producers to organise themselves better.

It is now up to the French *Cour de cassation* to rule on the appeal by the President of the French Competition Authority.

AG Opinion in Case C-191/16, Romano Pisciotti v Bundesrepublik Deutschland

ADVOCATE GENERAL IS OF THE OPINION THAT THE GERMAN AUTHORITIES DID NOT INFRINGE EU LAW BY EXTRADITING ROMANO PISCIOTTI – OPINION OF 21 NOVEMBER 2017 IN CASE C-191/16, *ROMANO PISCIOTTI V BUNDESREPUBLIK DEUTSCHLAND*

In this case Advocate General Bot recommends that the CJEU rule as follows:

> **Articles 18 and 23 TFEU must be interpreted as meaning that they do not preclude a Member State which has received from a third State, pursuant to an extradition agreement between the EU and that State, a request for the extradition of a Union citizen who is a national of another Member State and who has moved to the requested Member State, from granting that request.**

- The dispute in the main proceedings and the questions referred for a preliminary ruling:

Suspected since 2007 of having been engaging in concerted practices in the United States, Romano Pisciotti, an Italian national, was the subject of a request for extradition for the purposes of prosecution made by the US authorities.

Pisciotti was charged with having taken part in a working group of marine hose manufacturer sales representatives which had distorted competition by sharing out between themselves the market for the sale of marine hoses in Florida (United States) and elsewhere between 1999 and late 2006. After being arrested by the German federal police during his stopover at Frankfurt am Main airport in June 2013, the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main) and then the Bundesverfassungsgericht (Federal Constitutional Court) declared Pisciotti's extradition to be permissible, which was consequently granted by the German Government and took place on 3 April 2014.

However, in March 2014, Pisciotti brought an action before the Landgericht Berlin (Regional Court, Berlin, Germany), the referring court, for a declaration that the Federal Republic of Germany was liable for having granted his extradition to the United States of America and an order requiring it to pay damages. Having pleaded guilty in the criminal proceedings brought against him in the United States, Pisciotti was sentenced to a term of two years' imprisonment, reduced by the period of his 9 months and 16 days' detention in Germany, and fined USD 50,000 (approx. €42,671). He served his prison sentence in the United States until his release in April 2015.

In those circumstances, the Landgericht Berlin (Regional Court Berlin) decided to question the CJEU whether *Articles 18 and 23 TFEU must be interpreted as meaning that they preclude a Member State which does not extradite its own citizens (Germany according to Art. 16(2) of its constitution) and which has received from a third State, pursuant to an extradition agreement, a request for the extradition of a Union citizen who is a national of another Member State and who has moved to the requested Member State, from granting that request.*

- Analysis by Advocate General Bot:

Breach of EU law: The prerequisite for any attempt to establish the liability of a Member State is the existence of a breach of EU law by that State. In this instance, it must therefore be determined whether Pisciotti's extradition by Germany to the United States constitutes such a breach of EU law.

Question largely answered by Judgment of the European Court of 6 September 2016, C-182/15 - Aleksei Petruhhin v Latvijas Republikas Ģenerālprokuratūra: According to AG Bot, the CJEU seems to have largely answered that question in its judgment of 6 September 2016, Petruhhin, in the context of the application of an

extradition agreement concluded between a Member State and a third State.

Applicability of Article 18 TFEU: First of all, the situation at issue falls within the scope of application of Article 18 TFEU, as Pisciotti, an Italian national, availed himself, as a Union citizen, of his right to move freely within the European Union by travelling to Germany. It follows that the requested Member State was required, to respect the principle of non-discrimination on grounds of nationality laid down in Article 18 TFEU.

Justification of preventing the risk of impunity: In the *Petruhhin* case, the CJEU took into account the justification of preventing the risk of impunity. It recalled that, under Article 3(2) TEU, the European Union offers its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls and the prevention and combating of crime. According to the Court, the objective of preventing the risk of impunity for persons who have committed an offence is to be seen in that context and must be considered a legitimate objective in EU law. However, measures which restrict a fundamental freedom, such as that laid down in Article 21 TFEU, may be justified by objective considerations only if (1) they are necessary for the protection of the interests which they are intended to secure and (2) only in so far as those objectives cannot be attained by less restrictive measures.

- *No prosecution according to Paragraph 7(2) of the Strafgesetzbuch (Criminal Code)*: On the one hand, Paragraph 7(2) of the Strafgesetzbuch (Criminal Code) did not allow Pisciotti to be prosecuted in Germany for offences allegedly committed in a third State. One of the conditions which that Paragraph attaches to the exercise of such subsidiary criminal jurisdiction, namely that the extradition requested cannot be implemented, was not fulfilled.
- *Information of Member State of citizenship*: On the other hand, Article 18 TFEU and Article 21 TFEU require the following: When a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national. Furthermore, should that Member State so request, it has to surrender that citizen to it, in accordance with the provisions of Council Framework Decision 2002/584/JHA of 13 June 2002. However, this is only true, provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory. It can be observed, that the Italian Republic, of which Pisciotti was a national of, was kept informed by the German authorities.

Case C-547/16, Gasorba and others v Repsol

COURT OF JUSTICE HOLDS THAT BINDING COMMITMENTS OFFERED PURSUANT TO ARTICLE 9 OF REGULATION 1/2003 DO NOT PRECLUDE NATIONAL COURTS FROM FINDING AN AGREEMENT TO BE CONTRARY TO THE COMPETITION RULES: CASE C-547/16, *GASORBA AND OTHERS V REPSOL*.

In 1993 Repsol, a company active in the sale of petrol, concluded two contracts with Messrs. Gil and Gonzales, relating to a plot of land in Spain with a service station built on it.

The two contracts provided that the land and the service-station owned by the aforementioned individuals be given in usufruct to Repsol for a term of 25 years and, in turn, Repsol would lease the land and the service station back to the two individuals, together with an exclusive supply agreement.

In accordance with the terms of the exclusive supply agreement, Repsol was to be the sole supplier of petrol, would communicate periodically the maximum retail prices to be set at the service station and any discounts that were to be applied by Messrs. Gil and Gonzales . The exclusive supply agreement and other similar agreements entered into by Repsol were scrutinised by the Commission, which found that such agreements may not in fact be compatible with Article 101 TFEU. Following the Commission's preliminary assessment of these agreements Repsol offered commitments to the Commission, which were rendered binding by Decision 2006/446/EC.

Messrs. Gil and Gonzales, despite Repsol's offer of commitments, requested the Madrid Commercial Court that

it declare their contracts with Repsol null and void in light of their incompatibility with Article 101 TFEU. Messrs. Gil and Gonzales' claims were rejected both by the Madrid Commercial Court and on subsequent appeal on the basis that Repsol had made commitments in relation to these agreements which were rendered binding by the Commission decision. Messrs. Gil and Gonzales therefore sought relief from the Supreme Court, which, in turn, asked the CJEU whether Article 16(1) of Regulation 1/2003 would preclude a national court from declaring that agreements, to which a commitments decision applies and is binding (Article 9, Regulation 1/2003), are void pursuant to Article 101(2) TFEU.

The CJEU ruled that the national court is not precluded from examining the agreements adopted within the framework of Article 9 of Regulation1/2003 and to examine whether they comply with the competition rules.

In its reasoning the Court held that a commitments decision merely addresses the preliminary concerns expressed by the Commission in its preliminary assessment. It does not, however, constitute a legal finding as to whether the practice in question is or is not compliant with Article 101 TFEU. Against the fact that a joint reading of recitals 13 and 22 of the Regulation in question empowers competition authorities and Member State Courts to decide on the compatibility of a case with Articles 101 and 102 TFEU, decisions taken on the basis of Article 9 of the Regulation do not create a legitimate expectation on the part of the undertakings that gave the commitments that their conduct is in compliance with the competition rules. That being said, the content of the commitment decision must be taken into consideration by national courts when examining the agreements in question.

The outcome of this case is in line with the wording of Regulation 1/2003 and is noteworthy to the extent that, while a commitment decision does not imply that an agreement/conduct is in accordance with the competition rules, such commitment decision must nonetheless be taken into account by national authorities when reviewing the legality of such agreements/conduct.

T-180/15 Icap and others v Commission

THE GCEU UPHOLDS THE CARTEL LIABILITY OF FACILITATORS BUT RESTRAINS THE COMMISSION'S APPROACH IN SETTLEMENT CASES

– Judgment of the GCEU of 10 November 2017 in Case T-180/15 *Icap and others v Commission*

On 10 November 2017 the GCEU annulled in part the Commission´s decision against the Icap Group in the cartels relating to Yen interest derivatives.

Icap, an interdealer broker and provider of post-trade services was found liable for facilitating separate bilateral infringements of Article 101 (1) TFEU of differing durations in the Japanese LIBOR cartel.

The GCEU decided that the Commission had not succeeded in proving that Icap participated in one of the cartels, that the duration found by the Commission of Icap´s participation in three cartels was excessive and that it failed to provide sufficient reasons regarding the methodology for calculating the fine.

The judgment points out the Commission's ability to impose liability for cartel infringements on facilitators as well as on the cartel's main participants but attempts to restrain the Commission in hybrid settlements and restates the case law regarding "by object" infringements.

FACILITATION OF A CARTEL

First, the GCEU confirmed that an entity´s active contribution to a restriction of competition can be caught even if it relates to an activity outside the market in which the cartel took place. Furthermore the GCEU held that two factors are determining whether a company could be liable as a cartel facilitator:

- An intention to contribute by one's own conduct to the common objectives pursued by all participants; and
- An awareness of the actual conduct planned or put into effect by the other parties or reasonable predictability and preparedness take the risk.

However the GCEU held that Icap intended to contribute to the banks' anti-competitive practices and that it was key in influencing the JPY LIBOR panel submissions, it denied adduction of the necessary evidence of knowledge in one infringement, regarding the bilateral cartel between UBS and RBS. The GCEU held that an internal Icap email discussing the interests of two banks mostly demonstrate Icap's own view about certain conduct but not its knowledge of collusion.

SETTLEMENT OF HYBRID CASES

The GCEU furthermore agreed that, in cases of hybrid settlement procedures which do not concern all the participants in an infringement, the Commission must respect the presumption of innocence of the undertaking which has decided not to enter into a settlement.

By taking up a position of its decision in 2013, adopted following the settlement procedure in which Icap did not participate, on Icap´s liability regarding the facilitation of the infringements, the Commission infringed the presumption of innocence.

In the circumstances of the present case the infringement of the presumption of innocence did not have any effect on the contested decision.

"BY OBJECT" INFRINGEMENT

The GCEU confirmed that the infringements alleged against Icap were restrictive of competition by their object. The GCEU recalled the case law according to which price information exchanges may in certain circumstances be regarded as "by object" infringements even without a direct connection between such exchanges and subsequent price levels or actual anti-competitive effects on the relevant market. The GCEU considered that the coordination of the JPY LIBOR panel submissions had a direct effect on the levels of the fixed portions of the derivate. Additionally, the exchange of confidential information regarding the JPY LIBOR rate also contributed to an infringement "by object".

METHODOLOGY FOR CALCULATION OF THE FINE

tThe GCEU Court annulled the part of the decision setting the fines because it was insufficiently reasoned.

The GCEU recognised that the Commission had valid reasons for departing from the methodology set out in the 2006 Fining Guidelines but criticised the Commission for not providing any details about the alternative method used. The Commission limited itself to providing a general assurance that the basic amounts reflected "the gravity, duration and nature of Icap's involvement as well as the need to ensure that fines have a sufficiently deterrent effect". The contested decision did not enable Icap to "understand the justification for the methodology favoured by the Commission" nor did it enable "the Court to verify that justification". In addition, the decision did not "provide the minimum information that might have made it possible to understand and ascertain the relevance and weighting of the factors taken into consideration by the Commission in the determination of the basic amount of the fines".

Case C-230/16, Coty Germany GmbH v Parfümerie Akzente GmbH

SUPPLIERS MAY PROHIBIT SALES ON THIRD-PARTY ONLINE PLATFORMS - CJEU'S JUDGMENT OF 6 DECEMBER 2017, CASE C-230/16 *COTY GERMANY GMBH V PARFÜMERIE AKZENTE GMBH*

INTRODUCTION

The CJEU judgment in *Coty Germany* is welcome in two regards: first, it clarifies that suppliers of genuinely luxury products may, under certain conditions, prohibit their authorised suppliers from selling via third-party online platforms, such as Amazon; and second, it opens the possibility for suppliers of any products to claim that such prohibition is block-exempted.

However, this judgment creates a new issue for suppliers of branded goods, that is, whether or not their products are genuinely luxury products in the eyes of CJEU judges.

One thing is clear – whether products are luxury or not - suppliers must allow their authorised distributors to sell on their online stores and must avoid a blanket ban on online sales.

BACKGROUND

Coty Germany GmbH ("Coty Germany") sells luxury cosmetics of certain brands via a selective distribution network in Germany. Parfümerie Akzente GmbH ("Akzente") has for many years distributed Coty Germany goods, as an authorised distributor, both at its brick-and-mortar locations and over the internet – through its own online store and via the platform "amazon.de".

Akzente refused to sign an amended selective distribution contract that contained a general prohibition on internet sales via third-party platforms. As a result, Coty Germany brought an action before the national courts, seeking an order prohibiting Akzente from distributing via "amazon.de".

In this context, in April 2016, Higher Regional Court of Frankfurt am Main made a request for a preliminary ruling.

JUDGMENT

The CJEU first recalls the established case-law that a selective distribution system is not prohibited by Article 101(1) TFEU, to the extent:

> (1) that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down

uniformly for all potential resellers and not applied in a discriminatory fashion;

(2) that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use; and

(3) that the criteria laid down do not go beyond what is necessary.

In finding that the contract at issue satisfies the second criteria, the CJEU notes that "luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are used properly (paragraph 28)". This finding appears to run counter to, at least on first glance, the CJEU's own finding in *Pierre Fabre Dermo-Cosmétique*[21] where it ruled that that "The aim of maintaining a prestigious image is not a legitimate aim for restricting competition (paragraph 46)". In an effort to address this seemingly contradictory conclusion, the CJEU explains that "the goods covered by the selective distribution system at issue in [*Pierre Fabre Dermo-Cosmétique*] were not luxury goods, but cosmetic and body hygiene goods" (paragraph 32). However, it seems too easy to decide that cosmetics and personal care products of well-known brands in *Pierre Fabre Dermo-Cosmétique* are not luxury products without conducting any assessment of their quality or characteristics. Now suppliers of branded goods are left with uncertainty as to whether or not their selective distribution agreements infringe Article 101(1) TFEU due to the possibility of their products not being considered by the CJEU judges as luxury products.

Regarding the third criterion, the CJEU ascertains: (i) whether or not the prohibition imposed by a supplier on its authorised distributors of the use, in a discernible manner, of third-party platforms for the internet sale of the luxury goods is appropriate for the purpose of preserving the image of luxury and prestige of the goods concerned; and (ii) whether or not such prohibition goes beyond what is necessary to achieve that purpose.

As regards the first question, the CJEU concludes that such prohibition is appropriate to preserve the luxury image of the goods concerned because: first, it provides the supplier with a guarantee that those goods will be exclusively associated with the authorised distributors; second, the absence of a contractual relationship between the supplier and third-party platforms involves "a risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character (paragraph 49)"; and lastly the fact that the online sale is carried out solely in the online shops of authorised distributors contributes to the luxury image among consumers.

As for the second question, the CJEU concludes that such prohibition does not go beyond what is necessary to achieve the purpose because, first, authorised distributors are permitted to sell the contract goods online both via their own websites and via unauthorised third-party platforms when the use of such platforms is not discernible to the consumer; and, second, despite the increasing importance of third-party platforms in the marketing of distributors' goods, the main distribution channel, in the context of online distribution, is nevertheless constituted by distributors' own online shops.

Consequently, the CJEU rules that the prohibition imposed by a supplier on its authorised distributors of the use, in a discernible manner, of third-party platforms for the internet sale of the luxury goods does not infringe Article 101(1) TFEU insofar as the first criterion was satisfied, which is the case for the selective distribution system of Coty Germany.

Furthermore, the CJEU clarifies that such prohibition does not amount to a hardcore restriction - a restriction of the customers of the distributors or a restriction of passive sales to end users - within the meaning of Article 4 (b) or (c) VBER mainly because customers are able to find the online offer of authorised distributors through search engines.

COMMENT

For suppliers of genuinely luxury products, this ruling provides great comfort that they can prohibit sales, in a discernible manner, through third-party online platforms insofar as they allow the sales via the online shops of their authorised distributors. On the other hand, suppliers of branded goods are now faced with a question of whether or not their products will be considered as "luxury products", without any guidance, and with uncertainty as to whether their selective distribution agreements infringe Article 101(1) TFEU.

That said, suppliers of non-luxury products could now argue that the prohibition of the use of third-party online platforms in a discernible manner is block-exempted under VBER and thus lawful, although some may argue that the CJEU's

[21] Judgment of CJEU of 13 October 2011 in Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi.

clarification concerning this point only pertains to genuinely luxury products.

Key takeaways from this ruling:

- Businesses that use selective distribution agreements for their goods believed to be luxury are encouraged to highlight the luxury nature of their goods in their agreements.
- Any businesses that use selective distribution agreements must allow their authorised distributors to sell via their online shops and to use search engines for marketing purposes.

Case C-487/16 P, Telefonica v Commission

THE CJEU REJECTS TELEFÓNICA'S APPEAL SEEKING TO OVERTURN FINE IMPOSED BY THE COMMISSION FOR A MARKET-SHARING AGREEMENT WITH PORTUGAL TELECOM – JUDGMENT OF THE CJEU OF 13 DECEMBER 2017 IN CASE C-487/16 P TELEFÓNICA SA V. COMMISSION

In the present matter, the CJEU was called upon to decide on a case brought by Telefónica SA ("Telefónica") against a ruling of the GCEU.[22] In this ruling, the GCEU partially upheld Telefonica's request for annulment of a Commission decision which fined Telefonica for breaching Article 101 TFEU.[23]

At the origin of the case was an offer by Telefónica to acquire from Portugal Telecom the 50% stake it held in Brasilcel (of which Telefónica held the remaining 50%). Brasilcel, in turn, controlled one of the largest mobile telecommunications operators in Brazil (Vivo Participações SA).

The share purchase agreement entered into between Telefónica and Portugal Telecom on 28 July 2010 for the acquisition of Brasilcel contained a non-competition clause which provided that neither party would participate or invest, directly or indirectly, through any subsidiary in any project in the telecommunications sector which may compete with the other party in the Iberian market, for a period beginning on the day of final closing of the transaction (i.e., 27 September 2010) until 31 December 2011.

In its decision, the Commission considered that that this non-competition clause amounted to a market-sharing agreement between Telefónica and Portugal Telecom, intended to restrict competition on the internal market. It was therefore considered to be in breach of Article 101 TFEU. The Commission imposed fines in the amount of € 66.894.000 on Telefónica and of € 12.290.000 on Portugal Telecom.

Telefónica appealed this decision to the GCEU, seeking the annulment of the Commission's decision or, in the alternative, a reduction in the amount of the fine. The GCEU annulled Article 2 of the Commission's decision, on the ground that the Commission fixed the amount of the fine on the basis of an erroneous calculation of the value of Telefónica's sales, and rejected the remainder of the appeal.

Before the CJEU, Telefónica sought to obtain the annulment of the Commission's decision and of the GCEU's judgment or, in the alternative, the annulment of paragraph 1 of the operative part of the GCEU's judgment to determine the percentage of the reduction of the fine. The CJEU rejected the claims in their entirety.

Firstly, Telefónica argued that the GCEU breached its rights of defense by refusing to hear as witnesses some of its executives and an outside lawyer, whereas these people had knowledge of the negotiations pertaining to the transaction at hand and could have given witness testimony on this subject.

According to the CJEU in the present case Telefónica could not argue that its rights of defense had been breached by being denied witnesses to the proceedings because it did not demonstrate how the testimony of those witnesses could actually prove that the Portuguese government had imposed the non-competition clause in question. Therefore, Telefónica only put into question the Court's appreciation of the evidence but did not prove any misrepresentation on the part of the GCEU. The first point of appeal was, therefore, dismissed.

Secondly, Telefónica claimed that the GCEU misconstrued Article 101 TFEU by concluding that the non-competition clause was a restriction by object, arguing mainly that the case was unprecedented and that the non-competition clause did not necessarily, by its very nature, give rise to a degree of harm that was sufficient to qualify it as a restriction by object.

Telefónica argued that the GCEU deemed the non-competition clause as a restriction by object because it misconstrued the meaning of an e-mail where the non-competition clause was proposed. The Court held that the

[22] Case T-216/13, 28 June 2016 Telefónica v. Commission

[23] Commission Decision C(2013) 306 of 23 January 2013

GCEU, however, merely determined how the wording of the e-mail was not sufficient to prove that the Portuguese government had imposed the non-competition clause. Furthermore, Telefónica did not demonstrate that the clause was not an actual threat to competition or that it had an essential function in the conclusion of the agreement, but only underlined the agreement's nature in terms of legal safeguard. In fact, Telefónica argued that since the clause contained the sentence "to the extent permitted by law" this would constitute a legal safeguard. The CJEU underlined how it is not in its powers to raise a question of law on the appreciation of the facts performed by the GCEU unless the GCEU made a material error or misconstrued the facts: therefore, since there was no such situation, also this point of appeal was dismissed.

Finally, according to Telefónica, the GCEU made mistakes in the assessment of the amount of the fine, in that it (i) failed to take into account the fact that the market sharing had never been implemented and (ii) erred by stating as proof of such implementation that Telefónica and Portugal Telecom remained in their respective domestic markets.

In addition, Telefónica argued that "concurring evidence" would highlight that Telefónica and Portugal Telecom could not compete on these markets, in particular because of significant barriers to entry, and that in the presence of such "concurring evidence", requiring direct evidence of a negative fact would be tantamount to requiring impossible proof and to a breach of the rights of the defense.

The CJEU underlined that Telefónica, in arguing that the GCEU had not considered the "concurring evidence", merely made reference to its application for annulment, thus only calling into question the assessment of the facts done by the GCEU. The GCEU, in fact, has sole competence in controlling the way the Commission assesses the gravity of illicit behaviour. Telefónica's argument was, therefore, inadmissible. As regards the alleged efforts to minimise the impact of the clause, Telefónica failed to produce any evidence to support its statement. Lastly, Telefónica in arguing for a reduction of the fine, claimed that the case was unprecedented and that there was no ill will on its part. In response to this claim, the CJEU responded that the GCEU had already rejected this argument and deemed the market partitioning agreement illegal under the competition rules. Therefore, also the third point of appeal was dismissed.

Abuse of dominant position

39740 Company Search

COMMISSION IMPOSES RECORD FINE OF EUR 2.42 BILLION ON COMPANY FOR ABUSE OF A DOMINANT POSITION - *COMPANY SEARCH (SHOPPING)* – CASE AT.39740 – 27 JUNE 2017

On 27 June 2017, and following a seven-year investigation based on numerous complaints, the Commission imposed a fine of EUR 2.42 billion on Company for abusing its dominant position in general internet search. This is the highest fine ever recorded in the field of antitrust In addition to the imposition of a fine the Commission also required Company to cease its illegal conduct within 90 days of its decision and to refrain from taking any measure akin to the illegal conduct identified in this case.

In 2004, Company entered the comparison shopping market in Europe with a new product initially called "Froogle", then re-named "Company Product Search" in 2008 and, finally, named "Company Shopping" in 2013. This particular product permits consumers to compare products and prices online, including online shops of manufacturers and internet platforms etc.

The Commission found that by engaging in a strategy of giving prominent placement in its search results only to its own comparison shopping service, whilst demoting competing services, Company had abused its position of dominance in general internet search in breach of Article 102 TFEU. In particular:

The Commission first established that Company had been dominant in each national market for general internet search throughout the European Economic Areafor a number of years. A finding of dominance was based on the consistently high market shares held by Company, exceeding 90% in most EEA countries. A finding of dominance on the part of Company was also found on the basis of other factors, such as high barriers to entry and to expansion given *inter alia* the strong network effects associated with Company's internet search engine service. Indeed, the more consumers use a search engine, the more attractive it becomes to advertisers, raising profits which can be used to attract more consumers. The decision cites the following additional factors in support of its finding of dominance: the infrequency of user multi-homing, the existence of brand effects, and the lack of countervailing buyer power.

Having established that Company was in a dominant position in general internet search, the Commission found that Company had abused this dominant position by according an illegal advantage to its own comparison shopping service in 13 countries. This was achieved by systematically givingprominent placement to its own comparison product service whilst, in parallel, ensuring that competing services were not given such prominence in Company search results. Indeed, Company systematically ensured that the results of its own service were displayed at or near the top of the search results. On the other hand, rival comparison shopping services were specifially subject to Company's generic search algorithms, which resulted in these competing services being ranked lower down in Company's search results. Company's own comparison shopping services was not subject to Company's generic search programmes. In this regard, the Commission found that even the most highly ranked rival service appeared on average only on page four of Company's search results. Thus, Company's service was much more visible to users than services offered by competitors. The Commission demonstrated that results which are displayed at or near the top of the first search results page attract far more clicks by users than results which appear lower down on the first page or on subsequent pages.

In terms of consequences going forward, Company will have to comply with the simple principle of giving equal treatment to competing shopping services companies and its own services. The way that Company is required to achieve this is left to the discretion of Company. In the meantime, companies that have suffered at the hands of Company are likely to bring civil damages actions against Company for damage incurred as a result of its abusive conduct.

Case C-413/14 P, Intel v Commission

WHERE THE "AS EFFICIENT COMPETITOR" (AEC) TEST PLAYS A SUBSTANTIAL ROLE IN THE COMMISSION'S ASSESSMENT, THE GCEU MUST ASSESS ALL SUBMISSIONS REGARDING THIS TEST

Judgment of the Court of Justice of the European Union ("**CJEU**") of 6 September 2017, *Intel Corporation Inc. v Commission*, C-413/14 P

On 6 September 2017 the CJEU set aside the judgement of the GCEU of 12 June 2014 upholding the Commission's fine of €1.06 billion on Intel for abuse of a dominant position and referred the case back to the GCEU. The CJEU held that the GCEU had failed to consider all arguments put forward by Intel regarding the "as-efficient competitor" ("AEC") test applied by the Commission in its infringement decision.

In the early 2000s the Commission had started investigations against Intel following the complaint ofAdvanced Micro Devices Inc. ("***AMD***") against Intel regarding its behaviour.

By its decision of 13 May 2009 (COMP/C-3/37.990 – Intel) the Commission imposed a fine of €1.06 billion on Intel for abuse of a dominant position on the market for computer chips (specifically x86 central processing units (CPUs)).

In particular, the Commission accused Intel of granting (i) loyalty rebates to trading partners and (ii) so-called "naked restrictions", which were supposed to exclude AMD from the market for CPUs between October 2002 and December 2007. The rebates were granted to trading partners on the condition that theywould purchase all or almost all their x86 CPUs from Intel. With regard to the "naked restrictions" (i.e. payments to Media-Saturn-Holding, a European retail company for microelectronic devices etc.), the Commission found that Intel had tried to make Media-Saturn delay, cancel or restrict the marketing of products that are equipped with CPUs from AMD. Therefore the Commission concluded that Intel had infringed Art. 102 TFEU. By judgment of 12 June 2014 the GCEU upheld in its entirety the Commission's decision.

In its appeal before the CJEU Intel claimed, inter alia, that the GCEU did not assess the rebates in light of all circumstances relevant for the case. The CJEU divided this ground of appeal into three sections:

- First, Intel held the view that loyalty rebates only are abusive if an assessment of all relevant circumstances comes to the conclusion that by the rebates competition can be restricted.
- Second, Intel held that the GCEU did not evaluate, whether the rebates were likely to restrict competition. Even if rebates were assessed as loyalty rebates, the GCEU should have evaluated the capacity to be anticompetitive.
- Third, Intel held the view that the court´s assessment in its judgement of the capability to restrict competition had not been made adequately. The GCEU did not take into account relevant circumstances of the case, for example the duration of the grant- of the rebates, the foreclosing effects and the results of the "as efficient competitor"-test (AEC-test),that the Commission had carried out in its assessment of the

cse. The GCEU should have reviewed the Commission's application of the AEC test, as it had played an important role in the Commission's assessment.

In its judgment, the CJEU recalls that the grant of loyalty rebates by a dominant undertaking is presumed illegal but clarifies that the presumption is rebuttable, i.e. a dominant undertaking may contest during the course of an investigation, where supporting evidence is produced, that its behavior was not capable of restricting competition by foreclosing competitors. The Commission must assess, before concluding on whether a loyalty rebate is abusive, (i) the extent of the undertaking's dominant position on the relevant market and market coverage, as well as the conditions and arrangements for granting the rebates, their duration, and their amount (ii) whether the practice has "*an intrinsic capacity (…) to foreclose competitors which are at least as efficient as the dominant undertaking*" (para. 139). If the rebate schemes do give rise to foreclosure concerns, the Commission must assess whether the capacity to foreclose as efficient competitors may be outweighed by efficiencies.

The CJEU also clarifies that in cases where the Commission carries out the AEC test analysis, the GCEU is required to evaluate all arguments relating to that analysis. The CJEU found that the GCEU had failed to do so in the present case. The CJEU's judgement suggests that in future cases where the Commission carries out an AEC test that is contested on appeal, the GCEU will need to conduct its own analysis and not simply rely on the Commission's assessment.

This effects-based approach comes in line with the Commission's 2009 Guidance Paper on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings, which promotes the use of an effects-based analysis to determine whether a rebate scheme might foreclose competition.

The judgment has a significant implication for dominant and potentially dominant companies: the ruling provides legal clarity on how loyalty rebates are treated under EU competition law and gives greater flexibility with regard to the kind of pricing practices to adopt. Until now, compliance-minded companies have been reluctant to apply loyalty rebates to avoid the risk of their amounting to an abuse of a dominant position. However, after the CJEU's judgment, these companies may start applying loyalty rebates when they believe that such rebates would not foreclose as efficient competitors on the basis of an economic assessment.

Case C-177/16 AKKA LAA

LATVIAN ROYALTY-COLLECTING SOCIETY ABUSED ITS DOMINANT POSITION BY CHARGING EXCESSIVE FEES – AKKA/LAA – CASE C-177/16 – 14 SEPTEMBER 2017

The Copyright and Communication Consulting Agency/Latvian Authors Society ("***AKKA/LAA***") possesses the exclusive right in Latvia to license retailers and service providers to play copyright-protected music. The society represents both domestic and foreign artists.

Already in 2008 Latvia's competition authority, the Competition Council of the Republic of Latvia, fined the organization for charging excessive tariffs for remunerating copyright holders. The collecting society changed its fees in 2011 but the authority started a new investigation into whether the group was abusing a dominant market position.

In 2013 the authority fined AKKA/LAA approx. €65,000 for charging unreasonably high copyright fees. In its decision the authority said the collecting society's tariffs were unjustified, noting that they were 50% to 100% higher than those charged in other countries of the European Union. .

AKKA/LAA challenged the decision before a regional court which ordered Latvia's competition authority to recalculate the fine. Both parties appealed the ruling. Latvia's Supreme Court referred a preliminary question of EU law to the CJEU. The Latvian judges want to know how to calculate a collecting society's turnover and how to decide whether tariffs were unfair. In February 2017 the CJEU heard the case and two months later the Advocate General Nils Wahl handed down his opinion.

The CJEU's judgment of 14 September 2017 reasonedas follows:

1. In order to identify excessive pricing it is appropriate to draw a comparison between the prices in the market in question and the price rates in neighbouring markets. "*When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States, and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position.*" However, the national court has to verify whether

that comparison was correctly carried out and sufficient.

2. "A comparison cannot be considered to be insufficiently representative merely because it takes a limited number of Member States into account." Such a comparison may prove relevant, on condition, (i) "that the reference Member States are selected in accordance with objective, appropriate and verifiable criteria", (ii) that these "may include, inter alia, consumption habits and other economic and sociocultural factors, such as gross domestic product per capita and cultural and historical heritage", and (iii) that the comparison "must be made on a consistent basis". The CJEU concluded that all aspects have to be assessed by the national courts depending on the circumstances of the case.

3. The judgment makes it obvious that the purchasing power parity index based on gross domestic product ("***PPP index***") "*must be taken into account*" when conducting comparisons between Member States.

4. Concerning the question whether one should compare user segments or average rates for all segments the CJEU responded that it is possible to look at "*one or several specific segments*". Hence, the assessment of average rates is not the only possible method. But the CJEU clarified that "*it falls to the competition authority concerned to make the comparison and to define its framework, although it should be borne in mind that that authority has a certain margin of manoeuvre and that there is no single adequate method*".

5. Last, the most significant issue relates to an appreciable price difference and its indication of its abusive nature. Firstly, the CJEU observed that the differences (i) twice as high in comparison to Estonia and Lithuania and (ii) between 50-100% higher than the average EU rates were not as large as the differences that gave rise to the finding of excessive pricing by collecting societies in cases *Tournier (C-395/87)* and *Lucazeau (C-110/88, C-241/88 and C-242/88)*. However, these rulings do not say that other differences cannot be abusive, given that "*there is in fact no minimum threshold above which a rate must be regarded as 'appreciably higher', given that the circumstances specific to each case are decisive in that regard.*"

   The CJEU clarified that "*a difference between rates may be qualified as 'appreciable' if it is both significant and persistent on the facts*" and that "*that difference must persist for a certain length of time and must not be temporary or episodic*".

The message from this case is that the assessment of unfair rates enables the authority to make comparisons with those charged in other Member States. Asignificant and persistent difference indicates abusive rates. Antitrust enforcers should have a certain freedom when deciding whether prices are excessive. In other words, an authority may conduct a complex economic assessment for which some latitude on the part of the authority is accepted. However, the guidelines provided by the CJEU may give helpful advice in other commercial sectors, like for example during the ongoing investigations concerning pharmaceutical companies.

Case C-300/16 P, Commission v Frucona Kosice;

THE CJEU CLARIFIES THE "ACTIVE ROLE" THAT THE COMMISSION MUST PLAY IN STATE AID CASES INVOLVING THE PRIVATE CREDITOR TEST, PARTICULARLY IN THE CONTEXT OF INSOLVENCY PROCEDURES – *COMMISSION V. FRUCONA KOŠICE A.S.* - CASE C-300-16 P – 20 SEPTEMBER 2017

In this case the CJEU clarified that the Commission has an active role to play in state aid cases involving application of the "private creditor" test. The Commission must seek out all information liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor in a situation as close as possible to that of the public creditor. In the particular context of insolvency procedures, this includes obtaining all information on the duration and likely costs of the different procedures available.

Frucona Košice ("***Frucona***") was a Slovakian company which had got into financial difficulties. *Inter alia*, it had accumulated excise tax debts of approx. €17 million. Therefore Frucona filed an application before the Košice Regional Court for an arrangement with creditors procedure under the applicable insolvency legislation. In this procedure Frucona offered to pay all its creditors 35 % of the amount owed. The local tax authority, whose claim amounted to over 99 % of Frucona's total indebtedness, agreed to this arrangement, which was then approved by the Regional Court. As a result, the local tax authority wrote off 65 % of its claim against Frucona.

In October 2004 a complaint was lodged with the Commission alleging that unlawful State aid had been granted to Frucona. The Commission confirmed that the tax write-off that the local tax authority had granted to Frucona constituted unlawful State aid. In particular, it asserted that the company had received an advantage as compared to its competitors since the tax authority would have obtained a larger repayment of its claims through either a bankruptcy procedure or a tax execution procedure. In its decision, the Commission ordered the recovery of the State aid.

Frucona Košice sought annulment of the Commission's decision before the GCEU, but the action was dismissed. Frucona subsequently appealed to the CJEU, which set aside the GCEU's judgment in January 2013. The CJEU held that the Commission had made a manifest error of assessment by failing to take into account the duration of the bankruptcy proceedings and thus did not set out sufficient reasons for its decision. As a consequence, the CJEU referred the case back to the GCEU for reconsideration. Subsequent to the decision of the CJEU, the Commission adopted a new decision replacing its former decision. In its new decision, the Commission still upheld its conclusions that the tax debt write-off constituted unlawful State aid. In this respect, the Commission analysed whether the local tax authority had behaved towards Frucona like a private creditor in a market economy.

Again, Frucona sought annulment of the Commission's (second) decision before the GCEU. However, this time the GCEU annulled the Commission's decision. It upheld the plea of Frucona that the Commission's decision contained errors of fact and of law vitiating the finding that the bankruptcy procedure and the tax execution procedure were more advantageous than the proposed arrangement with creditors.

Subsequently, the Commission appealed against the GCEU's judgment. It based its appeal on arguments regarding the applicability and the application of the private creditor test. Regarding the applicability of the private creditor test, the Commission held the view that the position of the Member State is of fundamental importance for the assessment of this criterion.

As regards the application of the private creditor test, the Commission opposed the GCEU's assertion that the Commission had to reconstruct *ex officio* the behaviour of the ideal, rational and fully informed hypothetical private creditor. Notably, the Commission denied that there was any obligation on itself to gather the evidence and information a rational private creditor would have gathered before making its assessment. The Commission rather viewed its mission as one of verifying whether, subjectively, the public authority, on the basis of its behaviour and the evidence and information it actually had at its disposal when taking its decisions, behaved like a private creditor in a situation as close as possible to that of the public authority in coming to the decision to grant the measure in question.

The CJEU however disagreed with the Commission's interpretation of the private creditor test. It dismissed the Commission's appeal by judgment dated 20 September 2017.

According to the CJEU, the Commission has a more active role in the applicability of the test. First of all, the Commission is required, where appropriate, to ask the Member State concerned to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied. Moreover, the CJEU emphasised that the starting point for determining the applicability of the private creditor test must be the economic nature of the Member State's action. By contrast, it is not relevant how that Member State subjectively thought it was acting or which alternative courses of action it considered before adopting the measure in question. As a consequence, the CJEU concluded that the Commission's investigation cannot be limited to just the options that the competent public authority actually took into consideration, but must necessarily cover all the options that a private creditor would reasonably have envisaged in such a situation.

In addition, the CJEU clarified the extent of the Commission's investigative obligations when carrying out a private creditor test assessment. The CJEU pointed out that the Commission has to take into account all relevant evidence in the case enabling it, in an overall assessment, to determine whether the State aid recipient would manifestly not have obtained comparable facilities from such a private creditor. The Commission should regard all information as relevant for the assessment that is liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor finding itself in a situation as close as possible to that of the public creditor. The CJEU further clarified that only the information which was available, and the developments which were foreseeable, at the time when the decision was taken, are crucial for the assessment of the private creditor test.

Before reviewing the findings made by the GCEU, the CJEU recalled the scope of judicial review by the EU Courts. It pointed out that, in the context of complex economic assessments made by the Commission in the field of State aid, it is not for the EU Courts to substitute their own economic assessment for that of the Commission. The EU Courts rather have two tasks: to establish whether the evidence relied on is factually accurate, reliable and consistent and to review whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

Applying these principles, the CJEU found that "the Commission had failed, first to obtain information on the anticipated duration of a tax execution procedure, second, to take into account that it was likely to be interrupted by the initiation of the bankruptcy procedure and, third, to obtain information concerning the costs that such a procedure might generate." The CJEU considered that these elements constituted "information that a normally prudent and diligent private creditor in a situation as close as possible to that of the local tax office could not *a priori* ignore" and so the GCEU was justified in annulling the Commission's decision for failure to take into consideration all the relevant information.

39813, Lithuanian Railways

COMMISSION FINES LITHUANIAN RAILWAYS FOR HINDERING COMPETITION ON RAIL FREIGHT MARKET– DECISION 39813 OF 2 OCTOBER 2017

On 2 October 2017, the Commission fined Lithuanian Railways EUR 27 873 000 for hindering competition on the rail freight market, in breach of Article 102 TFEU. Lithuanian Railways is the incumbent state-owned rail company in Lithuania, which controls both rail infrastructure and transport.

In 2008, the Polish oil company AB Orlen Lietuva (Orlen), one of the major customers of Lithuanian Railways, considered redirecting its freight from Lithuania to Latvia by using the services of another competing rail operator. In October of the same year, Lithuanian Railways dismantled a 19km long section of rail track connecting Lithuania and Latvia, close to Orlen's refinery. Because of this, Orlen had to use a much longer route to reach Latvian ports.

Following a complaint filed by Orlen, the Commission dawn-raided Lithuanian railways in 2011, opened formal competition proceedings in March 2013 and, in October 2017, issued its infringement decision.

The Commission considered that Lithuanian Railways' behavior hindered competition on the rail freight market by preventing a major customer of Lithuanian Railways from using the services of another rail operator. In a case which can be seen as involving a practice that served no other purpose than to eliminate competition Lithuanian Railways failed to show any objective justification for the removal of the track. The the Commission thus imposed, for the first time, an antitrust fine for an abuse of a dominant position consisting in the removal of public infrastructure.

The decision needs to be placed in the broader context of the liberalization of the EU's rail freight market since 2007. Since 2007, the Commission has been working to complete the single market for rail services, including by ensuring the independent management of rail infrastructures and fostering investment in tracks that connect Member States. By removing a rail track connecting Lithuania and Latvia, two EU Member States, Lithuanian Railways not only infringed the EU competition rules, but it also prevented the EU from achieving its ultimate political objective of completing the single market for rail transport.

The case represents a good example of a practice that clearly had no other purpose than to eliminate competition, and stands in contrast in this respect to many other cases in the field of Article 102 TFEU involving allegedly abusive conduct which is not so clear-cut. Furthermore, the Lithuanian Railways case sends a clear signal to all rail operators that they need to comply with all aspects of EU competition law, and sends a reminder to competition authorities that they must to remain vigilant as regards abuses of a dominant position by incumbent operators.

Merger Control

Case T-194/13, United Parcel Service v Commission

THE GCEU ANNULS THE COMMISSION'S DECISION REFUSING AUTHORISATION FOR THE MERGER BETWEEN UPS AND TNT IN THE EXPRESS SMALL PACKAGE DELIVERY SERVICES SECTOR, ON THE GROUNDS OF A PROCEDURAL IRREGULARITY- JUDGMENT OF THE GCEU OF 7 MARCH 2017 – CASE T-194/13 – *UNITED PARCEL SERVICE, INC. V COMMISSION*

In 2012 UPS notified the Commission of its merger with the Dutch transport services operator TNT Express. However,

by decision of 30 January 2013 the Commission refused authorisation, declaring the merger incompatible with the internal market, and finding that it would have resulted in a significant impediment to effective competition ("**SIEC**") in express small package delivery services in 15 Member States.

UPS challenged the Commission's decision before the GCEU in Case T-194/13, claiming infringement of its rights of defence. This plea in law was divided into four parts:

- The likely effects of the merger on prices;
- The expected efficiency gains as a result of the merger;
- The future competitive position of FedEx;
- The number of Member States in which a SIEC would have resulted ("SIEC States").

In the context of the first part of the plea, UPS argued that the Commission used econometric analysis to predict the anti-competitive price effects of the proposed acquisition. UPS submitted that during the administrative procedure, the Commission participated in an ongoing dialogue with UPS regarding the econometric models used, providing UPS with the opportunity to submit its observations on those models throughout the process. However, between its Statement of Objections ("SO") and its final decision, the Commission relied on another econometric model but failed both to inform UPS of the changes and to provide UPS with the opportunity to express its opinion on the analysis.

In its judgment of 7 March 2017, the GCEU first recalled that the observance of the rights of defence is a general principle of EU law enshrined in the Charter Fundamental Rights of the EU. When applying these principles to the Commission's decision, the GCEU made some observations. First, the Commission relied on the econometric analysis in question to identify the number of SIEC States. Second, the Commission adopted the final version of its econometric model more than two months before the adoption of the contested decision, therefore providing ample time to consult with UPS. Third, the final version of the econometric model was not communicated to UPS. Fourth, the GCEU rejected the Commission's claim that the final econometric model was only marginally different from the models that were discussed with UPS. It held that, although there were numerous similarities between the final model and those discussed during the administrative procedure, the changes made to the final model could not be regarded as "negligible" (paragraph 205).

In consequence, the GCEU stated that the Commission was required to communicate the final econometric analysis model to UPS before adopting its decision. Because the Commission had failed to do so, UPS's rights of defence had been infringed.

The GCEU then observed whether the merger decision should be annulled. Referring to the CJEU's judgment in Solvay [24], the GCEU held that "*it has been sufficiently demonstrated by [UPS] not that, in the absence of that procedural irregularity, the contested decision would have been different in content, but that there was even a slight chance that it would have been better able to defend itself*" (paragraph 210).

In that regard, the GCEU noted that during the administrative procedure, UPS had significantly influenced the development of the econometric model by providing solutions to technical problems it had identified with the model.

Besides, the GCEU emphasized that the Commission expressly acknowledged that the results of its new econometric analysis had caused a decrease in the number of SIEC States after the issuance of the SO. The results were thus capable of countering the qualitative information, regarding certain States taken into account by the Commission.

UPS had therefore been deprived of information which, if provided in due time, could have enabled it to submit different results on the merger's effects on prices. Such submissions "*might have given rise to a reassessment of the scope of the information taken into consideration by the Commission and, accordingly, a reduction in the number of SIEC States*" (paragraph 218).

Although the GCEU recognised the need to take into account the necessity for speed inherent to the Merger Regulation, it also observed that the Commission's econometric analysis was "very stable" two months before the issuance of the prohibition decision. Thus, the Commission was free to communicate at least the essential elements of the chosen econometrics.

[24] Case C-109/10P *Solvay v Commission*, judgment of 25 October 2011.

The GCEU concluded that UPS's rights of defence had been infringed since, if the different econometric analysis model had been communicated to UPS, it would have been better able to defend itself.

This judgment is highly unusual as it reversed the Commission's decision from January 2013 prohibiting a merger between UPS and TNT. The reason given is also not common as the reversal is exclusively based on a procedural irregularity. The annulment of the decision gives guidance as to how tough can be the sanctions for a violation of the Charter of Fundamental Rights.

The UPS ruling appears to be a welcome result for notifying parties in a merger review context. It would seem, that as a general rule, the Commission will be required to disclose all the econometric models it uses if it wishes to rely upon the results of those models in its decisions.

It should be noted that in case of annulment of a decision, the institution concerned must fill any legal vacuum created by the annulment of the act[25]. Therefore, the Commission will have to find how to deal with the legal vacuum created by such annulment. In addition, the Commission filed an appeal against the GCEU's judgment (Case C-265/17 P). The pleas raised in the appeal can be summarised as follows:

- The GCEU erred in finding that the Commission was required to disclose to UPS the final version of its price concentration model before adopting its decision.
- Even if the Commission's failure to disclose the final version of the price concentration model to UPS before the adoption of its Decision could breach UPS's rights of defence, the GCEU erred in its characterisation of the evidential character of the price concentration model and, consequently, in the legal test applied in determining that the Decision was to be annulled.
- Even if a breach of UPS's rights of defence could arise in the circumstances, the GCEU erred in failing to address the Commission's submissions that UPS's plea was ineffective and that UPS could understand the price concentration model.
- In any event, the findings made by the GCEU could not justify the annulment of the Commission's decision.

M.7995, Commission blocks London Stock Exchange/Deutsche Börse

COMMISSION PROHIBITS THE PROPOSED MERGER BETWEEN DEUTSCHE BÖRSE AG AND LONDON STOCK EXCHANGE GROUP – COMMISSION DECISION M. 7995 OF 29 MARCH 2017

On 29 March 2017, the Commission prohibited the proposed merger between Deutsche Börse and the London Stock Exchange (LSE) almost a year after the parties first announced the deal, and on the day that the United Kingdom served notice of its intention to leave the EU.

The Commission found that, by combining several of the largest European clearing houses (*i.e.* Frankfurt, London, Paris and Rome), the merger would have significantly reduced competition by creating a *de facto* monopoly in the markets for clearing fixed income instruments. Specifically, the Commission had the following competition concerns:

- The monopoly in clearing fixed income instruments would have had a knock-on effect on the downstream markets for settlement, custody and collateral management as service providers in these markets depend on transaction feeds from clearing houses.
- The merger would have removed horizontal competition for the trading and clearing of single stock equity derivatives.
- The merger would have created the largest European stock exchange operator, which could potentially be used to squeeze out Euronext.

LSE proposed a remedy consisting of the divestment of its French clearing house, LCH.Clearnet SA, to address the Commission's concerns. The Commission considered that this divestment would have resolved the concerns relating to single stock derivatives, but that it would not effectively remedy Commission's concern stemming from the creation of the *de facto* monopoly in fixed income clearing. This was because market testing of the proposed remedy raised questions about the future viability of LCH.Clearnet SA given its dependence on trading feeds from LSE's MTS business, an Italian fixed-income trading platform.

Although the merging parties proposed supplementing the remedy with a set of behavioral measures, the Commission considered that the divestment of MTS, which it described as a "comparatively small asset" compared to the size of the merging parties, would have been the only "clear-cut" remedy. Since this additional divestment was publicly refused by LSE, the Commission decided to prohibit the proposed transaction.

[25] Press Release No 23/17, Case T-194/13, *United Parcel Service, Inc. v Commission,* judgment of 7 March 2013

This is the first prohibition decision taken in 2017. The Commission's most recent prohibitions occurred in 2016 (*Hutchison 3G UK/Telefonica UK*) and in 2013 (*UPS/TNT Express* and *Ryanair/Aer Lingus*). Prior to that, and in the same sector, the Commission blocked a proposed merger between Deutsche Börse and NYSE Euronext in 2012.

From a procedural perspective, the case highlights that the later the Commission receives a remedies proposal, the less time it has to review such remedies in light of the statutory deadline for doing so. . A corollary of this is that the parties have less time after the market testing of remedies to improve them. It is therefore crucial to deal with the Commission's antitrust concerns as swiftly as possible. This requires that proposed remedies be as robust as possible early on in the merger control review process.

M.7878, Commission blocks Heidelbergcement/Cemex Hungary/Cemex Croatia

THE COMMISSION PROHIBITED THE PROPOSED TAKEOVER OF CEMEX CROATIA BY HEIDELBERGCEMENT AND SCHWENK REGULATION AS IT HAD STRONG CONCERNS THAT THE TAKEOVER WOULD HAVE SIGNIFICANTLY REDUCED COMPETITION IN GREY CEMENT MARKETS AND INCREASED PRICES IN CROATIA – DECISION OF 5 APRIL 2017, M.7878

BACKGROUND:

On 5 September 2016, HeidelbergCement and Schwenk, two German cement companies, notified to the Commission their joint acquisition of two target companies, Cemex Croatia and Cemex Hungary, via their joint venture company Duna Dráva Cement (DDC). This was followed by an in-depth investigation by the Commission. Irrespective of the implementation by DDC, HeidelbergCement and Schwenk were the drivers of the transaction and were significantly involved in the initiation, organisation and financing of the deal. Therefore their respective turnovers were taken into account in assessing the Commission's jurisdiction.

DDC, among other activities, operates grey cement plants in Beremend (Hungary) and in Kakanj (Bosnia-Herzegovina). Cemex Croatia (Cemex Hrvatska dd) is a subsidiary of the Cemex Group, also a global construction material supplier. Cemex Croatia sells grey cement, ready-mix concrete, clinker and aggregates, in Croatia and the Western Balkans but also supplies cement to Italy, Slovenia, Malta and other export markets. Cemex Hungary (Cemex Hungária Építőanyagok Kft) mainly produces and sells ready-mix concrete in Hungary. In this respect the Commission referred the analysis of the deal's potential effects in Hungary to the Hungarian competition authority. Cemex Croatia operates three cement plants in Split and several cement terminals and ready-mix concrete plants in Croatia. The Commission received no request for referral for any other part of the transaction, including Croatia.

COMMISSION INVESTIGATION:

The Commission's investigation analysed competition between the parties in the Croatian cement markets. Like most construction materials, such as aggregates and ready-mix concrete, cement is sold within a relatively short distance from the site where it is manufactured. Because of high transport costs and security of supply issues, cement plants will not be competitive if they are located too far away from customers. In this specific case, the investigation found that each cement plant had a catchment area of about 250 kilometres around it.

Cemex Croatia is currently the largest cement producer in the country, operating three profitable and valuable plants in southern Croatia, near Split. DDC and HeidelbergCement are the largest cement importers in Croatia. DDC imports grey cement into Croatia from its plants in Hungary and Bosnia-Herzegovina (the closest competing plant to Cemex's plants in Split). HeidelbergCement imports grey cement into Croatia from a plant in Italy. The Commission investigated the overlaps in the Croatian cement markets between, on the one hand, Cemex Croatia and, on the other hand, HeidelbergCement and DDC.

THE COMMISSION'S CONCERNS:

The Commission had serious concerns that the takeover would have reduced competition in the Croatian markets for grey cement currently served by Cemex's cement plants in Split. This would have led to higher prices for cement customers.

The takeover would have eliminated competition between companies that were competing head-to-head for the business of Croatian cement customers and could have led to a dominant position in the markets. The combined market shares of the parties would have been around 45-50% in the markets and reached more than 70% in parts of the country (notably in Dalmatia).

The Commission's investigation also found that DDC had been pursuing a strategy to increase sales in Croatia, resulting in more competitive prices for Croatian customers

in recent years. The takeover would have eliminated this competition. Furthermore, the Commission found specific evidence forecasting appreciable cement price increases after the deal.

The Commission's assessment revealed that remaining domestic cement suppliers and importers would not have been able to compete effectively with the merged company after the takeover. This is because other suppliers have limited potential for sales expansion and are located further away, facing higher transport costs to reach customers in the relevant markets. Furthermore, there are no independent terminals available on the Croatian coast for seaborne imports.

Finally, the merged entity would have had the possibility to make market entry by competitors difficult.

THE PARTIES' PROPOSED REMEDIES:

In this case, the parties did not offer to divest an existing cement business as a potential remedy to address the Commission's competition concerns, but proposed the granting of access to a cement terminal in Metković in southern Croatia, currently leased by Cemex Croatia.

The Commission's investigation concluded that the proposed remedies would not have allowed a supplier to compete effectively and on a lasting basis with the merged company. The Commission had concerns that these would have offered only an uncertain possibility for a competitor to build up a new cement business in southern Croatia rather than divest an existing viable business. This is because the remedies offered only access to a storage facility without existing customers, brands, sales staff or established access to cement.

The Commission found that the new competitor would have been limited in its ability to compete with HeidelbergCement, Schwenk and Cemex, which would have combined their entire production and sales activities for Croatia:

- Any company leasing the storage facility in Metković would have had higher costs to reach customers in the Croatian markets, making it less competitive than the parties. This is mainly due to the transport costs to ship cement from a more remote production plant to the terminal before delivering it to final customers.
- The proposed remedies would also have been insufficient in scale because the terminal's cement capacity was limited. Moreover, due to the terminal's location, it is likely that the terminal's capacity would also have been used to sell to customers outside the Croatian markets that the Commission was concerned about.

April 2017, Germany and Austria introduce a transaction-based threshold

MERGER FILING REQUIREMENTS: GERMANY AND AUSTRIA INTRODUCE A TRANSACTION-VALUE BASED THRESHOLD

1. Germany:

The new German law introduces a transaction-value based threshold of €400 million (approx. US$425 million). Since June 2017, the German merger control threshold requirement can also be fulfilled if a newly introduced "size of transaction"-threshold is exceeded:

So far, the threshold requirement was only fulfilled if

i) the parties meet the combined worldwide turnover threshold (>€500 million),

ii) and one party, e.g. the buyer, meets the domestic turnover threshold (>€25 million),

iii) and any other party, e.g. the target or the seller, meets the second domestic turnover threshold (>€5 million).

From now on, in case the latter threshold of €5 million is not exceeded by neither party a transaction is nevertheless notifiable if:

i) The value of compensation exceeds €400 million, and

ii) The target has significant business activities in Germany (which may be activities with revenues < €5 million).

The "value of compensation/consideration" includes the purchase price and all other assets and non-cash benefits, as well as liabilities assumed by the purchaser. Similar to the HSR Act, but different to European Union merger control and most European jurisdictions, German merger control is not limited to the "acquisition of control". Additional triggering events are:

i) The acquisition of 25% or more of the shares in a company, and

ii) The acquisition of a shareholding below 25% if this, combined with other factors (e.g. the right to appoint one out of five members of the board), may have an

impact on competition ("acquisition of ability to exercise competitively significant influence").

The number of transactions requiring a merger control notification to the German Federal Cartel Office ("FCO") is, compared to most other jurisdictions, relatively high. On the plus side, the notification process is, in most cases, quick, efficient and, in cases without true competition issues, relatively inexpensive (the large majority of transactions notified to the FCO are cleared in Phase 1).

2. Austria:

Similarly, effective as of November 1, 2017, Austria's amendments introduce a €200 million transaction-value based threshold. So far, a merger must be notified prior to its completion if, in the last business year:

i) the combined worldwide turnover of all the undertakings concerned exceeded €300 million;

ii) the combined Austrian turnover of all the undertakings concerned exceeded €30 million; and

iii) the individual worldwide turnover of at least two of the undertakings concerned each exceeded €5 million.

In addition to the current above mentioned thresholds, which remain in place, a transaction will also be reportable if the following four cumulative conditions are fulfilled:

i) Combined worldwide turnover of the undertakings exceeds €300 million;

ii) Combined Austrian turnover of the undertakings exceeds €15 million;

iii) The "value of consideration" for the transaction exceeds €200 million; and

iv) The target has significant activities in Austria.

Although the actual implementation slightly differs in both countries the policy reasons for the new threshold requirement are the same. So far, transactions particularly in the start-up sector were not triggered because the target regularly does not achieve considerably high turnover to meet the previously solely existing domestic turnover thresholds in Germany and in Austria. Consequently this kind of transaction does not need notification even if the purchase price is extremely high, like e.g. deals concerning Facebook/WhatsApp about approx. US$19 billion or Activision/Candy Crush about approx. US$6 billion. Notwithstanding low national turnover, the target may have millions of users in Germany or in Austria hence the domestic market may be considerably concerned.

However, not all start-up deals entail such high values of compensation as mentioned in the recent examples so that only the future practice of the merger control authorities can show if the determined value is high or low enough to trigger the deal envisaged. Besides, both authorities do not have any experience with regard to the actual calculation of the value of compensation. Thus, it makes sense that each undertaking would have to go through each possible calculation to determine whether the new threshold is exceeded or not.

M.8228, Commission fines Facebook for providing incorrect or misleading information during merger investigation

COMMISSION FINES FACEBOOK €110 MILLION FOR PROVIDING MISLEADING INFORMATION ABOUT WHATSAPP TAKEOVER – COMMISSION DECISION M.8228 OF 17 MAY 2017

This case illustrates the obligation to provide full, accurate and reliable information during the Commission's merger control process regardless of whether the information has an impact on the ultimate outcome of the merger assessment. Failure to comply with this obligation can lead to serious fines.

In 2014, during the merger review of Facebook's intention to acquire WhatsApp, Facebook informed the Commission that it would not be able to establish reliable automated matching between Facebook and WhatsApp users' accounts. This was stated in both the notification form and a reply to a request of information from the Commission.

However, in August 2016, WhatsApp announced an update to its terms of service and private policy that included the possibility to link WhatsApp users' phone numbers with Facebook users' accounts, contrary to Facebook's prior statements.

In December 2016, the Commission announced that it had sent Facebook a Statement of Objections alleging that Facebook had intentionally, or negligently, submitted incorrect or misleading information to the Commission.

In its 18 May 2017 decision, the Commission found that:

- Contrary to Facebook's statements in 2014, the technical capacity to link Facebook and WhatsApp users' accounts already existed in 2014, and that Facebook staff were aware of such possibility;

- Albeit relevant, the incorrect or misleading information provided by Facebook did not have an impact on the outcome of the clearance decision.

Taking into consideration Facebook's cooperation with the Commission's investigation into the matter, by *inter alia* waiving its right to access the file and to have an oral hearing, the Commission ultimately imposed a fine of €110 million on Facebook.

This is the first time that the Commission has imposed such a significant fine for this type of breach under the 2004 Merger Regulation. Under the previous merger control regulation, fines for supplying incomplete or misleading information were capped at €50,000 per infringement. (This cap was reached in one case in which there were two infringements: one in the notification and one in a reply to a request for information, so the total fine was €100,000). However, since 2004, failure to supply full and accurate information can not only lead to a rejection of a merger notification or to a withdrawal of a clearance decision, but also to a significant fine of up to 1% of the aggregate turnover of the company concerned (Article 14(1) of the 2004 Merger Regulation) in addition to attendant reputational damage that such outcome can cause.

The Commission has confirmed that it is currently reviewing whether other companies may have provided incorrect or misleading information during recent merger proceedings. In this context, the fine on Facebook sends a clear signal to parties undergoing mergers that they must comply with all aspects of EU merger control rules, including the obligation to provide full and accurate information to the Commission.

Case C-248/16 Austria Asphalt

INTERPRETATION OF ARTICLE 3 OF THE MERGER REGULATION REGARDING A CHANGE OF CONTROL OF AN ALREADY EXISTING UNDERTAKING – CJEU´S JUDGMENT OF 7 SEPTEMBER 2017 IN CASE C-248/16 *AUSTRIA ASPHALT GMBH & CO. OG V BUNDESKARTELLANWALT*

On 7 September 2017 the CJEU issued a judgment regarding the interpretation of Article 3 of the Merger Regulation. It ruled that

> *"Article 3 […] must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity." (para. 36)*

This judgment was issued in the context of a preliminary ruling under Article 267 TFEU requested from the Supreme Court of Austria (decision of 31 March 2016).

The preliminary ruling was preceded by a merger control procedure before the (Austrian) federal competition authority. Austria Asphalt GmbH & Co. OG had notified the authority regarding an intended formation of an acquisition vehicle together with Teerag Asdag AG (Teerag; owned by Porr AG). The acquisition vehicle was intended to hold 100 % of the target. The target by then was owned 100 % by Teerag. It was a non-full-function undertaking and even after the acquisition of 50 % of the shares (and joint control) of the acquisition vehicle by Austria Asphalt, the (then newly created) joint venture would have been non-full-function.

The CJEU was asked for an interpretation of Article 3 of the Merger Regulation, because of an unclear situation regarding the competence in this proposed merger.

The following question was thus referred to the CJEU for a preliminary ruling by the Supreme Court of Austria:

> *"Must Article 3(1)(b) of [Regulation No 139/2004] be interpreted as meaning that a move from sole control to joint control of an existing undertaking, in circumstances where the undertaking previously having sole control becomes an undertaking exercising joint control, constitutes a concentration only where the undertaking [the control of which has changed] has on a lasting basis all the functions of an autonomous economic entity?"* (para. 14)

In its judgment the CJEU concludes that this question is to be answered in the above mentioned way. The CJEU concludes this because of the objectives and the general scheme of the regulation:

With respect to the wording of Article 3 one cannot conclude whether a concentration in terms of Article 3 is given in a case, where a change of control (from sole control to joint control) takes place regarding an already existing undertaking and the resulting joint venture is not qualified as full-function. Although Article 3(4) in principle includes joint ventures, only those joint ventures are covered that perform on a lasting basis all the functions of an autonomous economic entity.

One of the Merger Regulation´s objectives is to establish control over concentrations that impact on the competitive structure within the EU. A concentration comprises

transactions that establish a permanent change of control of the undertakings involved and thus of the market structure as well. Consequently joint ventures are covered by the regulation, if they are full-function (i.e. performing all functions of an autonomous economic entity on a lasting basis). In this context the regulation does not make a difference between an undertaking that is newly founded and one that already exists and within which control-mechanisms are changed. As stated by the CJEU, control of a formation of a joint venture by the Commission is only necessary in case effects on the market structure must be expected. However, those effects must only be expected, if this undertaking fulfils all functions of an autonomous economic entity on a lasting basis. Thus, the CJEU continues, Article 3 only covers joint ventures whose formation has a permanent impact on the market structure.

If one interpreted Article 3 of the Merger Regulation in the sense that a change of control of non-full-function joint ventures constitutes a concentration within the meaning of the regulation, as was supposed by the Commission, this would result in a not justifiable difference in treatment between newly founded undertakings and already existing undertakings.

The scheme of the Merger Regulation as well argues in favour of this interpretation. According to Article 21 of the Merger Regulation this regulation is only applicable for concentrations within its meaning. These concentrations are not governed by Regulation 1/2003. Regulation 1/2003 is applicable to any behaviour of undertakings not constituting a concentration but nevertheless constituting a breach of Article 101 TFEU. Given this situation they are nevertheless subject to the Commission´s control (within Article 101 TFEU and Regulation 1/2003). The possibilities of control under the Merger Regulation are of a more preventive nature. The wide interpretation of the definition of concentration suggested by the Commission would widen this preventive control to actions without effects on the market structure.

This judgment helps to clarify the question as to which authority is competent in merger control cases regarding a change of control in non-full-function joint ventures.

Case T-394/15, KPN BV v Commission

THE GENERAL COURT IN KPN BV V COMMISSION (CASE T-394/15) ANNULS COMMISSION DECISION C(2014) 7241 DECLARING THE CONCENTRATION BETWEEN LIBERTY GLOBAL PLC AND ZIGGO NV TO BE COMPATIBLE WITH THE INTERNAL MARKET

Judgement of the GCEU of 26 October 2017 – Case T-394/15 – *KPN BV v European Commission*

On 14 March 2014, Liberty Global notified the Commission of a proposed concentration consisting in the acquisition of sole control over Ziggo. Liberty Global and Ziggo are undertakings active in the cable TV, fixed telephony, fixed broadband, mobile telecommunications and digital telephonies markets, in the Netherlands. The Commission had initial concerns regarding the compatibility of the transaction with the internal market as a result of which Liberty Global, on 22 August 2014, offered final commitments to render the transaction compatible with the internal market. In particular, Liberty Global, owner of three out of four premium pay TV channels in the Netherlands (namely Film 1, HBO Nederland and Sport1), agreed to divest Film 1. On 10 October 2014 the Commission declared the proposed concentration to be compatible with the internal market.

On 17 July 2015 KPN BV, a competitor of Liberty Global's, active with respect to cable networks for television, broadband Internet, fixed telephony and mobile communications services, in particular in the Netherlands, challenged the Commission's (conditional) clearance decision before the GCEU. In particular, KPN BV argued that the Commission had erroneously failed to assess the impact of the transaction on the market for pay TV sports channels and to state reasons for not assessing any vertical effects on that market.

The GCEU, by judgment of 26 October 2017, upheld KPN BV's argument and annulled the Commission's conditional clearance decision in its entirety.

The Court found that the Commission's clearance decision lacked sufficient analysis of the vertical effects of the transaction on the possible market for the wholesale supply and acquisition of premium pay sports channels. The Commission, in fact, affirmed that the premium pay TV channels market could be further segmented into film and sports channels. The Commission analyzed the premium pay TV-channels market and its film segment, finding that the merger would not lead to any negative vertical effects thereon; but it did not carry out the same assessment as regards the sports channels segment.

The Court held that the Commission did not provide a definition of the relevant market for sports channels, a necessary precondition for a finding that there are no

negative competition effects on such market nor did it carry out a sufficiently robust competition analysis in relation to such potential market.

In fact, the Commission , in relation to a potential market for sports channels, simply acknowledged the existence of two players that were active with respect to sports channelsin the Netherlands, Sport1 and Fox Sports, and that Liberty Global, owning only one of the two, could not foreclose access to sports channels because it did not have any upstream market power with respect to such input.

The Court rejected this reasoning, stating that absent an analysis on the market player's market positions and competitive relationship, it would not be possible to rule out Liberty Global's upstream market power.

The Court furthermore added that given the short timeframe available in the context of merger control, the Commission had to fulfill its obligation to explain why, even briefly, it did not foresee problematic vertical effects arising from the transaction. ,. Lastly, the Court held that the "implicit" reasoning of the Commission in the decision was insufficient to the extent that it did not satisfy the condition of enabling third parties concerned by the decision to know why the measure was taken by the Commission nor did it provide the Court with sufficient material for it to exercise its power of review. It was ultimately found that since the decision was found to be vitiated by a failure to state reasons, there was no reason to examine the other pleas in law. The Commission will therefore now have to re-assess the transaction.

This decision is noteworthy as it is one of only very few cases where the Court has overturned a Commission decision to approve a transaction. It therefore sends a stern signal that the Commission must not only undertake a robust competition analysis but provide reasons as to why it has reached its conclusions in a given case. This may mean that notifying parties may be required to provide additional information to the Commission going forward so that the Commission can meet its obligation to state reasons for reaching a given finding.

Case T-704/15, Marine Harvest v Commission

GCEU UPHOLDS €20 MILLION GUN JUMPING FINE – CASE T-704/14, *MARINE HARVEST V COMMISSION*, 26 OCTOBER 2017

On 26 October 2017, the GCEU dismissed an appeal lodged by Marine Harvest, a Norwegian seafood company, against a €20 million fine imposed by the Commission for implementing the acquisition of Morpol, a Norwegian salmon producer, before obtaining the required clearance under the EU Merger Regulation.

The acquisition of Morpol, a listed company at that time, took place in three stages:

- In December 2012, Marine Harvest acquired 48.5% of the shares in Morpol from two companies controlled by Morpol's founder.
- This acquisition triggered a mandatory public offer for Morpol's remaining shares, which was successfully closed in March 2013.
- The acquisition was completed in November 2013 followed by a de-listing of Morpol.

Marine Harvest initially contacted the Commission on 21 December 2012 through the submission of a "Case Team Allocation Request", initiating the pre-notification process under the Merger Regulation. Following the submission of various drafts and responses to requests for information, a formal notification was filed on 9 August 2013. On 30 September 2013, the Commission cleared the transaction subject to divestment commitments.

In January 2014, the Commission launched a separate investigation into Marine Harvest's alleged "gun jumping". By decision C (2014) 5089 of 23 July 2014 the Commission imposed a fine of €20 million on Marine Harvest for taking control of Morpol without prior EU merger clearance. The Commission held that by acquiring a 48.5% stake in December 2012, Marine Harvest had acquired *de facto* sole control over Morpol. According to the Commission's findings, it was highly likely that Marine Harvest achieved a stable majority at shareholders' meetings in light of the evidence about the disperse ownership of the remaining shares and attendance rates at previous meetings.

The Commission concluded that by implementing the acquisition eight months prior to the formal notification to the Commission took place, and over nine months before the Commission's authorisation, Marine Harvest had breached Article 4(1) of the Merger Regulation (obligation of prior notification) and Article 7(1) of the same (standstill obligation pending authorisation).

Marine Harvest challenged the Commission's decision before the GCEU, arguing that it could rely on the specific exemption from the standstill obligation for public bid situations under Article 7(2) of the Merger Regulation. Pursuant to this provision, the acquisition of control from various sellers through a public bid, or a series of transactions in securities, can be implemented prior to clearance. However, this applies only if (i) the transaction is notified to the Commission, without delay, and (ii) the acquirer does not exercise the voting rights attached to the shares. According to Marine Harvest, the acquisition of 48.5% stake was one of a "series of transactions".

The GCEU rejected this argument. It considered that even if the complete acquisition of Morpol by Marine Harvest took place in several stages and involved various sellers, control was acquired by means of a single transaction and one seller (*i.e.* by the purchase of a significant block of shares from the largest shareholder).

Marine Harvest further claimed that the acquisition of 48.5% stake and the subsequent public offer formed a single concentration.

In this regard, the GCEU held that the concept of single concentration applies only to situations in which the change of the market structure is achieved by various transactions considered together, and not to situations where a change of control is realized by means of a single transaction - even if a mandatory public offer followed. As a result, the GCEU dismissed Marine Harvest's claim that similar to the 2010 *Ryanair/Aer Lingus* ("Ryanair") judgment, the acquisition was a single concentration. In *Ryanair*, the GCEU found that Ryanair's acquisition of 19% of Aer Lingus shares and a subsequent public bid formed a single concentration – see Case T-411/07, *Aer Lingus Group v Commission* (EU:T:2010:281). In that case, the GCEU clarified that Ryanair had not acquired control of Aer Lingus through the first acquisition of shares and that only both parts of the deal would have granted control.

The GCEU also rejected Marine Harvest's argument that the Commission was wrong to consider its conduct negligent. After having noted an e-mail in which Marine Harvest's corporate counsel states that "not unusually, no one [had] focused much" on the competition law aspect until the day on which the share purchase agreement ("SPA") was signed, the GCEU held that Marine Harvest "did not behave as a diligent operator would have done". If Marine Harvest had behaved like a diligent operator, a full analysis of the implications of the SPA from a competition law perspective would have been carried out prior to the signing, particularly given that the closing had to take place no later than three business days after its signing.

This judgment demonstrates that jumping the gun on acquisitions could have serious consequences for companies. Significant fines (of up to 10% of the group's total turnover) are imposed, irrespective of whether the transaction was ultimately cleared. It also confirms that the acquisition of a minority shareholding may, in specific circumstances, be considered as conferring *de facto* control. In this respect, the GCEU stressed that the mere possibility of exercising control is sufficient for a breach of the standstill obligation. Whether the acquirer actually makes use of that possibility is irrelevant. Last of all, the judgment clarifies that the Commission can apply a narrow interpretation of the public bid exemption. Parties who intend to rely on the public bid exemption for (partly) implementing transactions prior to clearance should do so only after consulting with the Commission.

State Aid

Case C-604/14 P, Portovesme Srl v Commission

THE ULTIMATE OBJECTIVE OF THE MEASURE SHOULD NOT BE TAKEN INTO CONSIDERATION WHEN ASSESSING WHETHER A STATE MEASURE IS SELECTIVE OR NOT. JUDGMENT OF THE COURT OF JUSTICE OF THE EU OF 1 FEBRUARY 2017 – CASE C-604/14 P – *PORTOVESME SRL V EUROPEAN COMMISSION*

This state aid case provides a useful confirmation that the ultimate objective of the aid is not an element that can be taken into account by the Commission when assessing whether a State measure is "selective" or not.

By its Decision SA.20168 of 23 February 2011, the Commission considered that an Italian measure in favour of, *inter alia*, Portovesme Srl ("Portovesme"), was incompatible with the internal market.

The measure at stake was a Prime Ministerial Decree of 2004 (the "2004 Decree") which introduced preferential electricity tariffs in favour of certain undertakings located in Sardinia, including Portovesme, a producer of aluminium and zinc. The Italian authorities further adopted Law 80/2005 which prolonged the preferential electricity tariff in favour of these companies until 2010.

The Commission concluded that the measure under review constituted State aid because:

- It conferred an economic advantage on the beneficiary. The Commission notably rejected Portovesme's argument that the preferential price corresponded in fact to the price that would prevail in a fully competitive market. Indeed, the Commission considered that unilateral measures by which a Member State seeks to approximate conditions of competition to those that would prevail in a virtual, fully competitive market, were still to be considered as aid;
- The preferential tariffs in Italy were exclusively granted to undertakings operating existing facilities located in Sardinia and belonging to a closed list of sectors identified in legislative and regulatory acts;
- The preferential tariffs were imputable to the Italian State, since the legal basis for the measures was laid down in national legislation and decrees and in the decisions taken by a public body; and
- The preferential tariffs distorted competition. This is because the markets concerned (lead, zinc, silver, aluminium and chlorine/soda) are fully open to competition. This consideration was not put into question by the fact that there are no actual trade flows between Member States in these sectors.

With respect to the compatibility of the aid with the internal market, the Commission considered that the preferential tariffs constituted operating aid and not, as contended by Italy, an investment aid. Operating aid is defined as aid intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities.

The Commission noted that operating aid may be granted in assisted areas eligible for aid under Article 107(3)(a) TFEU and considered whether the deficiencies of the Sardinian electricity market could constitute a regional handicap.

In this respect, the Commission concluded that the electricity market in Sardinia exhibits a combination of problems including high prices, a high degree of market concentration, dominant operators' market power, excess generation capacity in the high cost-segment, relative inefficiency of obsolete generating plants, lack of access to natural gas infrastructure, and insufficient interconnection. These problems are likely to translate into higher electricity prices for end-users, including the most energy-intensive ones.

The Commission however found that the aid at stake (i) did not make a lasting contribution to regional development (ii), was not proportional to the regional handicap it allegedly sought to alleviate and (iii), did not fulfil the degressivity requirement.

The Commission therefore considered that the tariffs at issue could not be considered as regional aid. The Commission furthermore rejected all the other arguments raised by the Italian Government.

The Commission therefore ordered the Italian Government to recover the unlawful aid.

Portovesme launched an action for annulment of this decision before the GCEU. The GCEU rejected Portovesme's case in its entirety. Portovesme appealed to the CJEU which upheld the Commission's decision and GCEU's ruling in their entirety.

The CJEU notably held that the time-limits mentioned at Article 7(6) of Regulation 659/1999, namely that the Commission should endeavour to adopt a decision within a period of 18 months from the opening of the in-depth examination of the measure, only apply where the aid has actually been notified. That was not the case here.

The CJEU further noted that the GCEU had not exceeded its jurisdiction by interpreting the disputed national measure at issue. The CJEU recalled that in the context of an action for annulment, the GCEU is competent to assess the facts necessary for the adjudication of the dispute.

The CJEU also confirmed that the GCEU was correct in considering that the objective of the measure, i.e., to approximate conditions of competition to those that would prevail in a virtual, fully competitive market, should not be taken into account for the assessment of the selectivity of the aid. The CJEU therefore upheld the GCEU's judgment in that it implicitly rejected the argument of Portovesme that the measure, although conferring an advantage on the beneficiary, could be justified by the character or structure of the system.

The CJEU dismissed the remaining claims raised by Portovesme.

This case is a confirmation that the ultimate objective of the aid is not to be taken into account when assessing the selectivity of the aid.

Case T-454/13, SNCM v Commission

THE GCEU CONFIRMS FRANCE MUST RECOVER €220 MILLION IN AID GRANTED TO SNCM IN RESPECT OF CERTAIN MARITIME TRANSPORT SERVICES BETWEEN MARSEILLE AND CORSICA -JUDGMENT OF THE GENERAL COURT OF 1 MARCH 2017 IN CASE T-454/13,, *SNCM V COMMISSION,*

This case illustrates the strict criteria, known as the "*Altmark*" criteria, that have to be complied with when a concession to provide a service of general public interest is awarded, if one is to avoid challenge under the EU's state aid rules. This can be particularly difficult when there is an incumbent operator whose equipment is already adapted to meet the technical specifications required for the service in question.

The Société Nationale Corse-Méditerranée ("SNCM") is a French shipping company carrying passengers, vehicles and freight on routes between notably mainland France (Marseille, Toulon and Nice) and Corsica. By decision of 2 May 2013,[26] the Commission classified as State aid the financial compensation paid to SNCM and Compagnie Méridionale de Navigation ("CMN") in respect of maritime transport services provided between Marseille and Corsica for the years 2007-2013 in the context of a public service agreement.

Although the Commission declared compatible with the common market the compensation granted by the State to SNCM and CMN for transport services provided throughout the whole year ("the basic service"), it declared the compensation paid to SNCM in respect of services it provided during peak periods ("the additional service") incompatible with the internal market. Consequently, the Commission ordered the recovery of the latter, which amounted to a total of €220 million, by 3 September 2013. Both the State and SNCM challenged the Commission's decision before the GCEU.

The SNCM claimed that the Commission:

- erred in judging that the additional service was not a service of general economic interest ("SGEI");
- erred in considering that the undertaking was not selected under a procedure which allowed the designation of a candidate which is able to provide the services at the least cost to the community;
- wrongly calculated the amount of the aid to be recovered by the French State;
- violated the principle of legitimate expectation;
- violated the principle of equal treatment.

As a preliminary remark, it is interesting to note that both the Commission and the GCEU recalled that State aid is an objective notion. Such qualification only depends on whether a State measure grants or not an advantage to a specific company. In addition, the assessment of the existence of a real need for public service, which could justify the grant of State aid, may evolve over time depending on the evolution of market forces. Consequently, past case law may be irrelevant in assessing the compatibility of a State aid with the internal market.

Regarding the arguments referring to the principles of legitimate expectations and equal treatment, the GCEU judged that the appellant did not meet the conditions required to rely on such principles.

In addition, the GCEU also confirmed the Commission's analysis on the other points.

First, the GCEU recalled that, notwithstanding the Member States' broad discretion regarding the qualification of a SGEI, maritime cabotage is an activity which comes under the scope of EU regulation.[27] Therefore, for a maritime cabotage company to be entrusted with the operation of a SGEI, and hence public service obligations, (*i*) the service in question must meet a real public service need, attested to by the shortage of regular transport services in a situation of free competition, and (*ii*) the scope of that service must be necessary and proportionate to that need.

To this respect, the GCEU held that the Commission was correct in both (*i*) assessing separately the basic service and the additional service, such distinction clearly flowing out of the wording and practical implementation of the public services agreement, and (*ii*) judging that SNCM failed to establish that the criteria to qualify the additional service as

[26] Commission Decision of 2 May 2013, on State Aid SA.22843 awarded by France to Société Nationale Corse-Méditerranée and the Compagnie Méridionale de Navigation.

[27] Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7). See also the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ 2012, C 8, p. 4.

a SGEI were met. Notably, the Commission had found that the additional service provided from Marseille was highly substitutable by other services provided from Toulon, from a demand perspective, that the competition was growing fast on this market and that there was no evidence of any lack of private companies initiatives regarding this additional service.

Secondly, the GCEU, in line with the Commission, judged that the tendering procedure carried out in relation to SNCM clearly failed to ensure adequate open and effective competition in order to select the candidate capable of providing the maritime transport services at the least cost for the community. The public service delegation was allocated to SNCM after a negotiated procedure with publication, which grants a broad margin of appreciation to the awarding authority and may, in turn, restrict the participation of undertakings in the procedure. As a matter of fact, only two offers were submitted, whereas this contract could have interested more companies. Moreover, (i) the historical position of SNCM, (ii) the short period of only four months between the definitive call for tenders (with final specifications) and the implementation of the services and (iii) the technical restraints under the selection criteria all contributed to limiting the number of candidates. Consequently, the GCEU confirmed the Commission's decision stating that the fourth criterion[28] set by the *Altmark* case,[29] was not met.

Finally, the GCEU upheld the Commission's calculation of the amount to be recovered by the French State. SNCM claimed, *inter alia*, that when calculating the amount to be recovered, the Commission should have taken into account the costs incurred due to the supply of the additional service. However, the Commission and the GCEU recalled that the recovery of a State aid is very different from a situation where the State had acquired, in exchange of a payment, an asset or a specific service. According to the *Altmark* case law, if the criteria set by this case are not met, the State aid should be recovered entirely. Otherwise, it would still be tantamount to an illegal State aid. Furthermore, the GCEU also recalled that the poor financial situation of the undertaking which benefitted from the State aid, SNCM in the present case, was irrelevant.

[28] The fourth criterion, as shown on DG Competition's website is: "Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company."

[29] European Court of Justice decision of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg v Commission*, Case C-280/00.

Case C-660/15 P, Viasat Broadcasting UK v Commission (Article 106(2) – services of general economic interest)

THE CJEU CLARIFIES AN IMPORTANT ASPECT OF THE APPLICATION OF THE TREATY RULES ON STATE AID TO SERVICES OF GENERAL ECONOMIC INTEREST

Judgment of the CJEU of 8 March 2017 – Case C-660/15 P – Viasat Broadcasting UK v Commission

Between 1995 and 2002, TV2 – a Danish public service broadcaster – benefited from several measures taken by Denmark. Following a complaint by a competitor, the Commission decided that the aid granted during the period of 1995-2002 qualified as state aid but was compatible with the internal market under Article 106(2) TFEU, with the exception of DKK 628.2 million (approx. €84.4 million) which it classified as overcompensation. Accordingly, the Commission ordered the Kingdom of Denmark to recover that sum from TV2 (the "TV2 I Decision"). In light of the fact that recovery of the aid rendered TV2 insolvent, Denmark notified the Commission of a planned recapitalisation of TV2, which was considered compatible with the internal market having regard for Article 106(2) TFEU (the "**recapitalization decision**").

The TV2 I decision was challenged by TV2 and the Kingdom of Denmark, on the one hand, and the competitors Viasat and SBS, on the other hand.

By its judgment of 22 October 2008, the **GCEU** held that the Commission had rightly concluded that TV2's public-service mission was consistent with the definition of broadcasting services of a general economic interest. However several instances of illegality led the GCEU to annul the decision.

Following the annulment of its decision, the Commission re-examined the measures concerned and maintained its position as regards the classification of the measures concerned as state aid, concluding that the measures did not meet the second and fourth Altmark conditions. However it held that the excessive aid actually constituted a capital buffer appropriate for TV2 – whereas in its first decision it had concluded that the sum was overcompensation (the "contested decision").

Viasat lodged an appeal against the Commission's decision arguing that the Commission had erred in finding that the

compatibility of the measures concerned with the internal market did not need to take into account the second and the fourth criteria set out by the Altmark case law. The GCEU dismissed this argument by its judgment of 24 September 2015. [30]

On appeal, the CJEU rejected Viasat's arguments and clarified an important aspect of the application of the Treaty rules on State aid to Services of General Economic Interest, regarding the interpretation of the criteria set out by the Altmark case law used to determine whether a compensation paid by the State to a company carrying out Services of General Economic Interest is state aid or not.

It first recalled the conditions to determine whether a particular measure constitutes State aid within the meaning of Article 107(1) TFEU: (i) there must be an intervention by the State, (ii) the intervention must be liable to affect trade between Member States, (iii) it must confer a selective advantage, and (iv) it must distort competition. Those conditions are cumulative and a State measure cannot be considered as State aid if one of them is not satisfied.

By way of a reminder, according to the *Altmark* judgment, compensation for the provision of services of general interest does not amount to state aid if the following cumulative conditions are met:

- The beneficiary must be entrusted with a clearly defined public service mission;
- The parameters for calculating the compensation payments must be established in advance in an objective and transparent manner;
- Compensation must not exceed the cost incurred in the discharge of the public service minus the revenues earned with providing the service;
- The beneficiary is chosen in a public tender, or the compensation does not exceed the costs of a well-run undertaking that is adequately equipped with the means to provide the public service.

Moreover, Article 106(2) TFEU provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance of the particular tasks assigned to them.

[30] Case T-674/11, *TV2/Danmark v Commission*, judgment of 8 March 2017

Viasat argued that the GCEU erred in law in finding that the Commission was not required, in its assessment under Article 106(2) TFEU, to take the second and fourth *Altmark* conditions into consideration in order to ascertain whether compliance with those conditions would have obstructed the performance by TV2 of the tasks assigned to it.

However, according to the CJEU, an important distinction lies between, on the one hand, the *Altmark* judgment and the conditions contained therein and, on the other hand, Article 106(2) TFEU and its requirements. The verification of the *Altmark* conditions occurs upstream, when assessing whether or not a measure qualifies as State aid. That issue must be resolved before examining, where necessary, if the aid is nevertheless necessary for the performance of the tasks assigned to the recipient and so can be found to be compatible with the internal market pursuant to Article 106(2) TFEU.

If the *Altmark* conditions are met, there is no aid for the purpose of Article 107(1) TFEU and, consequently, no reason to consider applying Article 106(2) TFEU. Accordingly, when the Commission, after having found that a measure must be characterised as State aid, examines whether that aid can be justified under Article 106(2) TFEU, the conditions laid down in the *Altmark* case law are no longer to be applied. The question at that stage is whether a prohibition of the aid would "obstruct the performance in law or in fact of the particular tasks" assigned to the recipient of the aid, and whether "the development of trade would be affected to an extent contrary to the interests of the Union".

This case is notable as it gives guidance as to how to apply the Treaty rules on State aid to Services of General Economic Interest. It is the first time the CJEU is called upon to deal with the issue of the compensation for the discharge of the public service broadcasting obligation.

Case C-329/15 P, ENEA SA v Prezes Urzedu Regulacji Energetyki

THE COURT OF JUSTICE OF THE EUROPEAN UNION, IN CASE C-329/15 *ENEA V PREZS URZEDU REGULACJI ENERGETYKI ("P.U.R.E.")*, HOLDS THAT AN OBLIGATION IMPOSED BY LAW TO SELL A CERTAIN AMOUNT OF ELECTRICITY PRODUCED BY COGENERATION DOES NOT AMOUNT TO STATE AID

ENEA is a fully state-owned, Polish energy company, producing and selling electricity. The Polish Law on energy provided, from 2003 to 2007, a support scheme for

electricity produced by cogeneration. Pursuant to this scheme, every company selling electricity to end users had meet a target of at least 15% of sales produced by cogeneration. The price of electricity to end consumers in Poland was set by the Office for the regulation of energy (P.U.R.E.). In 2006, ENEA failed to reach the 15% target and so P.U.R.E imposed a financial penalty. ENEA challenged the penalty before the Polish courts. The case was dismissed at first instance, but on appeal the penalty was reduced. ENEA appealed on a point of law to the Supreme Court of Poland raising, for the first time, the argument that the obligation to purchase electricity produced by cogeneration constituted a new, unlawful, State aid. The Supreme Court noted a similarity between this case and Case C-379/98, *PreussenElektra*, EU:C:2001:160). In that case private electric supply undertakings were obliged to purchase from renewable energy sources at prices higher than the real economic value, and then distribute the financial burden among those electric supply organisations and the upstream network operators. It was held by the CJEU that no state aid was involved in such circumstances. On the other hand, in a later case, *Association Vent de Colère*, Case C-262/12, EU:C:2013:851, the facts were similar except that there was a mechanism for offsetting the additional costs imposed electricity companies by the obligation to purchase wind-generated electricity. This offset mechanism was financed by a levy imposed by law on electricity consumers. It was held that the offset mechanism constituted an intervention through State resources.

The Supreme Court of Poland observed that a significant proportion of the electricity companies were State-owned and to the question arose whether state aid was involved to the extent that the State-owned companies were funding the difference between the cost of acquiring the cogenerated electricity and the regulated price at which they could supply it to end users.

The CJEU first enumerated the conditions necessary for a measure to constitute State aid: intervention by the State or through State resources, that is liable to affect trade between Member States, that confers a selective advantage on the beneficiary and distorts or threatens to distort competition. The CJEU noted that the Supreme Court had found that the measure met all but one condition, namely intervention by the State or through State resources. The CJEU therefore interpreted the Supreme Court's question as seeking guidance on whether the 15% requirement involved an intervention of the Polish State, or through State resources. The CJEU ruled that a national measure such as the 15% requirement, "placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration with the production of heat does not constitute intervention by the State or through State resources".

In coming to this conclusion, the CJEU noted that the undertakings concerned included private undertakings, not appointed by the State to manage a State resource but merely bound by a purchase obligation using their own resources. It was possible for an undertaking to have to purchase electricity at a higher price than the regulated price at which it could supply to end-users and there was no State system to compensate it for the resulting loss, as in *Association Vent de Colère*.

As far as concerned the undertakings in which the Polish State was a majority shareholder, the CJEU observed that there was no evidence that that the Polish State exercised a dominant influence that enabled it to direct the use of those resources. The 15% obligation applied equally to all electricity suppliers, whether State or privately owned. Moreover, there was nothing in the Polish State's conduct as legislator to suggest that it exercised such an influence.

SA.38944, Luxembourg, Illegal tax benefits for Amazon

COMMISSION ACCEPTS AMAZON'S COMMITMENTS CONCERNING MOST FAVOURED NATION CLAUSES IN E-BOOK PROBE – COMMISSION DECISION OF 4 MAY 2017 IN AT. 40153 *E-BOOK MFNS AND RELATED MATTERS (AMAZON)*

On 4 May 2017, the Commission adopted a second commitment decision in the e-book sector. The first commitment decision concerned concerted practices among Company and five major international publishers whereby they jointly forced Amazon to switch from a wholesale model to an agency model with a view to raising retail prices of e-books in the EEA or to preventing the emergence of lower prices for e-books in the EEA. [31] This time, it concerns potential abuses of a dominant position by Amazon. In both cases, the use of certain "most favoured nation" (MFN) or "parity" clauses was at the centre of the issue.

[31] Commission Decision of 12 December 2012 in Case No COMP/39847 – *E-Books* and Commission Decision of 25 July 2013 in Case No. COMP/39.847 – *E-Books.*

BACKGROUND

In 2012 and 2013, the Commission made commitments offered by Company and the five publishers to meet the Commission's concerns regarding their potential concerted practices in breach of Article 101 TFEU legally binding. The Commission was concerned, among other things, that a retail price MFN clause included in each of the agency agreements between Company and the five publishers strongly incentivised them to force Amazon to switch from a wholesale model to an agency model. The retail price MFN clause provided that, in the event another retailer were to offer a lower price for a particular e-book, the publisher had to lower the retail price of that e-book in Company's iBookstore to match that other lower retail price. As a consequence, the five publishers undertook not to enter into, for a period of five years, any agreement for the sale of e-books in the EEA that contained a retail price MFN clause, a wholesale Price MFN clause, a commission/revenue share MFN clause, or a business model MFN clause.[32]

Even before switching to an agency model in 2010, Amazon included MFN clauses related to selection concerning catalogue and availability date in its wholesale e-book distribution agreements covering the EEA. After the switch, it started to include MFN clauses related to agency price, agency commission and business model. Since then, Amazon typically included in its e-book agency and wholesale agreements MFN clauses related to: business model (e.g. print and e-book bundles, subscription models); selection with respect to catalogue, availability date, and feature; an agency, reseller or wholesale price; promotion; and an agency commission in the case of agency agreements.

In agreements with the five publishers who could not introduce MFN clauses because of their commitments described above, Amazon included notification provisions instead of MFN clauses.

Against this background, on 11 June 2015, the Commission initiated proceedings against Amazon. On 9 December 2016, the Commission adopted its Preliminary Assessment.

Commission's Preliminary Concerns

In its Preliminary Assessment, the Commission expressed the view that Amazon might be abusing or might have abused its dominant position in the relevant markets for the retail distribution of English and German language e-books to consumers in the EEA through MFN clauses and notification provisions.

Those MFN clauses required, in essence, e-book suppliers (i) to notify Amazon more favourable or alternative terms offered to any other retailers and (ii) to offer Amazon equivalent terms.

Notification provisions required e-book suppliers to notify Amazon more favourable or alternative terms offered to any other retailers but did not require them to offer equivalent terms. However, once notified by an e-book supplier, Amazon typically requested from that e-book supplier equivalent terms and explicitly threatened to punish it if it did not accede to such request.

The Commission was concerned that those MFN clauses and notification provisions were capable of reducing, or likely to reduce the competitiveness of retailers, thereby reinforcing Amazon's potentially dominant position in the relevant markets. The Commission also considered that they could lead to less innovation as well as fewer choices and higher prices for consumers.

COMMITMENTS

To address these concerns, in accordance with Article 9(1) of Regulation (EC) No 1/2003, Amazon proposed to cease to enforce or otherwise rely upon any of the MFN clauses or of the notification provisions contained in agreements with e-book suppliers for the sale of e-books to consumers in the EEA. It also proposed not to include any of the MFN clauses or of the notification provisions in any new agreements with e-book suppliers for the sale of e-books to consumers in the EEA. The duration of both commitments is five years.

The Commission found that these commitments adequately address its concerns identified in its Preliminary Assessment and made them binding on Amazon. A breach of the commitments could trigger the reopening of the proceedings.

COMMENT

As the divergent outcomes of investigations by several national competition authorities into MFN clauses used by online travel agents in their contracts with hotels show, there is a lack of clarity as to the legal status of MFN clauses – whether they should be prohibited outright or they may be allowed under certain conditions. The Commission's commitment decisions in the e-book sector are not helpful in this regard. One could argue that since the Commission allows the publishers and retailers to include MFN clauses

[32] For Penguin, a commitment with respect to a business model MFN clause is excluded.

again in e-book agreements after a period of five years, it does not prohibit MFN clauses outright. In any case, it is clear that the use of MFN clauses will require caution especially when they are used by parties that enjoy a high level of market power.

Legislative and policy developments

March 2017 Anonymous Whistleblower tool

THE COMMISSION INTRODUCES A NEW, ANONYMOUS, WHISTLEBLOWER TOOL FOR ALERTS ABOUT SECRET CARTELS AND OTHER ANTITRUST VIOLATIONS

In order to safeguard the European market and to reach a wider audience when it comes to detecting cartels and activities in violation of antitrust provisions, the Commission, on 16 March 2017, has introduced a new, completely anonymous tool through which anybody who has information concerning an illegal activity can submit it. Until the introduction of this new tool, most of the information relating to cartels was detected by the Commission through the leniency programme, which allows undertakings to report on their involvement in a cartel in the hope of receiving a reduction in fines.

The new tool will be run by a specialised external service provider, which will preserve anonymity through an encrypted messaging system allowing two-way communications. The intermediary will only forward the content of the messages but no metadata. The features of the new system include:

- possibility to request the Commission to reply to the messages;
- the Commission can follow-up to seek clarification and details.

With this new tool and system in place, the Commission aims to increase the chances of receiving sufficiently precise and reliable information, which can then be used by the Commission during investigations. If the sources of information wish to reveal their identity, then they will be able to contact the Commission directly through a dedicated phone number and e-mail address.

> Commissioner Margrethe Vestager commented: "*If people are concerned by business practices that they think are wrong, they can help put things right. Inside knowledge can be a powerful tool to help the Commission uncover cartels and other anti-competitive practices. With our new tool it is possible to provide information, while maintaining anonymity. Information can contribute to the success of our investigations quickly and more efficiently to the benefit of consumers and the EU's economy as a whole*".

May 2017, Commission's final report on the e-commerce sector

THE EUROPEAN COMMISSION PUBLISHES FINAL REPORT ON E-COMMERCE SECTOR INQUIRY

The European Commission's Digital Single Market ("DSM") strategy aims at creating one on-line market throughout the European Union's territory by taking down the regulatory barriers existing today. E-commerce is of course part of the DSM strategy and in order to collect information concerning this sector the Commission launched an inquiry on 6 May 2015.

Initial findings concerning geo-blocking were published in March 2016 followed in September of the same year by a Preliminary Report on the sector inquiry. This preliminary report gave an overview of the main market trends and possible concerns, relating to competition law. The Commission then launched a public consultation on consumer goods and digital content, and organised a stakeholder conference at which the attendees were able to express their opinion and views on the Preliminary Report.

The Final Report on the e-commerce sector inquiry was published on 10 May 2017, together with the accompanying Staff Working Document, presenting the main findings and the stakeholder's comments. The document is divided into two main sections, consumer goods and digital content, highlighting first the main findings and then the competition concerns.

As regards consumer goods, the Commission concluded that the manufacturers of these products wish to exert a greater control over their distribution. This is a result of increased price transparency/price competition resulting from a growth in e-commerce. In fact:

- manufacturers are increasingly selling their products directly through their own online retail shops, thereby competing with their own independent distributors
- manufacturers are increasingly setting up selective

distribution networks, and

- manufacturers are increasingly imposing vertical restraints in their distribution systems.

The following competition concerns were highlighted:

- a tendency towards the exclusion of pure online players from selective distribution networks
- decisions by manufacturers to implement a dual pricing policy *vis-à-vis* hybrid retailers, and
- recourse to retail price maintenance supported by pricing software
- restrictions/bans on selling on online marketplaces, and
- geographic restrictions on selling and advertising online.

As regards digital content the principal competition concerns relate to certain contractual restrictions in licensing agreements. In brief, these concerns include:

- the bundling of technology rights, a particular concern being that bundling may lead to a restrictionof output where online rights have been acquired but are not, or are only partially, exploited
- territorial restrictions
- the duration of licensing agreements, a particular concern relating to the foreclosure of new entrants, and
- payment structures, which implicitly favour incumbent content providers.

Key practices earmarked for further investigation by the Commission include the following:

- (unjustified) geo-blocking;
- Resale price maintenance (supported by pricing software), and
- Platform bans.

(UNJUSTIFIED) GEO-BLOCKING

Geo-blocking and geo-filtering raise competition concerns as regards e-commerce. Unjustified geo-blocking, as opposed to geo-filtering, encompasses:

- the blocking of access to websites by users located in a Member State other than that of the website host;
- the automatic re-routing of users to another website of the same or a different service (possibly with a different price) (e.g. customers in Germany are re-routed from an 'fr' version of an online store to its 'de' version);
- delivery and/or payment refusals based on the location/place of residence of the user, and
- the prevention of users from accessing online digital content services to which they have subscribed in one Member State from other Member States, or to play content previously downloaded in one Member State when the user travels to another Member State.

Geo-filtering, on the other hand, refers to commercial practices whereby online providers permit users to access/purchase consumer goods/digital content services cross-border, but offer different terms and/or conditions depending on the location of the user.

Agreements/concerted practices between undertakings containing unjustified geo-blocking/geo-filtering measures may fall within the purview of Article 101 TFEU. It bears note in this regard that the following are generally (with limited exceptions) considered hard-core restrictions under the Vertical Restraints Block Exemption Regulation (VRBE) (see The Vertical Restraints Block Exemption):

- agreements/concerted practices which threaten to undermine the Single Market Imperative are considered to have as their object the restriction of competition under Article 101 TFEU, and
- contractual restrictions of eg the territory into which a distributor may sell goods.

To the extent that a given measure arises as a result of a unilateral decision, as opposed to an agreement between companies, such practice would not in the absence of dominance be sanctioned under the EU competition rules. With that said, the soon to be promulgated Geo-blocking Regulation will fill this gap with respect to unjustified geo-blocking. On 18 May 2017 the European Parliament's IMCO Committee started the trilogue negotiation with the Council and the Commission with a view to reaching an agreement on the final text. On 20 November 2017 the European Parliament, the Council and the Commission reached a political agreements to end unjustified geo-blocking. The new rules envisaged by the trilateral *entente* define three situations where there are no objective criteria for a differentiated treatment. These new rules and the Regulation do not, however, impose to sell nor to harmonise prices. The rules are as follows:

- the sale of goods without physical delivery;
- the sale of electronically supplied services;
- the sale of services provided in a specific physical location.

The Regulation is expected to come into force by Christmas 2018 and anyways nine months after the publication of the text on the Official Journal.

RPM (SUPPORTED BY PRICING SOFTWARE)

Manufacturers should not take any actions that interfere with the freedom of retailers to set their final prices to customers by making a recommended retail price or a maximum retail price equivalent to a minimum or fixed price. Agreements that establish a minimum or fixed resale price or price range are a restriction of competition by object under Article 101(1) TFEU and a hardcore restriction within the meaning of Article 4(a) of the VBER.

In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through indirect means. Examples of such indirect means are agreements:

- fixing the distribution margin;
- fixing the maximum level of discount the distributor can grant from a prescribed price level;
- making the grant of rebates or reimbursement of promotional costs by the supplier subject to the;
- observance of a given price level;
- linking the prescribed resale price to the resale prices of competitors;
- threats, intimidation, warnings, penalties, delay or suspension of deliveries, or
- contract terminations in relation to observance of a given price level.

Direct or indirect means of achieving price fixing can be made more effective when combined with measures to identify price-cutting distributors, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level.

Despite their treatment as an infringement by object, during the e-commerce sector inquiry RPM practices were nonetheless found not to be uncommon among manufacturers. Particular concerns were raised in the Final Report about the use of pricing software to detect deviations from a manufacturer's pricing recommendations which would allow for potential retaliation against retailers. Furthermore, the Final report found that the mere presence of such software may dampen the incentives of retailers to deviate from pricing recommendations in the first place.

PLATFORM BAN

Platform bans typically occur in selective distribution systems pursuant to which manufacturers impose certain conditions on the ways in which retailers may promote and sell their products. A platform ban means that members of a selective distribution system are not permitted by the network head to sell products using third-party platforms (such as Amazon and eBay).

It has been established for some time now that selective distribution systems relating to the distribution of luxury and prestige products, and principally intended to preserve the luxury image of those products, are not necessarily caught by the prohibition of agreements where three criteria are met (the "*Metro* Exemption"): (i) the resellers are chosen on the basis of objective criteria of a qualitative nature which are determined uniformly for all and applied in a non-discriminatory manner for all potential resellers, (ii) the nature of the product in question, including the prestige image, requires selective distribution in order to preserve the quality of the product and to ensure that it is correctly used, and (iii) the criteria established do not go beyond what is necessary.

The *Metro* exemption therefore recognises that there are legitimate needs justifying a limitation on the price-related competition associated with systems of selective distribution in favour of competition relating to factors other than price.

With that said, confusion has been allowed to reign since the adoption of the *Metro* exemption in light of the CJEU's judgment in *Pierre Fabre Dermo-Cosmétique* which held that an outright ban on internet sales is to be considered a restriction by object. Specifically, such confusion arises out of paragraph 46 of the CJEU's judgment which states that "the aim of maintaining a [prestige] image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU". However, in its recent judgment in Case C-230/16, *Coty*, the CJEU said that "luxury goods may require the implementation of a selective distribution system in order to preserve the quality of those goods and to ensure that they are used properly (paragraph 28)". This finding appears to run counter to, at least on first

glance, the CJEU's own finding in Pierre Fabre Dermo-Cosmétique. For a further discussion of this, see the article on the *Coty* judgment in this publication.

May 2017, Simplification of State Aid rules for public investment in ports and airports, culture and the outermost regions

1. GENERAL LEGISLATIVE AND POLICY DEVELOPMENTS

1.1 Simplification of State Aid rules for public investment in ports and airports, culture and the outermost regions

In May 2017, the Commission approved new state aid rules exempting certain public support measures for ports, airports, culture and the outermost regions from prior Commission scrutiny. The aim of the amendment is to bolster public investment for job creation and growth while maintaining the integrity of competition. It also reduces administrative burdens for project developers and public authorities, aligning with the goals of the Commission's Regulatory Fitness and Performance of EU Legislation (REFIT) platform.

1.1.1 General Context

The 2014 General Bloc Exemption Regulation (GBER) allows Member States to implement a wide range of State aid measures without prior Commission approval, under the condition that such measure is unlikely to distort competition. Although roughly 95% of State aid measures already fall under GBER, the Commission further broadened the scope of the Regulation to include ports and airports. As a result, the types of State aid measures subject to prior notification are further limited. More importantly, the amendment should increase flexibility for Member States to implement State aid measures necessary for crucial infrastructure investments and ensure its full legal certainty for project developers and aid granting authorities.

Nevertheless, State aid measures that do not meet the requirements clarified under GBER will continue to follow the typical procedure of notification to the Commission.

1.1.2 Specific Amendments to include Airports and Ports

Specific to airports, the amended Regulation now exempts two types of investment aid based on the size of the airport.

For airports with passenger traffic of up to 200 000 passengers per year, exemption is granted for aid that covers operating costs.

For airports with passenger traffic of up to 3 million passengers per year, exemption is permitted under the following conditions:

- The airport is not located in the catchment area (100 kilometers distance or 60 minute travel time) of another airport.
- The funded infrastructure should be fully used and will not exceed expected demand.
- The aid can only cover the "funding gap," calculated as future revenues from the investment.
- Only a certain percentage of the investment costs can be subsidized, factoring the size of the airport and location.

Specific to ports, the amended Regulation now exempts the obligation of prior notification for investment aid of up to 150 million euros for projects involving maritime ports and up to 50 million euros for projects involving inland ports. Additionally, aid covering costs of dredging in ports and access to waterways equally fall within the exemption.

Similar to large airports, public investment in ports can only cover the "funding gap" and a certain percentage of investment costs in order to be eligible for the exemption.

1.1.3 Specific Amendments to Culture and Outermost Regions

The Regulation also introduces new and more flexible rules for aid to culture and support for EU's outermost regions. Specific to aid to culture, the Commission has increased the upper limit of aid since public support rarely involves economic activities or poses a threat to competition. Specific to supporting outermost regions, the amended Regulation now includes aid covering any additional costs for companies operating in those regions (*i.e.* transport). However, the company must demonstrate that a justifiable challenge exists due to the remoteness of its operations.

1.1.4 Additional Amendments

Interestingly, GBER now exempts the obligation of prior notification for state aid offered to start-up companies (up to 5 years from registration). The amended Regulation also includes "simplified cost options" applied in different areas of EU law to also apply under GBER. Such additions to the

Regulation illustrate the intention to remove red tape and lower costs for Member States.

June 2017, Introduction of a document discovery procedure for cartel damages cases in Germany

INTRODUCTION OF A "DISCLOSURE" PROCEDURE IN GERMAN ANTITRUST DAMAGES PROCEEDINGS

– IMPLEMENTATION OF THE DAMAGES DIRECTIVE IN GERMANY

On June 2017 the 9th amendment to the Act against Restraints of Competition came into force in Germany, implementing the Damages Directive (2014/104/EU). The new § 33g contains provisions for obtaining evidence and information for private enforcement.

These provisions constitute an innovation for German civil procedure law insofar as until now, parties to a lawsuit were not obliged to provide information that sustained the submissions of the opposing party.

RIGHT TO DISCLOSURE

In accordance with the new law, parties alleging injury by a cartel can request evidence and information that helps a potential claimant to prove any antitrust behaviour or that damage had been caused, even in the pre-trial phase.

The requirements for an effective request made by the claimant are:

- The evidence or information requested has to be necessary to support the plausibility of a claim for damages (arising out of anti-competitive practices)
- The claimant has to demonstrate that he has a claim for damages
- The claimant has to describe the requested piece of evidence or information as precisely and as narrowly as possible on the basis of reasonably available facts

Unlike US discovery proceedings, where far-reaching disclosure obligations without proof of relevance are common, investigative "fishing expeditions" should be provided by the demand of precise circumscription of the requested information.

In addition to the claimant's right to request disclosure, there is also a similar right for the defendant to request disclosure of evidence relevant to the question whether the claimant really suffered loss or whether he passed on his extra cost to his customers. The defendant has to describe the requested information precisely and demonstrate that it is necessary for his defence. In contrast to the right of the claimant, the defendant's right to request disclosure can only be exercised once a lawsuit for damages is pending against him.. The defendant therefore has no right to disclosure in the pre-trial phase.

EXCLUSIONS AND PRIVILEGES

In parallel with the implementation of more extensive rights to disclosure, some exclusions and privileges were created to protect the special interests of the parties. There are explicit exclusions for leniency and settlement submissions and also for all communications between the client and his attorney in cartel fine procedures.

Furthermore persons subject to professional secrecy, who have the right to refuse to testify, can also refuse to hand over the requested evidence or information. This applies in particular to any communication made under attorney-client-privilege.

Besides the request has to be relative

- to the interest of the defendant to keep his business and trade secrets confidential,
- to the dependency of the claimant on the information to support his case,
- the temporal, personal and financial expenditure to provide the information and
- the functioning of the antitrust law.

To verify whether the requested documents contain excluded or privileged information the documents have to be given to the court first. Only in the case of attorney-client communications that are in the possession of the attorney is there an exception to the rule of prior verification by court. In such a case the documents are excluded from disclosure without the need for a ruling by the court.

ENFORCEMENT

If the requested party does not comply with the request, the requesting party has to sue for disclosure and the court has to decide if there is a proper request, especially whether there is a right to disclosure, whether the request is proportionate and whether the information is privileged.

REIMBURSEMENT

The requested party can ask the other party for reimbursement of the expenses incurred in gathering the requested information. The reimbursement is limited to an amount the requested party may consider to be necessary and appropriate under the circumstances.

DAMAGES

To ensure the effective enforcement of the right to disclosure, the requesting party has a right to claim for damages if the requested party does not comply with the request for disclosure at all or gives incomplete or wrong information intentionally or through gross negligence.

The material in this publication may not be reproduced, in whole or part without acknowledgement of its source and copyright. *Annual Review of EU Competition Cases 2017* is intended to provide information of general interest in a summary manner and should not be construed as individual legal advice. Readers should consult with their McDermott Will & Emery lawyer or other professional counsel before acting on the information contained in this publication.

©2018 McDermott Will & Emery. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery AARPI, McDermott Will & Emery Belgium LLP, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, McDermott Will & Emery Studio Legale Associato and McDermott Will & Emery UK LLP. These entities coordinate their activities through service agreements. McDermott has a strategic alliance with MWE China Law Offices, a separate law firm. This communication may be considered attorney advertising. Previous results are not a guarantee of future outcome

Office Locations

BOSTON
28 State Street
Boston, MA 02109
USA
Tel: +1 617 535 4000
Fax: +1 617 535 3800

BRUSSELS
Avenue des Nerviens 9-31
1040 Brussels
Belgium
Tel: +32 2 230 50 59
Fax: +32 2 230 57 13

CHICAGO
444 West Lake Street
Chicago, IL 60606
USA
Tel: +1 312 372 2000
Fax: +1 312 984 7700

DALLAS
2501 North Harwood Street Suite 1900
Dallas, TX 75201-1664
USA
Tel: +1 214 295 8000
Fax: +1 972 232 3098

DÜSSELDORF
Stadttor 1
40219 Düsseldorf
Germany
Tel: +49 211 30211 0
Fax: +49 211 30211 555

FRANKFURT
Feldbergstraße 35
60323 Frankfurt a. M.
Germany
Tel: +49 69 951145 0
Fax: + 49 69 271599 633

HOUSTON
1000 Louisiana Street, Suite 3900
Houston, TX 77002
USA
Tel: +1 713 653 1700
Fax: +1 713 739 7592

LONDON
110 Bishopsgate
London EC2N 4AY
United Kingdom
Tel: +44 20 7577 6900
Fax: +44 20 7577 6950

LOS ANGELES
2049 Century Park East, 38th Floor
Los Angeles, CA 90067
USA
Tel: +1 310 277 4110
Fax: +1 310 277 4730

MIAMI
333 SE 2nd Avenue, Suite 4500
Miami, FL 33131
USA
Tel: +1 305 358 3500
Fax: +1 305 347 6500

MILAN
Via Dante 15
20123 Milan
Italy
Tel: +39 02 36575701
Fax: +39 02 36575757

MUNICH
Nymphenburger Str. 3
80335 Munich
Germany
Tel: +49 89 12712 0
Fax: +49 89 12712 111

NEW YORK
340 Madison Avenue
New York, NY 10173
USA
Tel: +1 212 547 5400
Fax: +1 212 547 5444

ORANGE COUNTY
4 Park Plaza, Suite 1700
Irvine, CA 92614
USA
Tel: +1 949 851 0633
Fax: +1 949 851 9348

PARIS
23 rue de l'Université
75007 Paris
France
Tel: +33 1 81 69 15 00
Fax: +33 1 81 69 15 15

SEOUL
18F West Tower
Mirae Asset Center1
26, Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
Tel: +82 2 6030 3600
Fax: +82 2 6322 9886

SHANGHAI
MWE China Law Offices
Strategic alliance with
McDermott Will & Emery
28th Floor Jin Mao Building
88 Century Boulevard
Shanghai Pudong New Area
P.R.China 200121
Tel: +86 21 6105 0500
Fax: +86 21 6105 0501

SILICON VALLEY
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
USA
Tel: +1 650 815 7400
Fax: +1 650 815 7401

WASHINGTON, D.C.
The McDermott Building
500 North Capitol Street, N.W.
Washington, D.C. 20001
USA
Tel: +1 202 756 8000
Fax: +1 202 756 8087

McDermott
Will & Emery

Boston Brussels Chicago
Dallas Düsseldorf Frankfurt Houston London
Los Angeles Miami Milan Munich
New York Orange County Paris
Seoul Silicon Valley Washington, DC

Strategic alliance with MWE China Law Offices (Shanghai)

www.mwe.com