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**January, 2016**

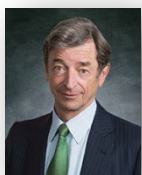
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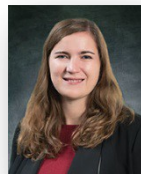
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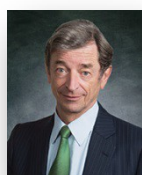


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The aim of this booklet is to summarise recent developments in EU competition rules. During the year 2015 several new regulations, notices and guidelines were issued by the European Commission. There were also many interesting cases decided by the General Court and the Court of Justice of the EU. All these new rules and judicial decisions can be relevant for international companies operating in the EU.

It is difficult for General Counsel and their teams to monitor all new developments adequately. With the growth of the Internet and the daily updates to EU competition rules, everyone receives and has access to masses of information, but it difficult to select that which is really relevant to one's business. The purpose of this booklet is to help General Counsel and their teams to focus on the essential updates that they should be aware of.

Indeed, in addition to the daily update, this booklet provides an overview of the main recent developments in EU competition rules and can be kept as a ready reference when dealing with complex issues of EU competition law.

This booklet was prepared by the lawyers in McDermott Will & Emery's European Competition Team, based not only in Brussels but also in France, Germany, Italy and UK. Throughout 2015 they have contributed to the monitoring of legal developments and the drafting of summary reports thereon.

The McDermott Will & Emery European Competition Team hope that you will appreciate this booklet and look forward to answering any questions you may have.

The information and opinions this booklet contains are not intended to be a comprehensive analysis of EU competition law or to provide legal advice. Counsel should be consulted for specific advice concerning particular situations.

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- 09/07/15 *InnoLux Corp. v Commission*, C-231/14P, Judgment, EU:C:2015:451

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- 15/12/15 *CCPL – Consorzio Cooperative di Produzione e Lavoro SC and others v Commission*, T-522/15R, Order of the President, not yet published
- 16/12/15 *Air Canada v Commission*, T-9/11, Judgment, EU:T:2015:994
- 17/12/15 *SNCF v Commission*, T-242/12, Judgment, EU:T:2015:1003

## ABBREVIATIONS

<b>“Brussels I Regulation”</b>	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12, p.1).
<b>“CJEU”</b>	Court of Justice of the European Union:
<b>“Commission”</b>	European Commission:
<b>“Damages Directive”</b>	Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L349, p.1).
<b>“Data Protection Regulation”</b>	Parliament and Council Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L8 p.1).
<b>“DG Competition”</b>	Directorate-General for Competition.
<b>“EC Charter”</b>	European Charter on Human Rights.
<b>“ECHR”</b>	European Convention on Human Rights.
<b>“EEA”</b>	European Economic Area.
<b>“EU”</b>	European Union.
<b>“Fining Guidelines”</b>	Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 of 1 September 2006 (OJ 2006 C210, p.2).
<b>“FRAND”</b>	Fair, reasonable and non-discriminatory.
<b>“GCEU”</b>	General Court of the European Union.
<b>“Leniency Notice”</b>	Commission notice on immunity from fines and reduction of fines in cartel cases of 8 December 2006 (OJ 2006 C298, p.17).
<b>“Merger Regulation”</b>	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L24, p.1) (ex Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings).
<b>“Official Journal”</b>	Official Journal of the European Union.
<b>“Postal Directive”</b>	Parliament and Council Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L15, p.14) as amended by Parliament and Council Directive 2002/39/EC of 10 June 2002.
<b>“Postal Notice”</b>	Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C39, p.2).
<b>“Procedural Regulation”</b>	Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 2004 L123, p.18) as amended:

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- “Regulation 1/2003”** Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L1, p. 1).
- “Transparency Regulation”** Parliament and Council Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L145, p.43).

## **1. GENERAL LEGISLATIVE AND POLICY DEVELOPMENTS**

### **1.1 Amendment of the Commission's Procedural Regulation and related notices to take account of changes introduced by the Damages Directive**

The Procedural Regulation lays down rules for the conduct of competition law proceedings, notably rules of the initiation of proceedings, the issue of a statement of objections, access to the Commission's file, intervention of interested parties and the holding of hearings. In August 2015 new provisions were inserted on leniency programmes, settlement procedures, access to the file and limitations on the use of information obtained in the course of Commission proceedings.

The purpose behind the amendments made in August 2015 is to take account of certain provisions of the Damages Directive which prohibit the use of corporate leniency statements and settlement submissions in damages actions before the national courts, and limit the use of documents created especially for the purposes of a Commission investigation until after the investigation has been closed.

These amendments are accompanied by the following amendments to Commission notices:

- Amendments to the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004;
- Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases;
- Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases;
- Amendments to the Commission Notice on cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC.

An interesting consequence of these amendments is that there exists now, for the first time, a legislative foundation for the Commission's Leniency Programme. The new Article 4a inserted into the Procedural Regulation empowers the Commission to lay down the conditions in which it may grant immunity from fines, or a reduction in the amount of fines. It also provides for the taking of oral corporate statements. A similar amendment is made in Article 10a to allow settlement submissions to be taken orally, thus avoiding the creation of any documents that might be subject to disclosure in damages litigation.

In the provisions in the Procedural Regulation on access to the file, it is now provided that access by the alleged cartel participants to settlement submissions and corporate leniency statements made by other cartel participants shall take place only at the Commission's premises, and no copies shall be made by any mechanical or electronic means. Access by alleged cartel participants to such statements or to settlement submissions shall be granted only for the purposes of exercising the rights of defence in proceedings before the Commission. A party who has obtained access for this purpose may *also* use information

taken from the corporate statements or settlement submissions – *only where necessary* – for the exercise of its rights of defence in:

- Proceedings before the GCEU or the CJEU for judicial review of Commission decisions; or
- Proceedings before a national court for allocation between cartel participants of a fine imposed jointly and severally on them by the Commission; or
- Proceedings before a national court for judicial review of a decision of the national competition authority finding an infringement of Article 101 TFEU.

### 1.2 **Commission updates its explanatory note on the conduct of unannounced on-the-spot inspections**

On 11 September 2015 the European Commission published a revised version of its Explanatory Note on unannounced on-the-spot inspections that are carried out pursuant to Article 20(4) of the Procedural Regulation.

The Explanatory Note is handed to the company being inspected at the beginning of the inspection (also known as a “dawn raid”). It provides guidance on the Commission’s approach to the conduct of the inspection. This is important because failure to cooperate with the Commission’s inspectors in the required manner can expose the company being investigated to penalties of up to 1% of turnover,<sup>1</sup> even if the company is not found guilty of a substantial infringement of competition law.

An important innovation is the fact that the Explanatory Note provides clarification and guidance with respect to software and data, to take account of the growing significance of IT tools for the Commission’s evidence gathering.

In particular, the Explanatory Note clarifies that the Commission may search the entire IT-environment of the company being investigated, including servers, external hard disks, backup tapes and cloud services. In addition, searches can be extended to private devices and media that are found on the company’s premises and are used for professional purposes.

The Explanatory Note also explains the Commission’s procedure if the selection of documents relevant to the investigation could not be completed during the on-site inspection. In such cases a copy of all the data may be collected and placed in a sealed envelope to be searched at a later date.<sup>2</sup> The Commission may invite the company to be present when the sealed envelope is opened and during the continued inspection process at the Commission’s premises.

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<sup>1</sup> Procedural Regulation, Article 23(1), sub-paragraphs (c), (d) and (e).

<sup>2</sup> *Nexans v Commission*, T-135/09, EU:T:2012:596, paragraphs 132-133, in which the Commission’s right to do this was challenged, but the CJEU ruled that the challenge was inadmissible.

Once the Commission has selected the final data for its case file, the company will receive a DVD on which all the selected data will be stored together with a signed copy of the index of its contents.

Another addition to the Explanatory Note is an explanation about the evidence gathering process, in particular, the fact that evidence selected during the inspection will be collected and listed in its technical entirety. For example, if only one attachment to an email is selected, the selection will include the cover email, along with all attachments that belong to that particular message. However, when the evidence is placed in the case file, the Commission may separate each item of evidence into its component parts (e.g. cover email and attachments) and list them individually with unique document references.

The Explanatory Note emphasises that, while the Commission processes personal data in compliance with EU data protection rules and that such data is not the target of inspections, personal information may be contained in business documents related to such inspections and may therefore be obtained and copied, and form part of the case file. In such cases, personal data can only be used for the purpose for which they were collected (i.e. the enforcement of Articles 101 and/or 102 TFEU) and will be processed in compliance with the Data Protection Regulation.

### 1.3 **Commission updates its guidance on best practices for disclosure of information in data rooms**

On 2 June 2015 the Commission updated its guidance on best practices for disclosure of information in data rooms. Addressees of a statement of objections have the right to access the non-confidential version of the Commission's file so as to be able to defend themselves. In principle, access to the Commission's file is granted by providing access to an electronic version of all documents contained in the Commission's file, excluding of course all internal documents and confidential information (i.e. "business secrets" and "other confidential information").

Data collected by DG Competition from third parties (e.g. cost and price data, etc.) often constitute business secrets which are by nature confidential. In particular, if the data are of a quantitative nature, it may not be possible to provide, in a timely manner, a meaningful non-confidential version. Exceptionally, this may also be true for qualitative information (e.g. internal strategy documents of competitors). Granting access to such data may nevertheless be necessary for an effective exercise of the rights of defence.

Pursuant to Article 339 TFEU the Commission has a general duty to protect confidential information that could seriously harm the undertaking if disclosed. Notwithstanding this, in antitrust proceedings confidential information may exceptionally be disclosed when such disclosure is necessary to prove an infringement of Articles 101 or 102 TFEU,<sup>3</sup> or to safeguard the rights of defence of the parties.<sup>4</sup> As regards merger proceedings, the

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<sup>3</sup> Procedural Regulation, Article 15(3).

<sup>4</sup> The need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of  
(continued...)



Commission may consider the disclosure of confidential information necessary for the purpose of the procedure. In merger cases, taking into account the administrative nature of the procedure and the need for speed, the Commission usually considers such disclosure to be necessary only in relation to information relied upon in the statement of objections. In both antitrust and merger proceedings, confidential information will not be disclosed when the rights of defence of the parties may be effectively exercised on the basis of non-confidential versions of the documents in the Commission's file.

Data rooms are an exceptional tool which can safeguard the rights of defence while respecting the legitimate interests of confidentiality of the undertakings or persons from which the Commission has obtained the information (the "data providers"). By means of a data room, documents in the Commission's file are made accessible to an addressee of a statement of objections in a restricted manner, i.e. by limiting the number and/or category of persons having access and the use of the information accessed to the extent strictly necessary for the exercise of the rights of defence.

It is in DG Competition's discretion to decide whether a data room is appropriate in a particular case. It does this either of its own motion or upon a request from an addressee of a statement of objections. Such a solution must be necessary and proportionate and any legal and practical difficulties must be resolved swiftly in agreement with the addressees of the statement of objections and the data providers.

In deciding whether a particular case is suitable for a data room procedure, DG Competition will also take into account whether it is appropriate to provide access, having regard for the circumstances of the case, the nature and degree of sensitivity of the information, the progress of the case, the resources available, the risk of information leaks, and the need for speed. The latter is particularly important in proceedings under the Merger Regulation, in which DG Competition is subject to short, legally binding time limits under which merger proceedings must be conducted.

Access to a data room is subject to compliance with the Commission's data room rules, the giving of confidentiality undertakings and sanctions in case of non-compliance.

### 1.3.1 The scope of the data included in the data room

The Commission organises data rooms mostly for the disclosure of quantitative data (e.g. individual sales data, etc.) on which the Commission has relied directly or indirectly in its statement of objections. In a few exceptional cases, data rooms have also been organised for the disclosure of qualitative data (e.g. internal strategy documents).

Quantitative data included in a data room should enable the addressees of a statement of objections, through their external advisors, to verify the methodology used by the Commission to collect, check the consistency of, manage and analyse, the data used in a statement of objections, as well as to check the robustness of the Commission's analysis.

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other parties – See Commission's Notice on Access to the File, paragraph 24 (OJ C375, 22.12.2005, p.7).

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Software codes used by the Commission that are necessary for the effective exercise of the rights of the defence may also be included in a data room.

Exceptionally, qualitative confidential documents may also be disclosed to the external advisors of the addressees of a statement of objections through a data room procedure. A qualitative data room may be organised where it is not possible or it is very burdensome for the data provider to provide meaningful non-confidential versions.

### 1.3.2 Organisation of data rooms

A data room can be organised at any point at which access to the Commission's file may be granted (i.e. after the notification of the Commission's statement of objections to the parties and before the Advisory Committee discussions). Normally, a data room is organised before the oral hearing.

Because of the sensitive and confidential nature of the data contained in the data room, access is limited to a restricted group of persons, on an "external advisor only" basis. The purpose of providing access to the data room is strictly limited to enabling the external advisors to advise their clients, i.e. the addressees of a statement of objections, about the exercise of their rights of defence without, however, disclosing to their clients the confidential information they were able to see.

Every data room organised by DG Competition is subject to the Data Room Rules, which must be accepted by the addressees of a statement of objections and signed by the external advisors prior to being granted access. Pursuant to the Data Room Rules:

- External advisors may not remove data, information or documents from the data room, nor disclose confidential information obtained within the framework of a data room procedure to the addressees of the statement of objections or any third party. It is in the first place for the external advisors to ensure that they comply with any relevant professional conduct rules and that they are able to operate on this basis, including obtaining waivers in relation to such rules from their clients where necessary.
- Similarly, an addressee of a statement of objections must never request nor receive any confidential information derived from the data room by its external advisor(s).
- DG Competition will make available to the external advisors the technical equipment to enable the latter to prepare the data room report. The external advisors will have a predefined number of secure computer workstations at their disposal, managed by DG Competition and equipped with the necessary software and the relevant data sets, as the case may require.
- External advisors may bring additional computer codes, paper material or text in electronic format in the data room (e.g. handwritten, printed notes or electronic text files, a copy of the statement of objections, etc.), that may be necessary for the verification of the Commission's analysis and the preparation of the data room report. Paper material brought into the data room by the external advisors may be reviewed by DG Competition's officials at any time. Such documents may not, under any

circumstances, be taken out of the data room and are destroyed at the end of the data room procedure.

- During the data room procedure, external advisors may (i) take notes on, copy or otherwise replicate the data, and (ii) print documents, on pre-numbered blank pages provided by DG Competition. All printouts and notes may be reviewed by DG Competition's officials at any time. Any such printouts and notes may not, under any circumstances, be taken out of the data room and shall be destroyed at the end of the data room procedure.
- No external communication in any form is allowed. The data room is monitored by DG Competition officials at all times. External advisors may not carry any electronic device, camera, mobile phone or other communication or recording device while they are in the data room.
- Prior to accessing the data room, the external advisors must also sign the Non-Disclosure Agreement setting out the obligations and liabilities of the persons accessing the data room.
- After having obtained access to the data room, and only during access to the data room, external advisors may prepare a data room report (the "Data Room Report"). The Data Room Report is the only means through which the external advisors may communicate to and discuss the data in the data room with the addressees of the statement of objections (their clients), to which the latter would not have otherwise obtained access.

The Data Room Report contains the findings and conclusions of the external advisors regarding their assessment of data relevant for the exercise of their client's rights of defence. As a general rule, the analysis of quantitative data carried out by the external advisors must be replicable by the Commission. In particular, any analysis underlying findings or conclusions in the Data Room Report must be documented and identified by the external advisors.

At the end of the data room procedure, DG Competition will review and approve the Data Room Report that has been prepared and finalised by the external advisors to ensure that it does not contain any business secrets or other confidential information. After approval, DG Competition sends each addressee of the statement of objections the individual Data Room Report prepared by their respective external advisors.

The external advisors may not remove any data, information or documents from the data room, even if such data, information or documents do not contain business secrets and other confidential information.

It is not possible to claim legal professional privilege or other kind of privilege protection vis-à-vis any part of the Data Room Report to be provided to the addressees of the statement of objections.

If any of the rules or obligations are not respected by any of the external advisors, all of the relevant party's external advisors will be immediately requested to leave the data room.

In addition, the Commission and the data providers may take all appropriate legal action in case of breach of the Data Room Rules and/or the Non-Disclosure Agreement, including but not limited to actions for damages. The Commission may also inform the relevant law bar associations or other professional associations, as appropriate, of a violation of the applicable deontological or professional conduct rules.

### 1.3.3 Involvement of data providers in a data room procedure

Following a request to organise a data room by the addressees of a statement of objections, DG Competition informs the data providers in writing and seeks to obtain their consent. DG Competition identifies the information to be disclosed and provides the reasons for the proposed disclosure. A time limit is set during which the data providers may submit written comments.

Data providers are given the opportunity to express any potential concerns in relation to the data room procedure. DG Competition may implement measures to address such concerns. For instance, if the data providers are concerned about potential retaliatory measures from the addressees of a statement of objections, DG Competition may anonymise relevant variables, or aggregate certain data to the extent that such altered data would still afford the addressees of a statement of objections an adequate opportunity to exercise their rights of defence.

At any point during the course of the data room, the data providers' legal counsel, at their request, may be allowed access to the data room for the sole purpose of ensuring that appropriate safeguards are in place.

### 1.3.4 Role of the Hearing Officer

In case of persisting disagreement between DG Competition and the addressees of a statement of objections, or the data provider, the matter may be brought before the Hearing Officer. The Hearing Officer may take a decision on the basis of Articles 7 and 8 of the Hearing Officers' Terms of Reference, and may order the disclosure of confidential information in a data room under the conditions laid down in Article 8(4) of the Hearing Officers' Terms of Reference.

## 1.4 **Commission updates its guidance on the preparation of public versions of decisions adopted under the Merger Regulation**

On 26 May 2015 the Commission updated its guidance on the preparation of public versions of decisions adopted under the Merger Regulation, that is to say, the versions published in the Official Journal and on the DG Competition website.

The updated guidance concerns only the preparation of the public version of Commission decisions and related publications. It outlines:

- what undertakings can claim for redaction as business secrets and confidential information and what is not usually considered to be confidential information;
- how confidentiality for business secrets and other confidential information can be claimed;

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- what the Commission usually redacts on its own initiative in the public version of a decision; and
  - the procedure that should be followed to settle confidentiality claims arising out of publication of the Commission decision and the related publications.

Undertakings can claim confidentiality for business secrets and other confidential information. Claims can be put forward by the addressee of the decision or by any other undertaking which submitted information to the Commission during the investigation of the merger.

“Business secrets” are confidential information about an undertaking’s business activity, the disclosure of which could result in serious harm for the same undertaking. The interests liable to be harmed by disclosure must objectively be worthy of protection.

“Other confidential information” is information other than business secrets, insofar as its disclosure would significantly harm a person or undertaking. Again, the interests liable to be harmed by disclosure must objectively be worthy of protection.

Generally all information that is not covered by the above definitions of “business secrets” and “other confidential information” will not be considered confidential.

In particular, DG Competition does not normally consider that information that has lost its commercial importance, for instance due to the passage of time, is still confidential. The GCEU has ruled a period of five years in itself to be sufficient for information to lose its qualification as a business secret or other confidential information.<sup>5</sup> Confidential treatment of information that is more than five years old may be granted exceptionally, if the provider can show that the information still constitutes an essential element of the commercial position of the undertaking concerned.

In general, an undertaking cannot claim confidentiality for an entire document or whole sections thereof because it is usually possible to protect confidential information using only limited redactions. An undertaking claiming confidentiality is required to identify any information in the decision which stems from the undertaking and which it considers as falling within the ambit of professional secrecy. In addition, the undertaking must substantiate each claim for confidentiality in writing, and explain why interests worthy of protection would be harmed by disclosure.

If the undertaking fails to identify the information which it considers to be confidential, the Commission may assume that the decision, and, where relevant, the summary of the decision, the final report of the Hearing Officer and the opinion of the Advisory Committee do not contain any business secrets or other confidential information and, consequently, that the undertaking has no objections to the disclosure of the information in those documents.

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<sup>5</sup> See, for example, *Evonik Degussa v European Commission*, T-341/12, EU:T:2015:51, paragraphs 84-85.

Irrespective of claims for confidentiality, other information redacted by the Commission in the public version of the decision (and the related publications) may include:

- personal data, in line with the requirements of the Data Protection Regulation (for example, information relating to an identified or identifiable natural person);
- information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers; and
- military secrets.

Once all confidentiality claims have been settled, the Commission will send the parties concerned a redacted version of the decision with the confidential information removed. In the absence of reply within the deadline set by the Commission, the Commission will be entitled to publish this redacted version.

If the undertaking considers that this public version of the decision still contains business secrets or other confidential information, it can refer the matter to the Hearing Officer within the deadline set by the Commission.

In recent years publication of the non-confidential versions of merger decisions has been substantially delayed,<sup>6</sup> but it is expected that the revised guidance will accelerate publication.

#### **1.5 Commission's DG Competition agrees a best practices cooperation framework for mergers with China's Ministry of Commerce (MOFCOM)**

On 15 October 2015 the Commission's DG Competition and the Ministry of Commerce (MOFCOM) of the People's Republic of China signed a guidance document on best practices for cooperation on reviewing mergers.

Building on Terms of Reference on EU-China Competition Policy Dialogue agreed with MOFCOM in 2004, this guidance document creates a dedicated framework to strengthen cooperation and coordination between the Commission and China's merger review authority, MOFCOM.

Cooperation between competition authorities increases the efficiency of investigations and reduces the burden on the merging parties, in particular when authorities are able to share information and to discuss timetables with each other and with the merging companies.<sup>7</sup>

The guidance will facilitate communication throughout the entire merger review procedure on issues of procedure and substance, including the definition of relevant markets, theories of harm, competitive impact assessments and remedies. The guidance notes that DG

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<sup>6</sup> In Phase II cases cleared with commitments, publication of non-confidential versions of decisions was taking eight months on average.

<sup>7</sup> The European Commission signed comparable framework agreements with the US authorities (the US Department of Justice and Federal Trade Commission) issued in 2002 and revised in 2011 as well as with the Japanese Fair Trade Commission in 2003.

Competition and MOFCOM will be able to coordinate information requests to the merging parties and third parties, including exchanging draft questionnaires. Both authorities will also be able to designate a liaison officer for receiving and facilitating requests regarding case cooperation.

Enforcement of the Anti-Monopoly Law in China is shared by three agencies. MOFCOM is responsible for merger review, the National Development and Reform Commission (NDRC) enforces the rules against price-related infringements and the State Administration of Industry and Commerce (SAIC) is responsible for non-price related infringements. For completeness, mention should be made also of a Memorandum of Understanding, signed in 2012 between the Commission on the one hand and the NDRC and SAIC on the other, that creates a dedicated framework to strengthen cooperation and coordination.

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## 2. ARTICLE 101 INFRINGEMENTS - CARTELS

### 2.1 Cartel practices

#### 2.1.1 Pre-price fixing exchanges of “quotation” prices constitute a restrictive practice prohibited by Article 101(1) TFEU

The Commission fined Dole Food Company Inc. and Dole Germany OHG (together “Dole”) an amount of €45,600,000, jointly and severally, for their participation in a cartel concerning the marketing of bananas.

The case provides an important illustration of how “pre-pricing” discussions between competitors can amount to a restriction of competition prohibited by Article 101(1) TFEU. The facts are important and so are set out in detail below (based on the GCEU’s summary of the Commission’s fining decision).

The banana business has three “tiers” of business: premium Chiquita brand bananas, second-tier bananas (Dole and Del Monte brands) and third-tier bananas, the latter including a number of other banana brands. This brand-division was reflected in banana pricing.

During the relevant period the banana business in Northern Europe was organised in weekly cycles. Banana shipping from Latin American ports to Europe took approximately two weeks. Banana shipments to Northern European ports generally arrived weekly according to regular shipping schedules.

Bananas were shipped green and were green on arrival at port. They were then either delivered directly to buyers (green bananas) or ripened and then delivered approximately one week later (yellow bananas). Ripening could be carried out by the importer or be organised by the buyer. Importers’ customers were generally ripeners or retail chains.

Chiquita, Dole and Weichert set their quotation prices for their brands each week, and announced them to their customers. The expression “quotation prices” usually corresponded to quotation prices for green bananas, while quotation prices for yellow bananas were normally the green quote plus a ripening fee.

The prices paid by retailers and distributors for bananas (known as “actual prices” or “transaction prices”) could be the result either of negotiations taking place weekly, or of the implementation of supply contracts with pre-established pricing formulae mentioning a fixed price or linking the price to a quotation price of the seller or a competitor or another quotation price, such as ‘the Aldi price’ (set by Aldi as a counter-offer to the prices offered by its suppliers).

The undertakings to which the contested decision was addressed engaged in bilateral pre-pricing communications during which they discussed factors relevant to the setting of quotation prices for the forthcoming week, or discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week. Those communications took place before the undertakings concerned set their quotation prices, and all related to future quotation prices.



Dole thus communicated bilaterally with both Chiquita and Weichert. Chiquita was aware or at least foresaw that Dole had pre-pricing communications with Weichert. The Commission took the view that those bilateral pre-pricing communications were designed to reduce uncertainty as to the conduct of the undertakings concerned with respect to the quotation prices to be set by them on Thursday mornings.

The Commission found that, after setting their quotation prices, the undertakings concerned exchanged their quotation prices bilaterally. That subsequent exchange enabled them to monitor the individual pricing decisions in the light of the previous pre-pricing communications and reinforced their links of cooperation.

The Commission took the view that the quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices and were relevant for the banana trade and the prices obtained. The prices of some transactions were linked directly to quotation prices through formulae.

The Commission considered that the undertakings concerned must necessarily have taken account of the information received from competitors when determining their conduct on the market, while Chiquita and Dole even expressly admitted having done so.

The Commission concluded that the pre-pricing communications, which took place between Dole and Chiquita and between Dole and Weichert, were liable to influence operators' pricing behaviour.<sup>8</sup> They therefore constituted a concerted practice having as its object the restriction of competition within the meaning of Article 81 EC (now Article 101 TFEU).

Dole challenged the Commission's decision before the GCEU against the Commission's decision, but the GCEU upheld the Commission's decision on the ground that an exchange of "pre-pricing" information that might have a certain influence on prices is sufficient to establish the existence of a restriction of competition "by object".<sup>9</sup>

Dole appealed against the GCEU's judgment arguing *inter alia* that the exchanges of information did not amount to a restriction of competition "by object" because the pre-pricing communications were not capable of removing uncertainty as to actual prices.

The CJEU recalled that certain types of coordination between undertakings, in particular on the price, quantity or quality of goods and services, reveal a sufficient degree of harm to competition, which may be considered to constitute *per se* infringements of competition law – without a need to examine their effects.<sup>10</sup>

The CJEU further specified that, based on the wording of the Article 101(1) TFEU, an anticompetitive object can be established even though there is no direct connection between the concerted practice and consumer prices.<sup>11</sup>

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<sup>8</sup> Commission Decision C(2008) 5955 final, recitals 54 and 271.

<sup>9</sup> *Dole Food and Dole Fresh Fruit Europe v Commission*, T-588/08, EU:T:2013:130.

<sup>10</sup> *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13P, EU:C:2015:184, paragraphs 113 and 114.

<sup>11</sup> At paragraph 125.

The CJEU then confirmed the GCEU's findings that pre-pricing information in the form of "quotation" prices was relevant to the market concerned because market signals, market trends and indications about the intended development of banana prices could be inferred from those quotation prices, which were important for the banana trade and the prices obtained.<sup>12</sup>

Thus, the CJEU confirmed its *T-Mobile* decision<sup>13</sup> according to which an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object.

The CJEU's judgment reaffirms the law as already stated clearly in the Commission's guidelines on horizontal restrictions of competition. An exchange of parameters relevant for future pricing between people involved in price-setting is presumed to restrict competition "by object" and may be considered to constitute a *per se* infringement of competition law. In other words, it is no defence to prove that the pre-pricing discussions did not actually restrict competition. Undertakings that exchange pre-pricing information expose themselves to the risk of fines and follow-on damages actions in the same way as undertakings that exchange actual prices.

#### 2.1.2 Facilitating the operation of a cartel amounts, in itself, to an infringement of Article 101(1) TFEU

In its landmark judgment in *AC-Treuhand II*, the CJEU confirmed that a consultancy firm not active on the cartelised market may be held liable under Article 101 TFEU.<sup>14</sup> This confirmation goes squarely against the argument of Advocate General Wahl in his Opinion of 21 May 2015 that such a firm, which cannot exercise a competitive constraint on any of the relevant markets, cannot be held liable under Article 101 TFEU. Indeed, notwithstanding Advocate General Wahl's call to reconcile the desire to ensure the effectiveness of competition policy with the principle that offences and penalties must be defined by law, the CJEU opted for a broad interpretation of Article 101(1) so as to ensure the effectiveness of that Article.

By Decision COMP/38.589 – *Heat Stabilisers* the Commission found, in 2009, that AC-Treuhand played an essential role in a set of anti-competitive agreements and concerted practices relating to the tin stabiliser sector and the epoxidised soybean oil and esters sector<sup>15</sup> and imposed on it two fines totalling €174,000. AC-Treuhand's conduct consisted in organising a number of meetings which it attended and in which it participated, collecting and supplying to the producers concerned data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises. For all this AC-Treuhand received remuneration.

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<sup>12</sup> At paragraph 130.

<sup>13</sup> At paragraphs 121 to 123, referring to *T-Mobile and others v Commission*, C-8/08, EU:C:2009:343.

<sup>14</sup> *AC-Treuhand AG v Commission*, C-194/14P, EU:C:2015:717.

<sup>15</sup> Decision COMP/38.589, recitals 109 to 129, 668 and 669.

AC-Treuhand challenged the Commission decision before the GCEU, claiming that the Commission infringed Article 101 TFEU and the principle that offences and penalties must be defined by law. In dismissing this claim, the GCEU simply reiterated the reasoning and conclusion in its judgment in *AC-Treuhand I* that any undertaking, including consultancy firms not active on the cartelised market, could reasonably have foreseen that the prohibition laid down in Article 101(1) TFEU was applicable to it based on the former decision-making practice of the Commission and the previous case-law. Likewise, the GCEU dismissed AC-Treuhand's claim that the Commission ought to have imposed only a symbolic fine as in *AC-Treuhand I*.<sup>16</sup> The GCEU observed that a symbolic fine is merely an option and not a requirement. In a similar vein, given the Commission's significant discretion in setting the level of fines, the GCEU rejected AC-Treuhand's claim that the Commission breached the 2006 Fining Guidelines by departing from the methodology set out in those Guidelines.

This time AC-Treuhand appealed against the judgment of the GCEU to the CJEU (unlike in *AC-Treuhand I*) and provided the CJEU with the opportunity of adjudicating on the question of whether a consultancy firm may be held liable for infringement of Article 101(1) TFEU despite not being active on the cartelised market.

The CJEU answered affirmatively to this question, relying on the literal interpretation of Article 101(1) TFEU, the relevant case law, and the principle of the full effectiveness of Article 101(1) TFEU.

First, the CJEU observed that "there is nothing in the wording of that provision that indicates that the prohibition laid down therein is directed only at the parties to such agreements or concerted practices who are active on the markets affected by those agreements or practices."<sup>17</sup>

Second, taking into account the case-law related to the concept of an "agreement" and "concerted practice", the CJEU held that "it cannot be inferred [...] that the terms 'agreement' and 'concerted practice' presuppose a mutual restriction of freedom of action on one and the same market on which all the parties are present".<sup>18</sup> The CJEU further underlined this point by noting that "the text of Article [101](1) refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the internal market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question".

Last, the CJEU considered that the exclusion of cartel facilitators not active on any of the relevant markets from the scope of prohibition laid down by Article 101(1) TFEU would be liable to negate the full effectiveness of the prohibition laid down by that Article.

The CJEU's approach contrasts starkly with the more careful and strict approach taken by Advocate General Wahl. Advocate General Wahl argued that in order for an undertaking to be caught by the prohibition laid down in Article 101(1) TFEU, the undertaking must be

<sup>16</sup> *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256.

<sup>17</sup> *AC-Treuhand AG v Commission*, C-194/14P, EU:C:2015:717, paragraph 27.

<sup>18</sup> *Loc. cit.*, paragraph 33.

capable of exercising a competitive constraint for the other cartel members and thus it must be active on the cartelised market or a related market. Advocate General Wahl based this argument mainly on a teleological interpretation of Article 101(1) TFEU: the overall objective of the competition rules is to ensure that the effects of freedom of competition are not distorted by measures that have the consequence of favouring or putting at a disadvantage certain undertakings. Interestingly, the same objective was stated by the CJEU in giving the “*effet utile*” reasoning to reach the opposite conclusion. It is regrettable that the CJEU did not address the issues raised by Advocate General Wahl’s Opinion at all.

The CJEU then went on to find that AC-Treuhand’s conduct was “directly linked” to the efforts made by the producers of heat stabilisers and the very purpose of the services provided by AC-Treuhand was the attainment of the anti-competitive objectives in question. Thus, “it cannot be concluded that the action taken by AC-Treuhand in that capacity constituted mere peripheral services that were unconnected with the obligations assumed by the producers and the ensuring restrictions of competition.”

The CJEU was seemingly trying to limit the scope of cartel facilitation that is prohibited by Article 101(1) TFEU by drawing a line between facilitation directly linked to the cartel and facilitation that constitutes mere peripheral services unconnected with the restriction of competition. Unfortunately, it is not clear what level of involvement (e.g. gathering and supplying of sales data, organisation of meetings, acting as a moderator in the event of conflicts) will be required for facilitation to be classified as directly linked to the cartel.

In response to AC Treuhand’s claim that the GCEU infringed the principle enshrined in Article 49(1) of the EC Charter that offences and penalties must be defined by law (*nullum crimen, nulla poena sine lege*), the CJEU stated, based on case-law, that this principle requires the law to give a clear definition of offences and the penalties which they attract; and that such requirement is satisfied “where the individual concerned is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.<sup>19</sup>

The CJEU then found that AC-Treuhand should have expected its conduct to be declared incompatible with the EU competition rules, “especially in the light of the broad scope of the terms ‘agreement’ and ‘concerted practice’ established by the Court’s case-law”. The CJEU also noted that the Commission had previously taken the view that a consultancy firm could infringe Article 101(1) TFEU in this way (Case IV/29.869 – *Italian cast glass*), and the case law had not changed since then.

For all these reasons the CJEU concluded that the GCEU was correct to hold AC-Treuhand liable under Article 101(1) TFEU, and this notwithstanding the strong and principled view taken by the Advocate General that there should be no penalty without a clear law to this effect.

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<sup>19</sup> *Loc. cit.*, paragraph 40, citing *Evonik Degussa v Commission*, C-266/06 P, EU:C:2008:295, paragraph 39.

## 2.2 Cartel fines

### 2.2.1 Reduction of the fine because of lack of proof of the continuous nature of the infringement

In COMP/39482 – *Exotic Fruits (bananas)*, the Commission fined FSL Holdings and its subsidiaries Firma Léon Van Parys and Pacific Fruit Company Italy (together “Pacific Fruit”) an amount of €8,919,000 for an anti-competitive price-fixing agreement with Chiquita Brands International Inc. (“Chiquita”) in the import, marketing and sale of bananas in southern European countries from 28 July 2004 to 8 April 2005. Chiquita as first leniency applicant was granted full immunity from fines.

Pacific Fruit challenged the Commission’s decision before the GCEU claiming *inter alia* that, the Commission breached essential procedural requirements and Pacific Fruit’s rights of defence, misused its powers and unduly influenced the leniency applicant, Chiquita.

Furthermore, Pacific Fruit alleged that the Commission made a manifest error of assessment in determining the gravity and duration of the infringement.

The GCEU dismissed the arguments regarding the Commission’s breach of essential procedural requirements by relying on documents obtained as part of a tax investigation by the Italian tax authority, and evidence obtained during another cartel investigation (Case COMP/39.188 – *Bananas*). The GCEU also dismissed Pacific Fruit’s arguments that the Commission had misused its powers by exerting undue influence over the other cartel participant, Chiquita, as a result of its status of leniency applicant and had erred in its assessment of the evidence.

However, the GCEU decided that the Commission did not adequately demonstrate that the infringement was continuous. Therefore, the GCEU reduced the duration of infringement and, as a consequence, the fine imposed.<sup>20</sup>

In its decision, the Commission found that the price coordination scheme was set up at a meeting on 28 July 2004 and continued throughout 8 April 2005, and thus lasted for about eight months.

According to Pacific Fruit, the Commission failed to establish the continuous nature of the infringement to the requisite legal standard. Indeed, Pacific Fruit argued that the Commission could not conclude that the infringement continued through 2004 and 2005 on the sole basis of three short handwritten notes and one internal e-mail.

The GCEU annulled the Commission’s decision in part, stating that the Commission must first satisfy its initial burden of proof before it can argue that there is no evidence to suggest that the infringement was interrupted. In order to discharge the initial burden of proof, the Commission must present evidence of facts sufficiently proximate in time which allow the reasonable conclusion that an infringement continued without interruption between two

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<sup>20</sup> *FSL Holdings v Commission*, T-655/11, EU:T:2015:383.

specific dates. The Commission is not allowed to infer the participation of an undertaking in cartel activity from mere speculation based on imprecise evidence.

The GCEU then considered that in the present case there was no evidence of contacts between 12 August 2004 and 19 January 2005. Since price negotiations in the banana business take place weekly, the absence of evidence of contacts for a period of five months constituted a serious gap in the Commission's case.

The GCEU concluded that the Commission should have characterised the infringement as consisting of two single repeated infringements excluding the period for which evidence of collusion was lacking. The duration of the established infringement was thus therefore reduced from 8 months and 12 days to 3 months and 11 days. Accordingly the GCEU reduced the fine to €2,230,000.

This judgment shows that the GCEU diligently reviews arguments concerning infringement interruptions, and takes into account the specificities of the relevant market. Periods for which evidence of infringement inactivity is lacking must be assessed carefully by the Commission, especially when the conditions on the relevant market require coordination on a regular basis.<sup>21</sup> The Commission cannot simply refer to the secretive nature of a contested cartel to decide that it is a single and continuous infringement.

#### 2.2.2 The CJEU upholds the Commission's new concept of "direct EEA sales through transformed products"

On 9 July 2015 the CJEU issued its judgment in Case C-231/14P, *InnoLux Corp. v Commission*, confirming the existence of a new concept in cartel fining: "Direct EEA sales through transformed products". This new concept can be used by the Commission to calculate fines of an amount higher than a restrictive reading of its Fining Guidelines might suggest.

The judgment arose out of the Liquid Crystal Display ("LCD") cartel, a case which involved several LCD producers in Asia. The Commission determined that the cartel participants had three channels of sale into the European Economic Area (EEA):

- Direct EEA Sales (that is LCD panels for IT or TV applications sold directly to another undertaking in the EEA);
- Direct EEA Sales Through Transformed Products (that is LCD panels incorporated intra-group into a final IT or TV product and subsequently sold to another undertaking in the EEA); and
- Indirect Sales (that is LCD panels sold by one of the cartel participants to another undertaking outside the EEA, which would then incorporate the panels into final IT or TV products and sell them in the EEA).

<sup>21</sup> *FSL Holdings v Commission*, T-655/11, EU:T:2015:383, paragraphs 493 to 498, especially 497.

The Commission took the view that inclusion of the third category was not necessary for the purposes of imposing a fine to achieve a sufficient level of deterrence, but did take account of the first two channels. InnoLux challenged the inclusion of the second channel.

The GCEU rejected InnoLux's challenge<sup>22</sup> and so InnoLux appealed to the CJEU. The CJEU upheld the GCEU and the Commission, notwithstanding the opinion of the Advocate-General to the contrary.<sup>23</sup>

The CJEU referred first to the established case law according to which the amount of the fine imposed on an undertaking must reflect "the economic significance of the infringement and the relative size of the undertaking's contribution to it".<sup>24</sup> The CJEU then deduced that the value of sales referred to in Point 13 of the Fining Guidelines "encompasses all sales made on the market concerned by the infringement in the EEA". Moreover, the CJEU observed that it is not necessary to determine whether those sales were genuinely affected by that infringement, since the proportion of turnover derived from such sales "is best able to reflect the economic importance" of the infringement.<sup>25</sup> It should be noted that in *Guardian Industries*<sup>26</sup> (and also *LG Display*,<sup>27</sup> another case involving LCDs) the CJEU approved of the fact that internal sales to a related party in the EEA were taken into account in order to reflect the economic importance of the infringement. However, the case of *InnoLux* differed from these two cases in that the internal sales of the cartelised product to related parties took place outside the EEA.

It is in respect of this latter point that the CJEU took an innovative step. It extended the approach in *Guardian Industries* and *LG Display* by ruling as follows: "whereas in the present case the internal sales of the goods concerned by the infringement took place within a vertically-integrated undertaking outside the EEA, nothing precludes, for the purposes of setting the fine to be imposed on a cartel participant belonging to that undertaking, account being taken of the sales of finished products by that undertaking to independent third parties. On the contrary... it is apparent precisely from paragraph 60 of the judgment in *Guardian Industries and Guardian Europe v Commission* ... that those sales must generally be taken into account since they were inevitably affected by that infringement".<sup>28</sup> It is implicit in the CJEU's judgment that the value of sales to be taken into account is not the full value of the downstream product, but the proportion of that value that corresponds to the value of the cartelised product that was incorporated into the downstream product.<sup>29</sup>

<sup>22</sup> *InnoLux Corp v Commission*, T-91/11, EU:T:2014:92

<sup>23</sup> *InnoLux Corp. v Commission*, C-231/14P, EU:C:2015:451; Advocate General's Opinion, EU:C:2015:292.

<sup>24</sup> At paragraph 50, citing *Team Relocations and others v Commission*, C-444/11P, EU:C:2013:464, paragraph 76; *Guardian Industries and Guardian Europe v Commission*, C-580/12P, EU:C:2014:2363, paragraph 57, and *LG Display and LG Display Taiwan v Commission*, C-227/14P, EU:C:2015:258, paragraph 53.

<sup>25</sup> At paragraph 51.

<sup>26</sup> *Guardian Industries*, C-580/12P, EU:C:2014:2363.

<sup>27</sup> *LG Display and LG Display Taiwan v Commission*, C-227/14P, EU:C:2015:258.

<sup>28</sup> *InnoLux Corp. v Commission*, C-231/14P, EU:C:2015:451, at paragraph 70.

<sup>29</sup> See paragraph 53.

The CJEU emphasised that this case was not about whether the Commission had jurisdiction.<sup>30</sup> (In this way, the CJEU disposed of the Advocate General's opposing opinion, which was based on considerations of jurisdiction.) The Commission's jurisdiction was not in dispute because the cartel participants, including InnoLux, made some sales of LCDs direct to independent third parties in the EEA.

The case shows that the CJEU is prepared to give a wide interpretation to the expression in the Fining Guidelines: "the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ... relates ... within the EEA".

### 2.2.3 Cartel participant obtains interim relief from obligation to provide a bank guarantee to secure payment of fine

When a party challenges a Commission decision imposing fines before the GCEU, the general rule is that it has to pay the fine pending the outcome of the case, or it can provide a bank guarantee to secure payment of the fine plus interest at the end of the court case. It is generally very difficult to escape having at least to provide a bank guarantee.<sup>31</sup> However, on 15 December 2015 the president of the GCEU ordered interim measures by which a company was relieved of the obligation to provide a bank guarantee on condition that:

- The company provided regular reports on its financial situation and on the funds realised through execution of a restructuring plan and the sale of assets; and
- As soon as the company had realised the sum of € million from the sale of its assets, this amount would be paid to the Commission.<sup>32</sup>

The GCEU will suspend execution of a Commission decision only if it is demonstrated (a) that the applicant has a *prima facie* case, (b) that there is urgency, in the sense that if the measure is not suspended, the applicant will suffer grave and irreparable harm, and (c), that the balance of all the interests is in favour of suspension. On this latter point, the GCEU examined whether immediate execution of the contested decision would prejudice the applicant unduly if the contested decision was later annulled in the main action, and conversely, whether suspension of execution could impede the full effectiveness of the contested decision if it was upheld in the main action.

In this case the applicant was in serious financial difficulties. The Commission had already taken this into account and reduced the total fines to an amount of €33,694,000. The applicant was in the course of negotiating a restructuring plan with its banks and creditors, and was therefore unable to provide a bank guarantee or make any payments until that plan had been agreed. In these circumstances, the president of the GCEU considered that there was a case for the GCEU to consider that the fine should be reduced. On the question of urgency, the president referred to letters from the applicant's bankers observing that the perspectives for the applicant were uncertain given the liability to pay a fine that was

<sup>30</sup> At paragraphs 71 to 74.

<sup>31</sup> For an earlier case where the obligation to provide a bank guarantee was suspended temporarily, see *Cascades v Commission*, T-308/94 R, EU:T:1998:90.

<sup>32</sup> *CCPL – Consorzio Cooperative di Produzione e Lavoro SC and others v Commission*, T-522/15R, not yet published.



materially higher than that foreseen in the restructuring plan, and as a result the initial plan had been rejected by the banks. The president therefore decided that the condition of urgency was satisfied. On the balance of interests, the president observed that immediate execution of the Commission's decision would lead to liquidation of the applicant. As for ensuring the dissuasive nature of fines, the president observed that the Commission had made substantial reductions in other cases on the grounds of financial difficulties, notably in *ArcelorMittal Wire France and others v Commission*,<sup>33</sup> when Arcelor Mittal Wire France belonged to the largest steel group in the world. The president therefore concluded that the balance of interests was in favour of suspension. However, in order to take account of the financial interest of the Union, the president imposed the two conditions mentioned above, namely regular financial reporting to the Commission and the payment of €5 million as soon as the applicant could realise such sum from the sale of its assets.

### 2.3 Joint and several liability

#### 2.3.1 CJEU allows separate challenges to a fine by parent and subsidiary companies

The Commission fined Total France SA an amount of €128,163,000 for its direct participation in the *Candle Waxes* cartels. The parent company, Total SA, was not a direct participant in the cartels, but was held jointly and severally liable for the fine. It was presumed that, by reason of its 98% shareholding in Total France SA, Total SA exercised a decisive influence over the conduct of its subsidiary. The subsidiary, Total France SA (which had changed its name to Total Raffinage Marketing), challenged the fine before the GCEU. The GCEU reduced the fine to €125,459,842 on the grounds that the Commission had breached the principles of proportionality and equal treatment by treating participation periods of 7 months and 28 days for paraffin waxes, and 6 months and 12 days for slack wax, each as participation for a full year.<sup>34</sup> In a separate challenge before the GCEU brought by the parent company, Total SA, the latter's fine was not reduced.<sup>35</sup>

Total SA appealed to the CJEU on several grounds. The ground that succeeded was the argument that Total SA's fine should have been reduced by the same amount as the reduction applied to its subsidiary's fine. Total relied on an earlier judgment of the CJEU, *Commission v Tomkins*.<sup>36</sup> In that case, the CJEU held that, in a situation "where the liability of a parent company is purely a derivative of that of its subsidiary and in which no other factor individually reflects conduct for which the parent company is held liable, the liability of the parent company cannot exceed that of its subsidiary".<sup>37</sup> This common sense solution is subject, however, to certain procedural requirements. The parent company and the subsidiary must each bring applications for annulment before the GCEU "having the same object". This requirement of having the same object "does not require that the scope of challenges by the parent and the subsidiary, and the arguments on which they rely, must be identical".<sup>38</sup> In

<sup>33</sup> *ArcelorMittal Wire France and others v Commission*, T-385/10R, EU:T:2010:52.

<sup>34</sup> *Total Raffinage Marketing v Commission*, T-566/08, EU:T:2013:423.

<sup>35</sup> *Total SA v Commission*, T-548/08, EU:T:2013:434.

<sup>36</sup> *Commission v Tomkins*, C-286/11P, EU:C:2013:29.

<sup>37</sup> At paragraph 38, citing *Commission v Tomkins*, C-286/11P, EU:C:2013:29, paragraphs 37, 39, 43 and 49).

<sup>38</sup> At paragraph 39, citing *Commission v Tomkins*, C-286/11P, EU:C:2013:29, paragraph 43).

Total SA's case, the CJEU held that these procedural requirements were satisfied. Both Total SA and Total France SA challenged the Commission's fining decision, and their respective challenges "had the same object in so far as they concerned, in particular, the duration of the infringement".<sup>39</sup> Consequently, the CJEU set aside the judgment of the GCEU in Case T-548/08, *Total SA v Commission*, and reduced Total SA's fine to the same level as that of Total France SA (subsequently renamed Total Raffinage Marketing).<sup>40</sup>

The case of *Total SA v Commission* is of interest from a procedural point of view. In cases where a parent company is held jointly and severally liable for the cartel infringement of a subsidiary, there is an understandable temptation for the parent company to bring a separate court challenge to the challenge made by its subsidiary. If the two companies were to make a joint challenge in one action, this would tend to reinforce the Commission's argument that the parent company exercised a decisive influence over the subsidiary. However, bringing separate court challenges carries the risk that the subsidiary may succeed and the parent company may fail. As a general rule of procedure, a judgment annulling a Commission act benefits only the party who brought the challenge – see *Commission v AssiDomän Kraft Products and Others*.<sup>41</sup> Other parties who did not challenge the act, or who challenged it unsuccessfully do not benefit from the annulment. In *Commission v Tomkins*, the CJEU recognised that this rule can sometimes produce illogical and unjust results. It therefore created an exception in the particular case where the parent company's fine is derived entirely from that of its subsidiary. This exception was applied again in *Total SA v Commission*, and so appears to be well-established.

### 2.3.2 CJEU ruling illustrates the problems flowing from a late challenge before the GCEU followed by intervention as an interested party

The Commission fined Fresh Del Monte Produce Inc. ("Del Monte") and International Fruchtimport Gesellschaft Weichert GmbH & Co. KG ("Weichert") an amount of €14,700,000, jointly and severally, for their participation in a cartel concerning the marketing of bananas.

Del Monte challenged the Commission's decision before the GCEU. Weichert introduced a challenge as well, but was late, so its direct challenge was inadmissible. Weichert applied to the GCEU to intervene in support of the order sought by Del Monte. Weichert's application for leave to intervene was granted.

The GCEU rejected all the arguments made by Del Monte that sought to have the Commission's decision annulled in so far as it applied to that company. However, the GCEU reduced the fine for which Del Monte was jointly and severally liable, to €8,820,000.

Del Monte appealed to the CJEU, requesting that the GCEU's judgment be set aside and that the Commission's decision be annulled in so far as it applied to Del Monte. This was Case C-293/13P.

<sup>39</sup> At paragraph 40. Unfortunately the CJEU did not give any further guidance than this on the meaning of the words "having the same object".

<sup>40</sup> *Total SA v Commission*, C-597/13P, EU:C:2015:613.

<sup>41</sup> *Commission v AssiDomän Kraft Products and Others*, C-310/97P, EU:C:1999:407.

The Commission also appealed, requesting that the GCEU's judgment be set aside in so far as it reduced the fine imposed on Del Monte. This was Case C-294/13P.

Weichert, as intervener in the proceedings before the GCEU, introduced cross-appeals in both cases, raising several claims, including a claim that the GCEU's judgment should be set aside and the Commission's decision annulled in its entirety. However, the CJEU declared Weichert's cross-appeal in Case C-293/13P inadmissible.

The CJEU observed that, since Weichert's application to challenge the Commission's decision before the GCEU was late, that decision had become definitive vis-à-vis Weichert. Any annulment of the decision in so far as it applied to Del Monte would leave Weichert liable on its own for the full amount of the fine. Weichert therefore had no interest in annulment of the Commission's decision. Its cross-appeal in Case C-293/13P was therefore inadmissible.

On the other hand, Weichert had an interest in ensuring that it was not left solely liable for the fine imposed jointly and severally on itself and Del Monte. Weichert therefore had an interest in submitting a response in Case C-294/13P, not to argue for annulment of the Commission's decision, but to support the Commission's defence of the validity of that decision.

As far as the substance of the appeals by Del Monte and the cross-appeals by Weichert are concerned, these were all dismissed by the CJEU.<sup>42</sup> As far as the amount of the fine was concerned, the CJEU found that part of the reduction of the fine made by the GCEU was unfounded in law, and so established the fine imposed jointly and severally on Del Monte and at the level of €9,800,000.<sup>43</sup> The end result was that Weichert and Del Monte were jointly and severally liable for an amount of €9,800,000 and Weichert was left solely liable for the balance of the original fine as set by the Commission, namely €1,900,000 (€14,700,000 less €9,800,000).

The case illustrates the obvious importance of making sure that, if a company decides to challenge a Commission fining decision before the GCEU, it does so within the prescribed deadline. The case also illustrates the well-established principle that if a party obtains annulment of a Commission fining decision, that annulment benefits only the party who obtains the annulment.<sup>44</sup> Moreover, if another party was held jointly and severally liable for the fine, that party will see his liability increased if the first party is successful in obtaining annulment or a reduction in fine. As a general rule, if A and B are held jointly and severally liable for a fine, and A challenges the fine before the GCEU, B has an interest in challenging the fine also. B will not gain by A's success alone. On the contrary, B will lose.

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<sup>42</sup> *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.

<sup>43</sup> Principally on the ground that a reduction in fine, as provided for by the Leniency Notice, is justified only when an undertaking provides information to the Commission without being asked to do so. This is not the case when responding (voluntarily) to a request for information under Article 18(2) of Regulation 1/2003.

<sup>44</sup> *Commission v AssiDomän Kraft Products and Others*, C-310/97P, EU:C:1999:407.

### 2.3.3 Single continuous infringement between Del Monte, Dole, Chiquita and Weichert upheld

In the *Del Monte* case discussed in section 2.3.2 above, Del Monte argued that the GCEU erred by concluding that Del Monte participated in a single continuous infringement with Dole and Chiquita while at the same time acknowledging that Weichert had no knowledge of the exchanges of information between Chiquita and Dole.

The CJEU dismissed Del Monte's argument on the basis of the case law which provides that an undertaking can be held liable for a single and continuous infringement even if it participated in only some of the forms of anti-competitive conduct comprising the single and continuous infringement, but where that undertaking could reasonably have foreseen other competitive conduct, or was prepared to take the risk that such conduct existed.

### 2.3.4 Finding that Del Monte exercised a decisive influence over Weichert upheld

In the *Del Monte* case discussed in section 2.3.2 above, a large part of the CJEU's judgment on the substance was devoted to reviewing the GCEU's assessment of the evidence relied upon by the Commission to find that Del Monte exercised a decisive influence over Weichert's conduct on the relevant market.

During the infringement Del Monte held a 80% shareholding in Weichert, its distributor for northern Europe. Because Weichert was not wholly-owned by Del Monte, the Commission did not apply the *Akzo Nobel* presumption but adduced evidence to prove that Del Monte exercised decisive influence over Weichert. In particular, the Commission relied on evidence of economic, organisational and legal links between the two entities,<sup>45</sup> and so held the two entities jointly and severally liable for their participation in the infringement. Del Monte, supported by Weichert, challenged this finding before the CGEU. When the CGEU rejected this challenge, Del Monte appealed to the CJEU.

In rejecting Del Monte's appeal on this point, the CJEU made the following striking statements.

- The fact that Del Monte was legally precluded from involvement in the management of Weichert's day-to-day business and that its veto rights did not allow it, inter alia, to impose a particular budget, does not mean that Del Monte was precluded altogether from being able to exercise decisive influence over Weichert's conduct on the relevant market. Indeed, other circumstances enabled it to wield power, notably the capital links between the two companies, provisions in a distribution agreement between the two companies, provisions in the partnership agreement, and the fact that Del Monte had the contractual ability to influence the volume of bananas supplied by it to Weichert.

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<sup>45</sup> COMP/39.188 – *Bananas*, recital 433.

- The fact that Del Monte received information reports from Weichert over and above the requirements of the distribution agreements between the parties provided a clear indication of exercise of influence by Del Monte over Weichert.
- The fact that a subsidiary does not carry out all the parent company's instructions does not prevent a finding that the parent company exercised decisive influence, as long as failure to carry out instructions is not the norm.

## 2.4 Cartel procedures

### 2.4.1 CJEU rules that the Commission may not launch a new investigation on the basis of the fortuitous discovery of another cartel during a "dawn raid"

The Commission suspected DB Energie of having accorded unjustified preferential treatment to other Deutsche Bahn subsidiaries through rebates for the supply of electric traction energy. In the course of subsequent on-site inspections in 2011, Commission inspectors found documents at the business premises of Deutsche Bahn which the Commission considered might indicate the existence of further separate anti-competitive conduct outside the scope of the initial inspection decision. (The Commission inspectors had been informed prior to the initial inspection that this might be the case.) Accordingly, another inspection decision was notified to Deutsche Bahn while the first inspection was still being carried out. The second inspection decision concerned suspected competition infringements by another Deutsche Bahn subsidiary, DUSS, through the strategic use of infrastructure managed by Deutsche Bahn. A third inspection in this context was also carried out at Deutsche Bahn's premises in order to substantiate the Commission's concerns.

Following the inspections, Deutsche Bahn brought actions against the Commission for annulment of the second and third inspection decisions on the grounds that they infringed Deutsche Bahn's right *inter alia* to effective judicial protection.

By judgment of 6 September 2013 the GCEU dismissed the actions in their entirety, confirming the Commission's broad powers and discretion when conducting on-site inspections. In particular, the GCEU confirmed that there was no need for the issuance of a national search warrant and judicial supervision prior to the inspections because EU law adequately safeguarded the parties' rights, and comprehensive judicial review would be available *ex post*. Furthermore, with respect to the fact that the Commission officials had been specifically informed prior to the first inspection about the possibility of there being a second antitrust infringement, the GCEU merely stated without more that "it ha[d] to be considered that there were valid reasons for providing the officials with general background information on the case", a remark for which it was later criticised by the CJEU.

Before the CJEU, Deutsche Bahn raised four grounds of appeal of which only three were examined by the Court:<sup>46</sup>

- The GCEU misinterpreted and misapplied the fundamental right to the inviolability of the home provided for in Articles 7 of the EU Charter of fundamental rights and 9 of the ECHR;
- The GCEU misinterpreted and misapplied the right to effective judicial protection provided for in Article 47 of the EU Charter and Article 6(1) of the ECHR; and
- The GCEU infringed the rights of the defence due to irregularities vitiating the conduct of the first inspection.
- The CJEU dismissed both the first and second grounds of appeal, agreeing with the GCEU's findings that (i) the lack of prior judicial authorisation is not, in itself, capable of rendering an inspection measure unlawful, notably because the presence of a post-inspection judicial review is considered by the ECHR as capable of offsetting the lack of prior judicial authorisation<sup>47</sup>; and (ii) the challenge of the inspection decision before the EU Courts can be initiated immediately after the company has been notified of the Commission decision, meaning that there is no need to wait until the Commission has adopted the final decision on the suspected infringement to bring an action for annulment.

With respect to the third ground of appeal, the CJEU followed the opinion of its Advocate General and upheld Deutsche Bahn's arguments.

The CGEU recalled that the information obtained during investigations must not be used for purposes other than those indicated in the inspection warrant or decision and that this requirement is "aimed at preserving in addition to business secrecy [...] undertakings' rights of defence, which Article 20(4) [of Regulation 1/2003] is intended to safeguard". The CGEU continued by stating that it could not, however, "be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules set forth in the Treaty".<sup>48</sup>

The CGEU therefore concluded that, "on the one hand, the Commission is required to state reasons for its decision ordering an inspection. On the other hand, if the statements of reasons for that decision circumscribe the powers conferred on the Commission's agents, a search may be made only for those documents coming within the scope of the subject-matter of the inspection".

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<sup>46</sup> *Deutsche Bahn and Others v. Commission*, C-583/13, EU:C:2015:404.

<sup>47</sup> See *Hoechst AG v. Commission*, Joined C-46/87 and C-227/88, EU:C:1989:337, where the ECJ ruled that "the Commission is required to respect the relevant procedural rules laid down by national law and must make sure that the competent body under national law has all that it needs to exercise its own supervisory powers" (paragraph 5).

<sup>48</sup> *Deutsche Bahn and Others v. Commission*, C-583/13, EU:C:2015:404, paragraph 59.

In the present case, the CGEU considered that the subject-matter of the first inspection, as set out in the decision, also had to include the particulars of the additional complaint. The lack of reference to that separate and additional complaint in the description of the subject-matter of the inspection decision therefore infringed the obligation to state reasons and the rights of defence of the undertaking concerned.

The CGEU thus concluded that “the first inspection was vitiated by irregularity since the Commission’s agents, being previously in possession of information unrelated to the subject-matter of that inspection proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision”. The CJEU criticised the GCEU for saying that the Commission had valid reasons for telling its officials about the existence of the complaint about DUSS before the first inspection when it was manifestly clear that the provision of such information did not fall within the subject-matter of the first inspection decision. As a result, the Commission disregarded the safeguards forming the framework for the Commission’s powers of inspection. Accordingly, the GCEU’s judgment had to be set aside in so far as it dismissed the actions brought against the second and third inspection decisions.

The CJEU made use of its power to give final judgment in the matter and annulled the second and third inspection decisions of the Commission because the information on which those decisions were taken was obtained in the first investigation in breach of the principles that information obtained during investigations must be circumscribed by the terms of the inspection decision and must not be used for purposes other than those stated in that decision.

#### 2.4.2 GCEU upholds higher fines for parties who withdraw from settlement procedures

This case arose out of the Commission’s *Animal Feed Phosphates* cartel investigation in which fines totalling €176 million were imposed on certain producers of animal feed for price fixing and market sharing throughout the EEA.

During the investigation, the Commission engaged in settlement discussions with all the companies. (Entering into a settlement with the Commission enables a company to obtain a 10% reduction in fine.) However, Timab, which is a subsidiary of Roullier Group, withdrew from the settlement procedure. Therefore, the Commission proceeded with the standard administrative infringement proceedings against Timab, even though it had concluded settlements with the other parties.

The preparation of the potential settlement resulted in several meetings between the Commission and Timab, during which the evidence of the infringement available at that time was considered. Subsequently, the Commission informed Timab that it would likely have a fine imposed on it in the range of €1 to 44 million. However, in its final decision, the Commission levied a fine of nearly €60 million on Timab.

Timab challenged the Commission’s decision before the GCEU, notably on the basis that its legitimate expectations had been infringed. In particular, Timab argued that, in any event, the fine should not have been higher than the range of fines which had been notified to it, increased by 10%, i.e., the reduction of fine to which it was no longer entitled because it had withdrawn from the settlement procedure.

The GCEU found that there had been no infringement of Timab's legitimate expectations, and that Timab had not been treated unfavourably for having withdrawn from settlement procedure. The GCEU found that the Commission had relied on the same Guidelines on the method of setting fines, both in the settlement procedure and when it imposed the fine on Timab.

The GCEU found that the difference between the amount proposed during the settlement procedure and the final amount could be explained by two elements. First, the Commission applied, as part of the settlement procedure, reductions that it was not obliged to apply as part of the standard administrative procedure. Second, during the standard administrative procedure, the Commission became aware of new information and evidence which required it to review the file and adjust the amount of the fine imposed on Timab.

Therefore, the GCEU found that the Commission did not treat Timab unfavourably for having withdrawn from the settlement procedure.

The GCEU took advantage of this case to make it clear that the Commission is not bound by the range of fines notified to companies as part of the settlement procedure. The Commission has a considerable margin of discretion to revise its proposed fines upwards without unlawfully penalising companies for withdrawing from the settlement procedure.

Furthermore, the calculation of a range of fines is a tool that is specific to the settlement procedure and is not found in the standard procedure. In the standard procedure, the Commission is only bound by its statement of objections, which normally does not specify a range of fines. Moreover, outside a settlement procedure the Commission is required to take into account any new evidence and information brought to its attention when calculating fines. The GCEU therefore considered that it would be illogical, and even inappropriate, that the Commission be required to apply, or to refer to, a range of fines falling within the scope of another procedure - a settlement procedure - that was no longer applicable.

#### 2.4.3 GCEU annuls Commission *Airfreight* decision for contradictory and inconsistent reasoning

The GCEU annulled the Commission Decision COMP/39258 – *Airfreight* in respect of all the airlines which challenged it and annulled the fines imposed on them, leaving the Commission decision valid solely in respect of Qantas Airways, the only undertaking which did not lodge a challenge.<sup>49</sup>

The GCEU annulled the decision on the technical grounds of internal inconsistencies within the decision. The GCEU's judgment can be taken as a caution to the Commission about the use of the concept of a single and continuous infringement. In the context of a single and continuous infringement, an undertaking may be held liable for participation in the single continuous infringement even if it participated directly only in one or some of the constituent elements of that infringement, if it is shown that undertaking knew, or should have known, that the collusion in which it participated was part of an overall plan that included all the constituent elements of the infringement.

<sup>49</sup> *Air Canada v Commission*, T-9/11, EU:T:2015:994.



Given the pending follow-on damages actions in Europe, the consequences of this judgment are significant but uncertain. With the annulment of the Commission's decision, a core element of proof for the plaintiffs falls. It could be very difficult of these plaintiffs to prove the existence of the infringement by themselves. It is possible that the national courts before which these damages actions are pending may stay the national proceedings until the CJEU renders its judgments in the event of appeal or until the Commission issues a new decision correcting the internal inconsistencies pointed out by the GCEU. In either scenario it will be some time before the practical consequences of the GCEU's judgment can be fully assessed.

On 9 November 2010, the Commission imposed fines totalling approximately €799 million on 14 undertakings for their participation in a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport ("the Swiss Agreement"), covering the EEA territory and Switzerland by which the participants coordinated their pricing behaviour in the provision of airfreight services with respect to various surcharges as well as commissions payable on surcharges. All airlines, including Lufthansa – the latter having obtained immunity from fines - but excluding Qantas, challenged this decision before the CGEU.

The GCEU annulled the Commission's decision on the ground of a defective statement of reasons caused by contradictions, first, between the grounds and the operative part of the Commission decision, and, second, within the grounds themselves.

(a) *Contradiction between the grounds and the operative part:*

The Commission found the existence of a single and continuous infringement covering airfreight services within the EU/EEA, between the EU and Switzerland and on routes between EU/EEA airports and third countries throughout the world. The Commission considered that the coordination took place at a worldwide level and therefore affected all the routes at the same time.

However, the scope of the Commission's competence varied depending on the routes concerned and which of three different provisions, namely Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement, were infringed. The Commission thus divided the operative part of its decision into four separate Articles.

- Article 1 concerns the Commission's competence to apply Article 101 TFEU and Article 53 of the EEA Agreement as regards routes between airports within the EEA, for the period from 7 December 1999 to 14 February 2006;
- Article 2 concerns the Commission's competence to apply Article 101 TFEU as regards routes between airports within the EU and airports outside the EEA, for the period from 1 May 2004 to 14 February 2006;
- Article 3 concerns the Commission's competence to apply Article 53 of the EEA Agreement as regards routes between airports in countries which are contracting parties to the EEA Agreement but which are not Member States and airports in third countries, for the period from 19 May 2005 to 14 February 2006;

- Article 4 concerns the Commission's competence to apply Article 8 of the Swiss Agreement as regards routes between airports within the European Union and airports in Switzerland, for the period from 1 June 2002 to 14 February 2006.

The CGEU agreed with the Commission that this division itself does not necessarily imply the existence of four separate infringements. However, the CGEU pointed out that if the anticompetitive conduct was regarded as comprising a single and continuous infringement in which all of the carriers at issue participated, all those carriers should have been listed in each Article. In this regard, the CGEU dismissed the Commission's argument that the failure to mention some of the carriers at issue in Articles 1, 3 and 4 can be explained by the fact that those carriers did not operate the routes referred to in those articles. Such argument goes against the very idea of there being a single and continuous infringement composed of a complex of anticompetitive conduct for which all the participants are liable, irrespective of the routes concerned.

The lack of mention of several carriers in Articles 1, 3 and 4 leads, in the CGEU's view, to either of the following interpretations:

- the operative part of the decision finds four separate single and continuous infringements, each concerning a different category of routes. (This might also explain the use of the word "infringements", in the plural, in Articles 5 and 6 of the contested decision.); or
- the operative part of the contested decision finds one single and continuous infringement, liability for which is attributed only to the carriers which - as regards the routes mentioned in each of the first four articles of the decision - participated directly in the unlawful conduct referred to in each of those articles or were aware of collusion regarding those routes and accepted the risk.

Both interpretations are contradictory to the grounds of the decision, which describe a single and continuous infringement in relation to all of the routes covered by the cartel and in which all of the carriers at issue allegedly participated.

(b) *Contradiction within the grounds:*

The GCEU also found that the grounds themselves are not entirely internally consistent and contain assessments which are difficult to reconcile with the existence of a single cartel covering all of the routes. Notably, the GCEU pointed out that the Commission took the first anticompetitive contact as the starting date except in the case of certain carriers which, according to the Commission, were not to be held liable for the infringement as regards routes between airports in the EEA. This is inconsistent with the Commission's application of the principles according to which, in the context of a single and continuous infringement, a person may be held liable for the participation of an undertaking in an infringement even though it is established that the undertaking concerned participated directly only in one or some of the constituent elements of that infringement, if it is shown that it knew, or should have known, that the collusion in which it participated was part of an overall plan that included all the constituent elements of the infringement.

Similar judgments were given the same day for the other airlines concerned.<sup>50</sup>

#### 2.4.4 Publication of non-confidential versions of decisions

The Commission fined Akzo Nobel NV, Akzo Chemicals Holding AB, Eka Chemicals AB (“Akzo”) an amount of €25.2 million, jointly and severally, for their participation in a cartel on the market for hydrogen peroxide and perborates.

In 2007, the Commission published a first non-confidential version of the decision. On 28 November 2011, the Commission informed Akzo that, for reasons of transparency, it intended to publish a new, more detailed, non-confidential version of the decision.

Akzo opposed the Commission’s proposal and applied to the hearing officer, asking to exclude from the non-confidential version of the decision all the information that Akzo had provided under the Commission 2002 Notice on immunity from fines and reduction of fines in cartel cases.

On 24 May 2012, the Hearing Officer rejected the request of confidential treatment submitted by Akzo and authorised the publication of information which the applicant had provided to the Commission in order to benefit from the Commission’s leniency programme. Akzo therefore applied to the GCEU seeking annulment of the decision of the Hearing Officer.

By order of 16 November 2012, the President of the CGEU suspended the contested decision and ordered the Commission to refrain from publishing the more complete version of the cartel decision.

On 28 January 2015, the GCEU dismissed the application on the substance stating that the Commission had not breached the legitimate expectations of the applicants nor the obligations of confidentiality or professional secrecy.

The GCEU held, in particular, that “disclosing information concerning an infringement of EU competition law through the publication of a decision penalising that infringement, [...] cannot, in principle, be conflated with allowing third parties access to documents contained in the Commission’s investigation file relating to such an infringement.”<sup>51</sup> According to the GCEU, a different interpretation would “effectively deprive the Commission of the possibility of publishing even the main content of its decision, since that content must necessarily reveal certain information in the investigation file.” Moreover, the GCEU found that “it would also, in practice, reverse the burden of proof, which, in relation to confidential

<sup>50</sup> *Koninklijke Luchtvaart Maatschappij*, T-28/11, EU:T:2015:995, *Japan Airlines*, T-36/11, EU:T:2015:992; *Cathay Pacific Airways*, T-38/11, EU:T:2015:985; *Cargolux Airlines International*, T-39/11, EU:T:2015:991; *Latam Airlines Group and Others*, T-40/11, EU:T:2015:986; *Singapore Airlines and Others*, T-43/11, EU:T:2015:989; *Deutsche Lufthansa and Others*, T-46/11, EU:T:2015:987; *British Airways*, T-48/11, EU:T:2015:988; *SAS Cargo Group and Others*, T-56/11, EU:T:2015:990; *Air France-KLM*, T-62/11, EU:T:2015:996; *Société Air France*, T-63/11, EU:T:2015:993; and *Martinair Holland v Commission*, T-67/11, EU:T:2015:984.

<sup>51</sup> *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraph 64.

treatment, is borne by the applicant” and “require the Commission to prove that the information at issue may be included in the published version of its decision.”<sup>52</sup>

On the basis of the past case-law,<sup>53</sup> the GCEU cited the three cumulative conditions that must be met in order for information to fall, by its nature, within the ambit of the obligation of professional secrecy and thus to enjoy protection against disclosure to the public, namely (i) that it is known only to a limited number of persons, (ii) that its disclosure is liable to cause serious harm to the person who has provided it or to third parties, and (iii) that the interests liable to be harmed by disclosure are, objectively, worthy of protection.<sup>54</sup>

With particular regard to the third condition, the GCEU found that “when the confidentiality of a piece of information is assessed, the individual legitimate interests opposing disclosure of the information must be weighed against the public interest that the activities of the institutions take place as openly as possible”. Therefore, the “applicants cannot legitimately oppose the publication of information revealing the details of their participation in the infringement” on the grounds that “such publication would expose them to an increased risk of having to bear the consequences, in terms of civil liability, of their participations in that infringement”.<sup>55</sup>

This case illustrates the important difference between, on the one hand, the strict rules and conditions under which cartel participants’ advisors can have access to confidential information in the Commission’s file in order to exercise their rights of defence,<sup>56</sup> and on the other hand, the requirement on the Commission to publish non-confidential versions of its decisions finding an infringement of Article 101(1) TFEU. Potential leniency applicants and parties who take part in settlement procedures should bear in mind that the Commission has the ability to publish revised versions of its decisions with information that is no longer considered to be a “business secret” or “other confidential information”. The Commission’s assessment of the three cumulative criteria to determine what constitutes “business secrets” and “other confidential information” play a central role in this. In particular, potential leniency applicants and participants in settlement procedures should be aware that they would not be able to rely on arguments based on the exposure to an increased risk of civil liability in order to oppose the publication in the Commission’s decision of information revealing the details of their participation in the infringement.

A similar judgment concerning similar facts was given the same day in *Evonik Degussa v Commission*.<sup>57</sup>

<sup>52</sup> *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraph 63.

<sup>53</sup> *Bank Austria Creditanstalt v Commission*, T-198/03, EU:T:2006:136, paragraphs 59 and 71, and *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, T-474/04, EU:T:2007:306, paragraphs 62 and 65.

<sup>54</sup> *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraph 65.

<sup>55</sup> *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraphs 79-80.

<sup>56</sup> See *inter alia* Section 1.3 above on best practices for disclosure of information in data rooms.

<sup>57</sup> T-341/12, EU:T:2015:51

## 2.5 Possible extradition to the US

Mr Romano Piscioti was an Italian based executive at Parker ITR Srl, one of the companies charged in 2010 by the U.S. Department of Justice (DOJ) for the marine hose price-fixing conspiracy. In August 2010, the DOJ issued an indictment against Mr. Piscioti, alleging that he had participated in the antitrust infringements.<sup>58</sup> The DOJ filed the indictment “under seal”, meaning that the court kept it secret and the fact of the indictment was not communicated to Mr. Piscioti. Almost three years later, on 17 June 2013, he was arrested in Germany, while he was on his way back to Italy from Nigeria, and on 3 April 2014, he was extradited from Germany to the United States. On 24 April 2014, Mr. Piscioti pleaded guilty and was sentenced to two years in prison (with credit for the nine months and 16 days he was held in custody by the German government pending his extradition). He was also sentenced to pay a fine of US\$50,000.

This is the first time the DOJ has successfully litigated an extradition on an antitrust charge. Previously, the DOJ only had success in extraditing Ian Norris from the United Kingdom on an obstruction of justice charge relating to an underlying criminal cartel investigation after he had been indicted by a Pennsylvania grand jury.<sup>59</sup> Norris’s extradition happened in March 2010 after seven years of litigation. Britain’s House of Lords refused to extradite him on price-fixing charges,<sup>60</sup> but the Supreme Court later allowed extradition on obstruction of justice charges.<sup>61</sup>

The United States has an extradition treaty with Germany, where Mr. Piscioti was arrested, whereby each country agrees to grant an extradition request for an individual charged with a crime, subject to certain exceptions. One of these exceptions is that the conduct charged must be a crime in both the United States and Germany for extradition to be granted. This exception is common in extradition treaties and has prevented extradition in prior antitrust cases, or has made extradition exceedingly difficult (e.g., the Ian Norris case).

On 28 January 2015 the Court of Justice rejected the appeal brought by Mr. Piscioti on the legality of his extradition to the United States on antitrust charges.

Mr. Piscioti called on the Commission to bring infringement proceedings against Germany for having allowed an EU citizen to be extradited. When the Commission rejected Mr Piscioti’s request, Mr Piscioti sought annulment before the GCEU. According to Mr. Piscioti, the Commission discriminated against him on grounds of nationality (in breach of Article 18 TFEU) and restricted his freedom to provide services within the European Union (in breach of Article 56 TFEU). When the GCEU rejected Mr Piscioti’s application for annulment, he appealed to the CJEU.

<sup>58</sup> *United States v. Piscioti*, No. 0:10-cr-60232 (filed 26 August 2010).

<sup>59</sup> *United States v. Norris*, No. 2:03-cr-00632 (second superseding indictment filed September 28, 2004). The original indictment and the first superseding indictment were filed in 2003.

<sup>60</sup> *Norris v Government of the United States of America* [2008] UKHL 16.

<sup>61</sup> *Norris (Appellant) v Government of the United States of America (Respondent)* [2010] UKSC 9.

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In particular, Mr Piscioti claimed that the order of the GCEU was inconsistent with its previous judgment in *AISCAT v Commission*,<sup>62</sup> where the GCEU considered admissible an action proposed by an association to annul a decision of the Commission refusing to start infringement proceeding against the Italian Republic. According to the applicant, the judgment in *AISCAT v Commission* shows that other entities have standing to file an action for annulment if they are able to show that they are directly concerned by the decisions of the Commission, because of their personal qualities or factual status.

The CJEU found that Mr. Piscioti's objections were manifestly unfounded. According to well-established case-law, private individuals are not entitled to challenge the refusal of the Commission to launch infringement proceedings against a Member State. According to the CJEU the reference to the judgment in *AISCAT v Commission* was not applicable, given that it related to a state aid proceeding under Article 108 TFEU, which has different features compared to infringement proceedings under Article TFEU.

Some countries, notably the UK, have already made price-fixing conduct a crime while others are in the process of doing so. In Germany, bid-rigging is a crime. Even in countries which do not provide for criminal sanctions for general anticompetitive conduct, such conduct can often be assimilated to a specific market abuse crime. Mr. Piscioti's extradition from Germany provides a sobering warning to all corporate executives that they are personally at risk if they participate in price-fixing or other anticompetitive conduct, and that they can be caught by the long arm of US law in most parts of the globe, even after they have ceased working for the company involved in the infringement.

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<sup>62</sup> *Aiscat v Commission*, T-182/10, EU:T:2013:9.

### 3. OTHER ARTICLE 101 INFRINGEMENTS

#### 3.1 Pay for delay in the pharmaceutical industry

##### 3.1.1 The Commission's sixth patent settlement monitoring report

On 8 July 2009 the Commission adopted the Final Report on its competition inquiry into the pharmaceutical sector. Since then, the Commission has been monitoring patent settlements between originator and generic companies and has published annual reports.

On 2 December 2015, the Commission published its sixth report on the monitoring of patent settlements. The report is based on the Commission's sixth patent settlement monitoring exercise, launched in February 2015 and relates to the 76 patent settlements concluded in the EEA between originator and generic companies in the pharmaceutical sector during the period from 1 January 2014 to 31 December 2014. According to the report, the number of settlements during this period is considerably lower than the high numbers reported in the peak year of 2012 (183) and in 2013 (146), and is closer to the levels at the beginning of the monitoring period. That being said, the number of patent settlements in 2014 remains significantly higher than the average during the period between 2000 and 2008 (on average 24 per year). The number of settlements that might attract competition law scrutiny has stabilised at a low level.<sup>63</sup> Indeed, according to the report 88% of the settlements fall into categories that *prima facie* do not warrant competition law scrutiny. According to the report, therefore, "companies, in most cases, are able to solve their disputes in a manner that is typically considered unproblematic from a competition law perspective".

##### 3.1.2 *Lundbeck (citalopram)* and *Servier (perindopril)*

In the context of what can be considered to constitute an anticompetitive patent settlement, on 19 January 2015 the Commission published its decision in *Lundbeck (citalopram)* of 19 June 2013<sup>64</sup> and on 14 July 2015 it published its decision in *Servier (perindopril)* of 9 July 2014.<sup>65</sup> The published versions of the Commission decisions in these cases provide a detailed insight into the reasoning of the Commission when it comes to its assessment of patent settlements.

By way of preliminary background to the aforementioned two cases, in *Lundbeck (citalopram)* the Commission imposed a fine of €3.8 million on Danish pharmaceutical company Lundbeck and fines totalling €5.2 million on several producers of generic medicines e.g. Merck KGaA, Arrow Group ApS, Alpharma and Ranbaxy. According to the Commission in 2002 Lundbeck agreed with each of these companies to delay the market entry of cheaper generic versions of Lundbeck's branded citalopram, a blockbuster anti-depressant.

In *Servier (perindopril)* the Commission imposed fines totalling €427.7 million on the French pharmaceutical company Servier and five producers of generic medicines – namely,

<sup>63</sup> With respect to the US, the US Federal Trade Commission has found that the number of potential pay-for-delay deals has dropped for the second consecutive year, falling to just 21 such deals in 2014.

<sup>64</sup> Commission decision of 19 June 2013, COMP/ AT. 39.226 – *Lundbeck*.

<sup>65</sup> Commission decision of 9 July 2014, COMP/ AT.39.612 - *Perindopril (Servier)*.

Niche/Unichem, Matrix, Teva, Krka and Lupin – for concluding a series of deals allegedly aimed at protecting Servier’s bestselling blood pressure medicine, perindopril, from price competition by generics in the EU.

In the eyes of the Commission, the agreements concluded in the *Lundbeck (citalopram)* and *Servier (perindopril)* cases violated Article 101 TFEU. Specifically, in reaching its conclusions that the agreements underpinning these two cases were “by object” infringements of Article 101 TFEU, the Commission set forth a three pronged test which represents the core of its theory vis-à-vis anti-competitive settlement agreements ‘by object’. This three-pronged test, which can no doubt be satisfied in almost all cases, is as follows:

- The generic producer and the originator were at least potential competitors;
- The generic producer committed itself in the agreement to limit, for the duration of the agreement, its independent efforts to enter one or more EEA markets with generic product; and
- The agreement was related to a transfer of value from the originator which substantially reduced the incentives of the generic producer to independently pursue its efforts to enter one or more EEA markets with generic products.

The Commission also cited “other important factors” which it took into account in order to reach the conclusion that the agreements in question had an anti-competitive object. These additional factors (which in fact point to there being a six-pronged test for the finding of a “by object” infringement) were as follows:

- The fact that the value which the originator transferred took into consideration the turnover or the profit the generic producer expected if it had successfully entered the market;
- The fact that the originator could not have obtained the limitations on entry through enforcement of its patents, the obligations on the generic producer in the agreement going beyond the rights granted to holders of patents; and
- The fact that the agreement contained no commitment from the originator to refrain from infringement proceedings if the generic producer entered the market with generic product after expiry of the agreement.

The Commission’s decision in *Lundbeck (citalopram)* has been challenged before the GCEU and judgment is expected in 2016. Questions likely to be hotly debated in this case are whether the generic producers were really potential competitors and whether the agreements can be considered to be “by object” infringements in light of the CJEU’s ruling in *Cartes Bancaires* that “the concept of restriction of competition ‘by object’ 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, otherwise the Commission would be exempted from the obligation to prove the actual effects on the



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market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.”<sup>66</sup>

Servier and the generic producers involved in *Servier (perindopril)* have introduced challenges before the CGEU.

### 3.1.3 US Supreme Court judgment in *Actavis*

The Commission’s *per se* approach towards patent settlements stands in contrast to that taken by the U.S. Supreme Court in *Actavis*.<sup>67</sup> By rejecting the “scope of the patent” test and holding that reverse payment patent settlements “can sometimes violate the antitrust laws,” the U.S. Supreme Court subjects such settlements to a greater level of antitrust scrutiny. By establishing the rule of reason (which requires the Federal Trade Commission to prove that the agreement’s anticompetitive effects outweigh its procompetitive effects) as the standard for assessing such cases, with the burden of proof on the plaintiff, the U.S. Supreme Court rejected the Federal Trade Commission’s position that reverse payment settlements are “presumptively anticompetitive” and that the burden should be on defendants to overcome the presumption at trial. Moreover, the U.S. Supreme Court held that the likelihood of anticompetitive effects from such a settlement “depends upon its size, its scale in relation to the payer’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification”.

Only time will tell whether the European courts will take an effects-based approach to patent settlements akin to the approach taken in the United States.

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<sup>66</sup> *Groupement des cartes bancaires (CB) v Commission*, C-67/13P, EU:C:2014:2204, paragraph 58.

<sup>67</sup> *Federal Trade Commission v. Actavis, Inc.*, No 12-416, US Supreme Court, 17 June 2013. Also of note, the U.S. Court of Appeals for the Third Circuit ruled in June 2015 (*King Drug Co. of Florence Inc. et al. v. SmithKlineBeecham Corp. et al.*, No 14-1243) that settlements between pharma companies do not have to necessarily involve cash payments but can also involve other forms of consideration in order to be scrutinised pursuant to the Supreme Court’s ruling in *Federal Trade Commission v. Actavis*.

#### **4. PRIVATE ENFORCEMENT THROUGH CARTEL DAMAGES CLAIMS**

##### **4.1 The CJEU rules that all cartel participants may be sued collectively in the Member State of domicile of one of the participants, but that the jurisdiction of those courts is limited to the loss suffered by claimants whose registered offices are located in its jurisdiction**

A private damages action arose out of a decision of 3 May 2006 by which the Commission found that several companies supplying hydrogen peroxide and sodium perborate had participated in a cartel, by reason of which some of those companies were ordered to pay fines.<sup>68</sup>

Cartel Damage Claims Hydrogen Peroxide SA (CDC) is a Belgian company to which a number of companies operating in the industrial pulp and paper processing industry transferred their rights to damages suffered in connection with that cartel. In March 2009, CDC brought an action for damages before the Landgericht Dortmund (Regional Court, Dortmund, Germany) against six of the companies fined by the Commission. As those companies were established in various Member States, CDC stated in its application that the German courts had jurisdiction to rule in respect of all the defendants because one of them, Evonik Degussa GmbH, had its registered office in Germany. In September 2009 CDC withdrew its action against Evonik Degussa, following an out-of-court settlement.

The other companies which were defendants in the action brought by CDC challenged the international jurisdiction of the German court. They argued that the supply contracts concluded with the companies which were wronged contained jurisdiction clauses designating the courts having jurisdiction in the event of disputes arising from those contracts. The Landgericht Dortmund referred to the CJEU several questions concerning jurisdiction under the Brussels I Regulation.<sup>69</sup>

The CJEU ruled that victims of an unlawful cartel may claim compensation for their loss before the courts where one of the participants in the infringement is domiciled. Furthermore, the CJEU determined that a victim's withdrawal of its action against the sole participant domiciled in the same Member State as the court seized does not, in principle, affect the jurisdiction of that court to hear and determine actions brought against the other participants.

The Brussels I Regulation provides that persons domiciled in a Member State must, as a rule, be sued in the courts of that Member State (Article 2(1)).<sup>70</sup> Nevertheless, when there are several defendants, a person may also be sued in the courts of the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings in different Member States.

<sup>68</sup> Case COMP/F/C.38.620 — *Hydrogen peroxide and perborate*.

<sup>69</sup> *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others*, C-352/13, EU:C:2015:335.

<sup>70</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 012, 16.01.2001 p. 1).

The CJEU found, in the first place, that the Commission's decision of 3 May 2006 did not determine the requirements for holding the cartel participants liable in tort, since this is to be determined by the national law of each Member State. The CJEU added that, since the various national laws may differ on this point, there is a risk of irreconcilable judgments if the victim of the cartel were to bring actions before the courts of various Member States. In the event of such a risk, the Brussels I Regulation provides for an action to be brought before the courts of one single Member State against several defendants domiciled in various Member States (Article 6(1)).

Furthermore, the CJEU observed that companies which have participated in an unlawful cartel must expect to be sued in the courts of a Member State in which any one of them is domiciled. On the same point, the CJEU ruled that an applicant's withdrawal of its action against the sole co-defendant domiciled in the same Member State does not, in principle, affect its jurisdiction to hear and determine actions brought against the other co-defendants. Nevertheless, the provision of the Brussels I Regulation which allows several defendants to be sued before the same courts must not be abused. In this instance, that would be the case if it were found by the national court that CDC and Evonik Degussa had knowingly delayed the conclusion of their out-of-court settlement until an action had been brought for the sole purpose of the German courts having jurisdiction over the other participants in the infringement.<sup>71</sup>

In the second place, the CJEU made it clear that a person wronged by an unlawful cartel has the alternative of bringing its action for damages against several cartel participants either before the courts of the place where the cartel itself was concluded, or the place of conclusion of one specific agreement which implied the existence of the cartel, or before the courts of the place where the loss arose. The former was not possible in the present case because the Commission found that it was not possible to identify a single place where the cartel was concluded since it consisted of a number of collusive agreements concluded during various meetings and discussions which took place in various places in the EU. The CJEU concluded from this that the action for damages had to be brought before the courts of the place where the loss arose. This place was identifiable for each alleged victim taken individually as the victim's registered office.

The CJEU emphasised that the courts thus identified have jurisdiction to hear an action brought either against any one of the participants in the cartel or against several of the participants. However, since the jurisdiction of those courts is limited to the loss suffered by the undertaking whose registered office is located in its jurisdiction, an applicant such as CDC would need to bring separate actions for the loss suffered by each of those undertakings before the courts having jurisdiction for their respective registered offices.<sup>72</sup>

In the third place, the CJEU held that the court seized of a matter is, in principle, bound by a jurisdiction clause which derogates from the application of the specific provisions of the Brussels I Regulation concerning the case of several defendants and their liability in tort,

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<sup>71</sup> *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others*, C-352/13, EU:C:2015:335, paragraph 33.

<sup>72</sup> *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others*, C-352/13, EU:C:2015:335, paragraph 55.

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delict or quasi-delict. However, the Court stated that disputes concerning the payment of damages arising from an unlawful cartel can be encompassed by jurisdiction clauses only if the victim has consented thereto.<sup>73</sup>

The CJEU's preliminary ruling in this case illustrates how private litigants have a number of options as to where to bring a follow-on cartel damages action. On the basis of a *bona fide* "anchor" defendant domiciled in Member State A, private litigants may consolidate all their respective claims against all the cartel participants in Member State A. However, the monetary extent of those claims will be limited to the loss deemed to be suffered by the private litigants in Member State A. If a private litigant has its registered office also in Member State A, all its losses caused by the cartel will be deemed to be caused in that Member State. But if that private litigant has its registered office in another Member State, it will have to examine the Brussels I Regulation to determine in which jurisdiction or jurisdictions it should bring its action.

In so far as it discusses choice of jurisdiction clauses, the preliminary ruling should be taken into consideration by all operators when drafting standard terms and conditions of business.

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<sup>73</sup> *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others*, C-352/13, EU:C:2015:335, paragraph 72

## 5. ARTICLE 102 AND ABUSE OF DOMINANT POSITION

### 5.1 **The CJEU rules on the conditions in which the holder of a standard essential patent (SEP) does not abuse its dominant position by seeking an injunction against a patent infringer**

Huawei Technologies entered into negotiations with ZTE Corporation concerning the possibility of concluding a licence agreement on FRAND terms in relation to Huawei's patent that is essential to the long-term evolution standard (commonly known as 4G). Given that negotiations between the companies were unsuccessful, and because Huawei contended that ZTE continued using the standard-essential patent (SEP) without paying royalties, Huawei brought an infringement action against ZTE, seeking an injunction to stop the sale of certain ZTE products.<sup>74</sup>

In adjudicating on the matter, the Regional Court of Düsseldorf considered that the outcome of the litigation largely depended on whether or not the action brought by Huawei constituted an abuse of dominance. Given this consideration, and the uncertainty surrounding the topic of SEP injunctions, the Regional Court made a reference for a preliminary ruling to the CJEU. The Regional Court asked in what circumstances a dominant SEP holder, who has committed to grant licences to third parties on FRAND terms, is to be regarded as committing an abuse contrary to Article 102 TFEU if it seeks an injunction to stop an infringement of that SEP or to recall products manufactured using the SEP.

In its preliminary ruling, the CJEU decided that the following conditions must be satisfied before a dominant SEP licensor can bring an injunction against a party infringing its SEP, without acting contrary to Article 102 TFEU:<sup>75</sup>

- Notification from the SEP holder - Prior to taking any action, a SEP holder that has given an irrevocable undertaking to a standardisation body to grant a licence to third parties on FRAND terms, must alert the alleged infringer to the infringement complained about. This prior notice must designate the SEP in question, and specify the way in which it has been infringed.
- "Willingness" of the alleged infringer - After the alleged infringer has been informed about the infringement, it must express its willingness to conclude a licensing agreement on FRAND terms. Presumably, this willingness refers to the alleged infringer agreeing to receive a FRAND offer from the SEP holder. It would seem, therefore, that an alleged infringer who is not prepared to enter into any sort of *bona fide* negotiations would be presumed to be unwilling.

<sup>74</sup> See also: Wilko van Weert and David Henry, "The European Union's Highest Court Rules on Standard-Essential Patents, Injunctions and Abuse of Dominance", 23 July 2015, McDermott Will & Emery Publications, and Jacques Buhart and Nicholas Lafont, "Essential Patents Declared to the European Telecommunication Standardization Institute: How Should They Be Treated in U.S. Litigation?" 26 April 2013, BNA's Patent, Trademark & Copyright Journal, 85 PTCJ 1024.

<sup>75</sup> *Huawei Technologies Co., Ltd. v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477

- FRAND offer - The SEP holder must present to the alleged infringer a specific, written offer for a licence on FRAND terms, in accordance with the undertaking given to the relevant standardisation body. In particular, this written offer must specify the amount of the royalty, and the way in which that royalty is to be calculated.<sup>76</sup>

Although the CJEU's judgment does not elaborate on what are to be considered as FRAND terms, it does state that the SEP holder may not discriminate between licensees, i.e., the licence terms must be comparable with the licensing arrangements the SEP holder has already concluded with other competitors.

Response to FRAND offer - The alleged infringer must respond to the FRAND offer in accordance with recognised commercial practices in the field, and in good faith. The infringer's response to the FRAND offer will usually be one of the following:

- Acceptance of the FRAND offer, in which case the SEP holder cannot seek an injunction, but can claim damages for the unlicensed use of the SEP;
- Rejection of the FRAND offer, which presumably makes the alleged infringer an "unwilling" licensee and therefore enables the SEP holder to seek injunctive relief. According to the CJEU, if the alleged infringer has already been using the SEP without a licence, it must provide appropriate security e.g., through a bank guarantee or by placing funds on a deposit account, from the point at which the counter-offer is rejected;
- Submission of a FRAND-compliant counter-offer, to which the SEP holder must respond before taking any further steps. The alleged infringer must not engage in any delaying tactics once a FRAND offer has been presented by the SEP holder. If the alleged infringer wishes to submit a counter-offer, it must do so promptly in writing. Any delay may indicate the alleged infringer's "unwillingness" and prevent it from relying on Article 102 TFEU in a counterclaim against the SEP holder. The CJEU judgment also states (albeit in rather loose terms) that the alleged infringer "cannot be criticised" for challenging the validity of the SEP and/or its essential nature. Furthermore, the CJEU observed that if the parties are unable to agree bilaterally on the details of the FRAND terms following the counter-offer by the alleged infringer, they "may" request that the amount of the royalty be determined by an independent third party.<sup>77</sup>

By making it a condition that the alleged infringer must still be using the patent in question for the SEP holder to be able to seek injunctive relief, the CJEU draws a clear distinction between an injunction based on the alleged infringement of an SEP and proceedings brought with a view to obtaining the rendering of an account or an award of damages. Thus, if the SEP holder only intends to pursue an action for damages for the unlicensed use of its SEP, Article 102 TFEU cannot be invoked as a defence by the alleged infringer.

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<sup>76</sup> *Huawei Technologies Co., Ltd. v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 63.

<sup>77</sup> *Huawei Technologies Co., Ltd. v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477, paragraph 66.

To a large extent, the ruling reflects the Commission's earlier efforts to regulate business practices in matters of SEP licensing.<sup>78</sup> That said, it is too early to judge whether or not the pro-licensee safe harbour envisaged by the Commission will develop under the law as stated in the CJEU's judgment. There are still a number of detailed issues that remain unresolved, e.g., in relation to the existence of dominance on the part of the SEP holder, the definition of "willingness", or the meaning of FRAND.

## 5.2 CJEU provides guidance on how to assess rebates under Article 102 TFEU

In *Post Danmark A/S v Konkurrencerådet (Competition Council)*, more commonly known as *Post Danmark II*, the CJEU provided much-awaited guidance on how to assess rebates under Article 102 TFEU.<sup>79</sup> While ruling out the as-efficient-competitor test as a necessary condition to find a rebate scheme abusive, the CJEU held that the as-efficient-competitor test is just "one tool" for the analysis of abusive effects of a rebate scheme. In this regard, the CJEU appears to have heeded Advocate-General Kokott's exhortation that the CJEU should "not allow itself to be influenced so much by current thinking ('*Zeitgeist*') or ephemeral trends. The CJEU also ruled that the anti-competitive effect of a rebate scheme must be "probable" but that there is no need to show that such effect was of a "serious" or "appreciable" nature.

### 5.2.1 Background

The preliminary ruling was requested by the Sø-og Handelsretten (Maritime and Commercial Court) in proceedings between Post Danmark and the Konkurrencerådet (Competition Council).

In 2009, the Competition Council found that Post Danmark had abused its dominant position on the market for the distribution of bulk mail by applying, in 2007 and 2008, rebates in respect of direct advertising mail. This finding was made following a complaint lodged by Bring Citymail Danmark ("Bring Citymail"), Post Danmark's only serious competitor on the bulk mail market during the relevant period.

Bring Citymail started offering a bulk mail service in the greater Copenhagen area in 2007 but withdrew from the Danish market in 2010 due to heavy losses.

Post Danmark implemented a rebate scheme in respect of direct advertising mail in 2003. The rebate scale was "standardised" in that all customers were entitled to receive the same rebate on the basis of their aggregate purchases over a reference period. The rebate scale included rates from 6% to 16% and the reference period was one year. The rebates were "conditional": Post Danmark and its customers concluded agreements at the beginning of the year in which estimated quantities of mailings for that year were set out. At the end of the year, Post Danmark made an adjustment where the quantities presented were not the same as those that had been estimated initially. The rebates were "retroactive": where the threshold of

<sup>78</sup> See also: Commission decision of 29 April 2014, COMP/AT.39.985 – *Motorola - Enforcement of GPRS Standard Essential Patents*, and Commission Decision of 29 April 2014, COMP/AT.39.939 – *Samsung - Enforcement of UMTS Standard Essential Patents*.

<sup>79</sup> *Post Danmark A/S v Konkurrencerådet*, C-23/14, EU:C:2015:651.

mailings initially set was exceeded, the rebate rate applied at the end of the year applied to all mailings presented during the period concerned and not only to mailings exceeding the threshold initially estimated.

In connection with this rebate scheme, the referring court asked, in essence, the following questions:

1. What are the criteria applicable to the assessment of whether a rebate scheme is liable to have an exclusionary effect contrary to Article 102 TFEU?
2. What relevance is to be attached, in such an assessment, to the widespread impact of the rebate scheme and to the “as-efficient-competitor” test? and
3. Must the anti-competitive effect be probable, and serious or appreciable to constitute an abuse under Article 102 TFEU?

#### 5.2.2 The criteria for assessing rebate schemes under Article 102 TFEU

The CJEU first found that the rebate scheme of Post Danmark could not be regarded as a simple quantity rebate or a loyalty rebate. The rebates at issue were not granted in respect of each individual order but on the basis of the aggregate orders placed over a given period. Thus, the rebate scheme at issue could not be regarded as a simple quantity rebate linked solely to the volume of purchases. Such a scheme is not, in principle, liable to infringe Article 102 TFEU. On the other hand, the rebate scheme of Post Danmark was not coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark. Thus, the rebate scheme at issue could not be regarded as a loyalty rebate. Such a scheme would constitute an abuse within the meaning of Article 102 TFEU.

In order for a rebate that is neither a simple quantity rebate nor a loyalty rebate to produce an anti-competitive exclusionary effect, the CJEU held that it was necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, the extent of the dominant undertaking’s dominant position, and the particular conditions of competition prevailing on the relevant market.

As regards the criteria and rules governing the grant of the rebate at issue, the CJEU pointed out the following factors as relevant:

- the retroactive nature, which produces a strong suction effect;
- the reference period of one year, which the CJEU appears to consider as relatively long;
- the equal application of the rebates both to the contestable part of demand and to the non-contestable part of demand; and
- the difficulty of switching from Post Danmark to Bring Citymail.



With regard to the extent of Post Danmark's dominant position, and the particular conditions of competition prevailing on the relevant market, the CJEU noted that the following elements indicated that the competition on the relevant market was already very limited:

- Post Danmark's market share of 95% on the bulk mail market;
- high barriers to entry;
- high economies of scale;
- the statutory monopoly granted to Post Danmark in respect of letters weighing up to 50 grams that concerned 70% of all bulk mail; and
- Post Danmark's unique geographical coverage encompassing all of Denmark.

In response to the question concerning the importance to be attached to the fact that the rebate scheme applied to the majority of customers on the market, the CJEU answered that such a fact could constitute a useful indication as to the extent of that practice and its impact on the market.

As for the "as-efficient-competitor" test, the CJEU pointed out that this has been applied by the EU Courts to selective price cuts, predatory prices and margin squeeze. However, according to the CJEU, in the context of a rebate scheme, there is no legal obligation to base the finding of an abuse on the as-efficient-competitor test, which is merely "one tool amongst others" for the purposes of assessing whether there is an abuse of a dominant position.

In the case of Post Danmark II, given the very high market share of Post Danmark and its statutory monopoly, the CJEU considered that applying the as-efficient-competitor test would be of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.

With regard to the likelihood of anti-competitive effect, the CJEU held that only dominant undertakings whose conduct produces "an actual or likely" anti-competitive effect on the market fall within the scope of Article 102 TFEU. In other words, the anti-competitive effect of a rebate scheme must be "probable" for such a scheme to be abusive under Article 102 TFEU.

### **5.3 GCEU upholds Commission's finding that Slovakia's extension of a postal monopoly into a neighbouring market for hybrid postal services amounted to an infringement of Articles 102 and 106 TFEU**

In November 2007, the Slovak Parliament proposed an amendment to the Postal Law, so that the delivery of hybrid mail would, without any possible ambiguity, be reserved to Slovenská pošta a.s.

After sending a letter expressing its concerns and several requests for information, the Commission addressed a letter of formal notice to the Slovak authorities, stating that it had come to the preliminary conclusion that the Slovak Republic had infringed Articles 102 and 106 of the TFEU. The Commission also took the view that the State measure at issue could

cause serious and irreparable harm to competition on the hybrid mail market unless interim measures were ordered.

On 7 October 2008, the Commission adopted Decision COMP/39.562 in which it held that the amendments to Slovakia's postal law illegally extended Slovenská pošta's monopoly in traditional mail services to the market for the delivery of hybrid mail and limited the availability of related downstream services.

Slovenská pošta challenged this Decision before the GCEU arguing that the Commission had made a number of manifest errors in assessment and interpretation, in fact and in law, as a result of which it had misapplied Articles 106 and 102 TFEU.<sup>80</sup>

The GCEU recalled that a Member State can breach the prohibitions laid down by Article 106(1) TFEU in conjunction with Article 102 TFEU if it adopts any law, regulation or administrative provision that creates a situation in which a public undertaking is led, merely by exercising the special or exclusive rights conferred upon it, to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses. Moreover, the GCEU stressed that an infringement of Article 106(1) TFEU in conjunction with Article 102 TFEU may be established irrespective of whether any abuse actually exists.

The GCEU then dismissed Slovenská pošta's claim that the Commission had incorrectly defined the relevant market by taking into account a market for hybrid mail services, separate from traditional postal services.

The GCEU also dismissed Slovenská pošta's claim that the contested amendment to the postal legislation did not lead to an extension of a monopoly into a neighbouring market and the absence of limitation of downstream services to end-users. Indeed, the GCEU agreed with the Commission that the amendment extended Slovenská pošta's monopoly in traditional mail services to the neighbouring market for hybrid mail services.

The GCEU also dismissed Slovenská pošta's claim that reserving hybrid mail services to Slovenská pošta had not limited the downstream services available to all users. Indeed, the GCEU considered that Article 106(1) TFEU is breached in situations where an undertaking is unable to satisfy the demand for a service covered by statutory extension of its exclusive rights and the provision of the service by private corporations is rendered impossible by the statute. In this specific case, the GCEU agreed with the Commission's finding that there was a specific demand for additional services linked to delivery, which constituted a separate market demand, and that Slovenská pošta had not adduced evidence to prove that it offered such additional services or was capable of offering them.

Slovenská pošta argued also that the Commission had not taken appropriate account of the Postal Directive and that, in accordance with the Postal Notice, it ought to have found that the special or exclusive rights were *prima facie* justified under the universal service exception under Article 106(2) TFEU.

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<sup>80</sup> *Slovenska posta a.s. v Commission*, T-556/08, EU:T:2015:189.

The GCEU observed that the burden of proof of the applicability of the universal service exception under Article 106(2) TFEU remained with the Member State relying on it. Slovakia, who intervened in support of Slovenská pošta, had failed to provide a reasonable and reliable estimate of the cost of providing the universal service in Slovakia which justified the extension of the reserved area to include hybrid mail.

The GCEU therefore dismissed Slovenská pošta's action in its entirety. An appeal by Slovenská pošta is now pending before the CJEU (Case C-293/15 P).

## **6. MERGER CONTROL**

### **6.1 Merger Control statistics**

The Commission's statistics show that, in 2015, the number of decisions taken during Phase I examinations totalled 311. One was a finding that the notification fell outside the scope of the Merger Regulation, 297 were findings of compatibility with the internal market pursuant to Article 6(1)(b) of the Merger Regulation (222 of which were under the simplified procedure), and 13 were cleared after commitments had been given in Phase I.

Eight decisions were taken during Phase II, all of which cleared the transactions, but in seven of those cases, only after commitments had been given. Further details are given in the sections below. There were no direct refusals, although six cases were withdrawn during Phase I and two cases during Phase II.

There were 15 Reasoned Submissions made by the parties pursuant to Article 4(4) of the Merger Regulation for referral of a concentration with a Community dimension to the merger control authorities of one or more Member States on the grounds that it affected competition within a distinct market in that or those Member States. In all but two of the cases, the referrals were made, in whole or in part.

There were 20 Reasoned Submissions made by the parties pursuant to Article 4(5) of the Merger Regulation for a concentration that did not have a Community dimension but was capable of being reviewed by three or more Member States, to be referred by the competent Member States to the Commission. All but one of these requests were granted.

Three requests were made by competent authorities of the Member States for referral of a case to them pursuant to Article 9. These requests were refused, although a partial referral was made in one case.

### **6.2 Commission clears Liberty Global's acquisition of a controlling stake in De Vijver Media, subject to commitments<sup>81</sup>**

Following a Phase II investigation, the Commission cleared Liberty Global's acquisition of a stake in the Belgian media company De Vijver Media NV ("De Vijver") subject to commitments. The transaction gave Liberty Global joint control over De Vijver and therefore over its two TV channels Vier and Vijf. The other two controlling shareholders of De Vijver were Waterman & Waterman and Corelio Publishing.

The Commission found that TV distributors in Flanders and Brussels must have Vier and Vijf in their offer to compete on an equal footing with Telenet. Moreover, it would be profitable for Telenet and De Vijver to withhold Vier and Vijf from competitors such as Belgacom and TV Vlaanderen. These competitors would find it harder to attract and retain customers without Vier and Vijf while new players, such as Mobistar, would not be able to enter the

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<sup>81</sup> Commission Decision M.7194 of 24 February 2015.

market at all. The result would be less competition in the TV distribution market and ultimately higher prices and less innovation for consumers.

The Commission also investigated whether the transaction would give Telenet the incentive to remove the channels of Medialaan and VRT from its cable platform. Medialaan and VRT are two Flemish broadcasters that competed directly with De Vijver. The Commission concluded that this would not be a profitable strategy for Telenet, as it would make Telenet's offer less attractive and lead to a loss of subscribers. Moreover, Telenet was obliged to carry VRT's channels by law. However, the investigation found that Telenet could disadvantage the channels and programmes of Medialaan and VRT in more subtle ways, for instance by displaying their video-on-demand content less prominently than that of De Vijver.

The Commission had concerns that, after the transaction, De Vijver would refuse to license its channels to TV distributors that competed with Telenet, a cable company controlled by Liberty Global.

The Commission's concerns were partly removed by the fact that De Vijver and Telenet entered into several agreements with other market participants during the investigation. Specifically, De Vijver concluded agreements with some TV distributors to license Vier and Vijf and offered to prolong its agreements with others. Telenet amended its agreement with VRT to ensure that VRT's content would not be disadvantaged compared to that of De Vijver Media. Telenet offered to amend its agreement with Medialaan in the same way.

To address the Commission's remaining competition concerns, the parties committed to offer the following under FRAND terms to any interested TV distributor in Belgium:

- To license the channels Vier and Vijf.
- To license any new basic pay TV channel that De Vijver may launch in the future. Basic pay TV channels are those that are part of Telenet's basic channel package and that all or most subscribers receive.
- De Vijver must also license to distributors linked services such as catch-up TV and PVR (a service that allows users to record programs and view them at a later stage).

The commitments will be in place for seven years. They ensure that Telenet's competitors are able to offer Vier and Vijf to their subscribers and have no competitive disadvantage vis-à-vis Telenet. In addition, Telenet also committed to maintain its offer to amend its agreement with Medialaan for at least six months. These commitments, together with the agreements signed by Telenet and De Vijver Media during the investigation, removed the Commission's competition concerns. The Commission therefore approved the transaction, as modified by the commitments.

### 6.3 Commission clears acquisition of orthopaedic implants producer Biomet by Zimmer, subject to conditions<sup>82</sup>

Following a Phase II investigation, the Commission cleared the acquisition of Biomet Inc by Zimmer Holdings Inc., both of the United States, subject to certain divestments. Both companies produce orthopaedic implants and related surgical products.

The Commission assessed the proposed transaction's effect on competition in particular in the markets for:

- partial (unicondylar) knee implants in Austria, Belgium (including sales in Luxembourg), the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, The Netherlands, Poland, Portugal, Slovenia, Spain, Sweden and the UK;
- elbow implants in Austria, Belgium (including sales in Luxembourg), the Czech Republic, Denmark, France, Germany, Italy, Norway, Portugal, Spain, Sweden and the UK; and
- total knee implants in Denmark (primary and revision) and Sweden (primary).

On these markets, the merged entity would have faced insufficient competitive constraint from the remaining players, which were much smaller. In addition, barriers to entry were relatively high. Thus, the merger would have led to less innovation and choice, as well as to price increases for the products concerned.

To address these concerns, Zimmer offered to divest the Zimmer Unicondylar Knee implant ("ZUK") and Biomet's Discovery Elbow ("Discovery"), both across the EEA, and the Biomet Vanguard total Knee system for primary and revision implants ("Vanguard Knee") in Denmark and Sweden. In addition, Zimmer committed to grant to the purchaser of the Vanguard knee in Denmark and Sweden an EEA-wide, non-exclusive license to the rights and know-how that are currently used and are needed for the manufacturing, marketing and sale of an exact copy of the Vanguard Knee.

The three divestment businesses include instrumentation, any improvements and pipeline projects. The divestments also include intellectual property rights and know-how; the transfer of licences, permits and authorisations; the transfer of access to CE certification marks; customer contracts, leases, commitments, orders and records; key personnel, technical assistance and training. Furthermore, Zimmer committed for a transitional period to supply the divestment businesses' product lines on reasonable conditions.

The remedy would ensure that the purchasers of ZUK and Discovery would acquire the positions that Zimmer and Biomet held in the unicondylar knee and elbow implants markets, respectively. The Vanguard Knee remedy would transfer the largest part of Biomet's market share to a competitor.

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<sup>82</sup> Commission Decision M.7265 of 30 March 2015.

A set of additional purchaser criteria would ensure that these assets were sold to one or several purchasers capable of running the businesses as a competitive force in the market. In addition, the companies committed not to implement the transaction before one or more suitable purchasers were found and approved by the Commission for all of the divested businesses.

The Commission concluded that the transaction, as modified by the commitments, would no longer raise competition concerns. The clearance was therefore made conditional upon full compliance with the commitments.

Throughout the proceedings the Commission cooperated closely with the US Federal Trade Commission and the Japanese Fair Trade Commission.<sup>83</sup>

#### 6.4 Commission clears coffee joint venture between DEMB and Mondelēz, subject to conditions<sup>84</sup>

Following a Phase II investigation, the Commission cleared the creation of a joint venture between two of the world's leading coffee manufacturers - D.E. Master Blenders 1753 B.V. (DEMB) of the Netherlands and Mondelēz International Inc. of the US. The approval was conditional on implementation of commitments to address the Commission's concerns.

The proposed transaction would combine in a joint venture all material assets of DEMB and the coffee business of Mondelēz. The joint venture would operate under the name Jacobs Douwe Egberts (JDE) and would be active in all coffee formats, including filter pads for Senseo single-serve coffee machines, T-discs for Tassimo single-serve coffee machines and N-capsules for Nespresso single-serve coffee machines.

The Commission had concerns on those markets where the investigation revealed the joint venture would bring together consumer brands which currently compete closely against each other. This included competition between L'Or and Carte Noire in France; between Merrild and Gevalia in Denmark; between Merrild and Jacobs in Latvia; and between Senseo and Jacobs in Austria. The remaining companies on the market would not have been able to exert sufficient competitive pressure on the joint venture to avoid price rises for coffee.

To address these concerns in France, Mondelēz offered to sell its Carte Noire business across the EEA (including the Lavérune manufacturing plant near Montpellier, France) while DEMB offered to sell its Merrild business across the EEA. The purchaser(s) of these brands would be in a position to compete against the joint venture. To alleviate concerns in the Austrian filter pads market, the Senseo brand would be licensed for five years for re-branding purposes. This would be followed by a five-year period in which neither the joint venture nor

<sup>83</sup> The U.S. Federal Trade Commission ("FTC") also challenged the transaction. Pursuant to the FTC's complaint, Zimmer and Biomet were two of only three players in the U.S. market for unicondylar knee implants, and two of only four players in the U.S. market for bone cement. To resolve the FTC's concerns, Zimmer entered into a consent decree through which it its U.S. ZUK unicondylar knee implant rights and assets to Smith & Nephew and Biomet's U.S. Discovery Total Elbow implant and bone cement to DJO Global, Inc. – see File No 141-0144, *Zimmer Holdings, Inc. and Biomet, Inc.*

<sup>84</sup> Commission Decision M.7292 of 5 May 2015.

the purchaser would be able to use the Senseo brand in Austria. This would allow the licensee to take over the Senseo filter pad market share and re-brand its products.

The Commission was also initially concerned that the joint venture could lead to higher prices and less innovation by bringing together DEMB's Senseo single-serve system and Mondelēz's Tassimo single-serve system. Although the Senseo and Tassimo single-serve machines are sold by Philips and Bosch respectively, DEMB and Mondelēz could influence the price paid for these machines by consumers e.g. by offering cash-backs and coupons. Coffee companies have an incentive to do this because market penetration of these coffee machines would increase their sales of compatible capsules, pads or pods.

However following its in-depth investigation, the Commission concluded that the joint venture would compete against its strong rival Nestlé, which owns the other two single-serve systems – Dolce Gusto and Nespresso. In fact, Nestlé's Dolce Gusto competes particularly closely with Tassimo as they both respond to similar consumer needs by offering a variety of hot drinks (for example, spiced coffees, milky coffees, tea and hot chocolate). Furthermore, the joint venture would continue to have incentives to continue to support sales of Tassimo and Senseo coffee machines, because only by maintaining a high level of sales of these single-serve machines could the joint venture ensure a sufficient level of profitability on its sales of the corresponding filter pads and T-discs.

For all these reasons, the Commission approved the transaction subject to the divestment and licensing commitments given by Mondelēz and DEMB.

#### 6.5 Commission clears acquisition of Jazztel by Orange, subject to conditions<sup>85</sup>

Following a Phase II investigation, the Commission cleared the acquisition of Jazztel plc, a telecommunications company registered in the UK but mainly active in Spain, by rival Orange SA of France subject to commitments.

The takeover would bring together the third and the fourth providers of fixed telecommunication services in Spain. The Commission's investigation revealed that both Orange and Jazztel were important competitors in the retail markets involving fixed internet access services in Spain. In particular, they had attracted a higher share of new customers than their market shares would suggest and were the only two nationwide operators that had significantly increased their market shares in recent years. In the absence of effective remedies, a merger of these two dynamic players would have significantly reduced competition.

The Commission's findings showed, in particular, that:

- the merged entity would have had fewer incentives to compete aggressively against the remaining operators;

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<sup>85</sup> Commission Decision M.7421 of 19 May 2015.



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- the remaining major competitors - Telefónica and Vodafone – would have been unlikely to replace the competitive pressure formerly exercised by Orange and Jazztel because they would also have stood to benefit from the reduced price pressure;
  - new players would have faced significant difficulties to enter the market due to the high investments needed to enter retail markets involving fixed internet access services;
  - end-consumers would have no countervailing negotiation power to influence contractual conditions offered by strong providers.

The main impact of this reduced level of competition would have been felt in the short- to medium-term in the market segment with speeds of up to 30 megabits per second, which represented around four out of five internet connections in Spain in 2014.

The Commission also considered the fact that Orange and Jazztel's offers for the provision of mobile telecommunication services were complementary and could lead to efficiencies. Although these efficiencies would reduce the anti-competitive effects of the transaction, the Commission concluded that the loss of competition caused by the merger as initially notified would still remain significant.

To address the Commission's concerns, Orange submitted commitments based on two different technologies:

- on optical fibre: Orange committed to divest an independent Fibre-To-The-Home (FTTH) network covering 700,000 to 800,000 building units, which was similar to the size of Orange's current FTTH network in Spain. This high speed network covered 13 urban districts located in five of the largest Spanish cities: Madrid, Barcelona, Valencia, Sevilla and Málaga.
- on copper: Orange committed to grant the purchaser of the FTTH network wholesale access to Jazztel's national ADSL network for up to eight years. This commitment was for an unlimited number of subscribers and would allow the purchaser to compete immediately on 78% of Spanish territory. The cost for this wholesale access to Jazztel's ADSL network would allow the new player to compete as aggressively as Orange and Jazztel.

The vast majority of fixed internet contracts in Spain were bundled with a mobile component so that a new entrant would need access to a mobile network to compete effectively. Orange therefore committed also to grant to the purchaser of the FTTH network wholesale access to its mobile network including 4G services, unless the purchaser already had access to a mobile network. This would be at conditions that are at least as favourable as those Orange granted to Jazztel.

The remedies taken as a whole ensured that a fourth nationwide operator could enter the Spanish market and be able to compete effectively in markets involving fixed internet access services. They addressed in full the competition concerns raised by the merger on the markets involving fixed internet access services in Spain.

Throughout the investigation the Commission cooperated closely with the Spanish competition authority and telecoms regulator CNMC.

#### 6.6 **Commission clears joint venture for cross-border licensing of online music between PRSfM, STIM and GEMA, subject to commitments**<sup>86</sup>

Following a Phase II investigation, the Commission cleared the proposed creation of a joint venture for multi-territorial online music licensing and copyright administration services by three music collecting societies: PRS for Music Limited (“PRSfM”) of the UK, Föreningen Svenska Tonsättarens Internationella Musikbyrå u.p.a. (“STIM”) of Sweden and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (“GEMA”) of Germany, subject to commitments.

The Commission had concerns that the creation of the joint venture would make it more difficult for other collecting societies to offer copyright administration services by raising the barriers to entry and growth in this market and so focused its investigation on the impact of the joint venture on competition in the market for copyright administration services.

As regards copyright administration services provided to “Option 3 publishers”, the Commission had concerns that the creation of the joint venture would make it more difficult for new players to enter the market or for existing ones to expand.

First, the joint venture could force “Option 3 publishers” to use only its services for copyright administration.

Second, “Option 3 publishers” typically license performing rights together with their mechanical rights by virtue of a mandate granted to them by PRSfM. Following the creation of the joint venture, PRSfM could have an increased incentive to push “Option 3 publishers” or their service providers who were not customers of the joint venture to purchase copyright administration services from the joint venture. The reason for this was that PRSfM controlled the performing rights that matched the mechanical rights that “Option 3 publishers” had withdrawn from the collecting societies system in order to license directly.

The copyright administration services that the joint venture would offer to other collecting societies were a new product because they related to multi-territorial licences. Thus far, collecting societies had only administered each other’s repertoires for a single country, namely the home country of the collecting society. Some collecting societies had just started, or were considering, cooperating to provide copyright administration services to other, smaller collecting societies.

The Commission was concerned that the creation of the joint venture would prevent some of the existing cooperation initiatives from succeeding or new cooperation initiatives from emerging. The joint venture could bundle the different types of copyright administration services it offered and make it difficult for customers of its database to take their data to a competitor. In addition, the joint venture could require its customers not to source their

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<sup>86</sup> Commission Decision M.6800 of 16 June 2015.

copyright administration services from any other third party. This would lead to less competition and potentially higher prices for customers.

The Commission also investigated the impact of the joint venture on competition in the market for online licensing. Specifically, it assessed whether the combination of the repertoires of PRSfM, STIM and GEMA in the new product that the joint venture would license to online platforms would allow it to charge royalty rates higher than those each of the parties could obtain if they licensed their repertoires separately. The Commission found that in the present market situation, collecting societies licensing larger repertoires on a multi-territorial basis were not typically able to command higher royalty rates than those licensing smaller repertoires on a multi-territorial basis. The Commission therefore concluded that the creation of the joint venture was unlikely to lead to higher royalty rates for online platforms.

To address the Commission's concerns, the companies submitted the following commitments:

- PRSfM committed not to use its control over the performing rights that it manages to force 'Option 3 publishers' or their service providers to purchase copyright administration services from the joint venture. The joint venture would allow other collecting societies and 'Option 3 publishers' to choose which copyright administration services they wanted to use.
- The joint venture would offer key copyright administration services to other collecting societies on FRAND terms when compared to the terms offered to its parents PRSfM, STIM and GEMA. The joint venture would also facilitate the switching of collecting societies relying on the joint venture's copyright database to another provider of database services. Collecting societies could terminate their contract with the joint venture at any time.
- The joint venture would not enter into exclusive contracts with its customers for copyright administration services other than for database services.

In consideration of these commitments the Commission cleared the transaction under the Merger Regulation.

#### 6.7 **Commission clears acquisition of rotating equipment manufacturer Dresser-Rand by Siemens**<sup>87</sup>

Following a Phase II investigation, the Commission cleared the acquisition of rotating equipment manufacturer Dresser-Rand of the US by Siemens of Germany. Both companies supplied turbo compressors as well as the engines which drive these compressors ("drivers"). There are different kinds of drivers including aero-derivative gas turbines ("ADGT"), industrial gas turbines ("IGT"), steam turbines and electric motors.

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<sup>87</sup> Commission Decision M.6800 of 29 June 2015.

The Commission's initial investigation indicated that:

- As far as concerned ADGT driven turbo compressor trains, the transaction would reduce the number of competitors from three main suppliers– Siemens/Rolls-Royce, Dresser-Rand and General Electric – to two main suppliers.
- As far as concerned small steam turbines below 5 megawatts (MW), Siemens and Dresser-Rand would face competition from only a few suppliers.

The Commission therefore focused its in-depth investigation on these two market segments.

With regard to ADGT driven compressor trains, the Commission's investigation showed that the activities of Dresser-Rand and Siemens were largely complementary, because:

- they are, to a large extent, focusing on different oil and gas applications; and
- they are only rarely bidding against each other in tender procedures.

In addition to this, the Phase-II investigation showed that ADGT driven compressor trains were largely substitutable with light IGT driven compressor trains. For turbo compressor trains with a power requirement below 23 MW, Solar was currently the market leader ahead of respectively GE and Dresser-Rand. Siemens had only a limited offering of IGTs. As a result, for trains requiring a power output below 23 MW, the Commission found that the two companies not only faced competition from GE but also from Solar. Solar did not manufacture light IGTs with a power output above 23 MW.

The Commission therefore concluded that the proposed concentration would not raise competition concerns with respect to ADGT and light IGT driven compressor trains.

With regard to small steam turbines of less than 5 MW, the in-depth investigation showed that the two companies were not close competitors, as their activities were largely complementary. Instead, they both faced strong competition from other major suppliers on their respective market segment. Moreover, the investigation showed that a number of smaller competitors were, and would remain, active in small steam turbines of less than 5 MW.

Based on its investigation, the Commission found that these smaller suppliers could expand their production and that additional producers could enter the market. As a result, the Commission concluded that the proposed concentration would not raise competition concerns with respect to small steam turbines of less than 5 MW.

For all these reasons the Commission cleared the transaction under the Merger Regulation.<sup>88</sup>

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<sup>88</sup> This transaction was also approved by the U.S. Department of Commerce and by China's Ministry of Commerce (MOFCOM).

### 6.8 Commission approves Cargill's acquisition of ADM's industrial chocolate business, subject to conditions<sup>89</sup>

Following a Phase II investigation, the Commission cleared the acquisition of the industrial chocolate business of Archer Daniels Midland ("ADM") by Cargill, subject to conditions. Both US-based businesses supply industrial chocolate as well as fat-based coatings and fillings. Industrial chocolate, sold in both liquid and solid form, is used by customers in the food processing industry to produce consumer foodstuffs such as biscuits, ice-cream and chocolate confectionery.

The Commission's investigation showed that the transaction as notified would reduce competition in the already concentrated market for industrial chocolate and risked increasing industrial chocolate prices for customers located near the parties' German plants, especially for small and mid-sized customers. The Commission therefore focused its investigation on competition in industrial chocolate markets. The Commission also looked at the effects of the transaction in the markets for cocoa products and chocolate compound.

The Commission found that Cargill and ADM were important suppliers of industrial chocolate to customers based around their plants in Germany. The parties' most important competitor in those areas was Barry Callebaut, albeit with a smaller market share. The investigation revealed that several smaller competitors had a more limited presence and would not pose a sufficient competitive constraint on the parties. The proposed transaction would eliminate an important competitor and reduce the choice of suitable suppliers in already concentrated markets, which could lead to price increases especially for small and mid-sized customers.

The Commission's investigation also showed that the market structure was different in the areas around the parties' plants in Belgium, France and the United Kingdom. In these areas, the parties' combined market position was more moderate and Barry Callebaut was a much more important competitor. The Commission therefore did not identify any competition concerns in these geographical areas.

In addition, the Commission investigated whether the proposed acquisition could have any effects on Cargill's activities in the production and sale of cocoa products which are used as a raw material for industrial chocolate. However, the Commission concluded that Cargill's position in the cocoa markets was not significant enough to make any such effects likely and that there are a sufficient number of alternative suppliers to ensure the supply of cocoa products.

The Commission also did not find competition concerns in the markets for fat-based coatings and fillings and in particular for chocolate compound, which is sometimes used instead of chocolate in the production of end-consumer products. In these markets, the parties' combined market position was moderate and there were a number of alternative suppliers.

To address the Commission's concerns, Cargill submitted commitments according to which it would divest ADM's industrial chocolate plant in Mannheim to a suitable purchaser. The

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<sup>89</sup> Commission Decision M.7408 of 17 July 2015.

Mannheim plant was the largest of ADM's industrial chocolate plants in Europe and was ADM's only industrial chocolate plant in Germany.

The commitments ensured that an important alternative supplier would remain available. They addressed in full the competition concerns raised by the acquisition on the market for industrial chocolate sold to customers located around the parties' German plants. The Commission therefore cleared the transaction subject to these commitments.

#### 6.9 **Commission clears GE's acquisition of Alstom's power generation and transmission assets, subject to conditions<sup>90</sup>**

Following a Phase II investigation, the Commission cleared the acquisition of Alstom's energy businesses by General Electric subject to divestment of central parts of Alstom's heavy duty gas turbines business to Ansaldo.

The Commission had concerns that the transaction would have eliminated one of the main global competitors of GE in the heavy duty gas turbines market, where GE is the world's largest manufacturer and Alstom is the number three or four player globally. This would have led to less innovation and higher prices in a market for a technology vital to meeting climate change goals.

Concerning the other businesses that are part of the transaction, namely the thermal power generation businesses (other than gas), grid and renewables, the Commission did not identify any competition concerns because the activities of the two companies are complementary and do not overlap.

Advanced heavy duty gas turbine technology is crucial to face the challenges of climate change and modernising the EU's energy supply. It is the most efficient, cleanest and flexible fossil fuel power generation technology and an important complement to more unpredictable generation from renewables - when the wind stops blowing it is mostly flexible gas-fired plants that can step in.

Heavy duty gas turbines operate on either of two frequencies 50 Hz and 60 Hz, and can be further differentiated according to power output - medium, large and very large. In the EEA all heavy duty gas turbines operate at a frequency of 50 Hz. The Commission's Phase-II investigation therefore focused on the markets for the sale and servicing of heavy duty gas turbines operating at 50 Hz, where Alstom competes directly with GE in the EEA.

The Commission found that the market for heavy duty gas turbines was concentrated with only four globally active full technology competitors: GE, Siemens, Alstom and Mitsubishi Hitachi Power Systems (MHPS). This was due to the large upfront investments in R&D, testing and manufacturing required, setting very high technological and financial barriers to enter the market. The fifth player, Ansaldo, had more limited R&D capabilities, a narrower product range and a more limited geographic reach.

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<sup>90</sup> Commission Decision M.7278 of 8 September 2015.

The merged entity would account for more than 50% of the EEA market for heavy duty gas turbines and also very high market shares on the worldwide market for 50 Hz frequency heavy duty gas turbines. In fact, in the EEA, the transaction as notified would have brought together two of the three main competitors.

In order to address the Commission's concerns, the parties offered to divest the main, technologically most advanced parts of Alstom's heavy duty gas turbine business and key personnel for its further development. In particular:

- Alstom's heavy duty gas turbine technology for the GT 26 and GT 36 turbines, existing upgrades and pipeline technology for future upgrades, excluding essentially only the technology for Alstom's older GT 13 model for which the Commission had no competition concerns;
- a large number of Alstom R&D engineers who would continue to develop the Alstom heavy duty gas turbine technology;
- the two test facilities for the GT 26 and GT 36 turbine models in Birr, Switzerland;
- long term servicing agreements for 34 GT 26 turbines already sold by Alstom; and
- Alstom's PSM servicing business based in Florida, US.

GE proposed Ansaldo of Italy as a potential purchaser for these assets. Ansaldo is an existing competitor in the heavy duty gas turbine market. It already has know-how, experience and an efficient factory for gas turbines and other power plant components (such as steam turbines and generators) that are often sold together with heavy duty gas turbines.

The commitments offered by GE would allow the purchaser to replicate Alstom's previous role in the market thereby maintaining effective competition. Moreover, the divestment would guarantee the continuation of Alstom's distinctive dual combustion heavy duty gas turbine technology, which is particularly well suited for the needs of European customers, while at the same time offering the purchaser advanced R&D capabilities and incentives to continue pushing innovation on this important market for the EEA.

Subject to these conditions, the Commission was able to clear the transaction under the Merger Regulation.

Given the complexity of the case and the global reach of the parties' activities, the Commission cooperated with the competition authorities of a significant number of countries. This involved in particular close and successful cooperation with the Antitrust Division of the Department of Justice in the US. While the scope of the Department of Justice's concerns was different due to different conditions in the US markets for heavy duty gas turbines (operating at 60 Hz), the cooperation involved regular exchanges of views and evidence and a joint approach to remedy discussions leading to satisfactory and mutually aligned remedy solutions for both EU and US concerns.

The Commission also cooperated with merger control agencies in Brazil, Canada, China, Israel and South Africa.

## **7. STATE AID**

### **7.1 Commission finds that favourable tax rulings granted by Luxembourg and the Netherlands, constitute illegal state aid that must be recovered**

In October 2014 the Commission opened several investigations into whether favourable tax rulings granted by certain Member State tax authorities constitute illegal state aid. The Commission's concern is that tax rulings are being used to approve transfer pricing arrangements whereby a Member State artificially reduces a company's tax base in order to encourage the company to establish its operations in that State. Such arrangements involve a cost to the state because tax revenue is reduced. These arrangements are selective because they are not set out expressly in the tax legislation as being available to all operators. On the contrary, they are far from transparent and are granted only to certain companies. They therefore distort competition. Last of all, they affect trade between Member States because the companies involved are multinationals which do business throughout the EU, usually from a single manufacturing or administrative base in the EU. As such they are illegal under EU law unless they have been notified to and approved in advance by DG Competition.

The cases examined or under examination concern excess profit tax rulings in Belgium, intra-group financing arrangements in Luxembourg, and transfer pricing arrangements in Luxembourg, Ireland and the Netherlands arising out of the supply of raw materials and the licensing of know-how. Companies are particularly exposed if they use transfer-prices for intra-group supplies that are totally out of line with economic reality, or if they apply inconsistent royalty rates, for example, where one company in the group pays an intra-group royalty at a much higher rate than other companies in the group. The Commission's investigations also focus on factual situations which tend to indicate that the rulings are based on considerations other than tax, such as the creation of additional employment.

In October 2015 the Commission adopted two decisions in this area, one addressed to Luxembourg and the other to the Netherlands. These decisions make formal findings that two transfer-pricing rulings, one concerning intra-group financing and the other concerning transfer pricing and royalties, are illegal. As a result, Luxembourg and the Netherlands are each required by the Commission to recover the illegal aid granted. The Commission leaves it up to these two Member States to calculate the precise amount of aid granted illegally, but informal indications suggest that the amounts at stake are of the order of €20 to €30 million.

It should be noted that the Commission's decisions do not call into question the possibility for Member State tax authorities to grant tax rulings. Such rulings can be a legitimate way for the tax authorities to provide a company with clarity on how its corporate tax will be calculated. The Commission's crusade is against tax rulings that endorse artificial and complex methods of reducing the tax base which do not reflect economic reality. It is quite normal for companies to seek tax rulings, but they need to be attentive to situations where the tax ruling is being used to provide an incentive for the company to locate or retain its location in a particular Member State. It will be important to ensure that the tax ruling is based on objective economic and market considerations. If in doubt, one possibility is for the Member State concerned to notify a proposed ruling to DG Competition for clearance. Although this provides legal certainty, it is a time-consuming process that can last up to 18 months.



## 7.2 GCEU annuls Commission decision for incorrect application of the concept of selectivity

In Hungary all mining and hydrocarbon exploration and exploitation is regulated by the Mining Act of 1993. In 2005 Magyar Olaj-és Gazipari Nyrt (“MOL”) and the Hungarian State entered into an agreement whereby certain hydrocarbon exploitation rights granted to MOL were extended and the fees payable for those rights were determined on a non-revisable basis for the period 2005-2020 (“the 2005 Agreement”).

In 2008, a reform of the 1993 Mining Act significantly increased the fees payable for the exploration and exploitation of hydrocarbon fields. However, in view of the 2005 Agreement, MOL was exempted. Following receipt of a complaint, the Commission initiated a formal investigation under Article 88(2) EC (now Article 108(2) TFEU) with respect to the 2005 Agreement, in so far as it exempted MOL from the increase in exploitation fees resulting from the 2008 amendment.

The Commission decided that, given the way the 2005 Agreement and the provisions of the 2008 amendment had been designed, they should be regarded as part of the same measure, and concluded that their combined effect conferred an unfair advantage on MOL. Thus, the Commission considered that the measure constituted state aid within the meaning of Article 107(1) TFEU.<sup>91</sup> Consequently, the Commission ordered Hungary to recover alleged state aid of approximately €12 million from MOL.

The Hungarian authorities challenged the Commission’s decision before the GCEU, arguing that the measure did not constitute State aid since the 2005 Agreement did not confer any advantage on MOL; it was not selective because the company received no preferential treatment resulting from that agreement.

The GCEU annulled the decision on the ground that the Commission had not demonstrated adequately that MOL had benefited from favourable treatment in relation to its competitors regarding the payment of the exploitation fees. Furthermore, the combination of the 2005 Agreement and the 2008 Mining Act reform could not be categorised as state aid.<sup>92</sup>

The Commission appealed to the CJEU arguing that the GCEU had wrongly interpreted the condition of selectivity.

The CJEU upheld the GCEU’s finding that the Commission had failed to establish the selectivity of the alleged aid measure, and confirmed that the agreement between the Hungarian State and MOL relating to the exploitation of hydrocarbon fields did not constitute State aid.<sup>93</sup>

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<sup>91</sup> Commission Decision 2011/88/EU of 9 June 2010 on State aid C 1/09 (ex NN 69/08) granted by Hungary to Magyar Olaj-és Gazipari Nyrt (MOL) (OJ L34, 2011, p.55).

<sup>92</sup> *Magyar Olaj-és Gazipari Nyrt (MOL) v Commission*, T-499/10, EU:T:2013:592.

<sup>93</sup> *Commission v Magyar Olaj-és Gazipari Nyrt (MOL)*, C-15/14P, EU:C:2015:362.

The CJEU specified that the selectivity requirement differs depending on whether the measure in question is contemplated as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective.

By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity.

Therefore, the appropriate comparator for establishing the selectivity of the measure at issue, was to ascertain whether the procedure for concluding and setting the terms and conditions of the agreement extending mining rights, drew a distinction between operators that were in a comparable factual and legal situation.

The CJEU found that the GCEU was correct to hold that the mere fact that the Hungarian authorities enjoyed limited discretion, defined by law, to determine the rate of the extension fee, was not sufficient to establish that certain undertakings might gain a selective advantage therefrom.

Moreover, the CJEU considered that the GCEU rightly found that the fact that the rates set by the 2005 Agreement were the result of negotiations between MOL and the Hungarian authorities did not confer a selective character on that agreement. According to the CJEU, the Hungarian authorities exercised their discretion to set the rate of the mining fee objectively and without discrimination and did not, therefore, favour MOL over its competitors.

Finally, the CJEU ruled that the GCEU could validly conclude that the discretion enjoyed by the Hungarian authorities with regard to the decision to extend the agreement for the period 2015-2020 did not enable MOL to gain any selective advantage.

Last of all, the CJEU found that the 2005 Agreement and the 2008 amendment of the Mining Act should not be regarded as a single intervention for the purposes of Article 107(1) TFEU, mainly because the increase in the level of the mining fees resulting from the 2008 amendment to the Mining Act occurred in a context of an increase in international crude oil prices. Several consecutive measures of State intervention can only be regarded as a single intervention when those measures, having regard to their chronology, their purpose and the circumstances of the undertaking at the time of the interventions, are so closely related to each other that they are inseparable from one another.

### **7.3 CJEU provides guidance on how certain measures could constitute state aid, but leaves it to the national court to apply this guidance**

The year 2015 saw several references to the CJEU concerning the preliminary questions whether a particular scheme constituted state aid. The CJEU provided guidance on the law but left it to the national court to apply the guidance to the facts of the case. This illustrates the clear division of roles between the CJEU and the national courts in the application of EU law. It is not the role of the CJEU to resolve individual disputes.

7.3.1 Whether the reservation of bus lanes for black cabs in London, to the exclusion of other taxis, could constitute state aid

Transport for London, the traffic authority for certain roads in Greater London, operates a “bus lanes policy”. This policy authorises London taxis (“Black Cabs”) to use London bus lanes when the bus lanes restrictions are operational but prohibits private hire vehicles (“minicabs”) from doing so. Addison Lee plc, which operated a fleet of minicabs, issued a notice to drivers telling them to use the London bus lanes and offering to indemnify them for any fines incurred for doing so. As a result, several minicab drivers used the bus lanes and the traffic authority imposed several fines on Eventech Ltd, a wholly-owned subsidiary of Addison Lee.

Eventech challenged the fines before the Parking Adjudicator without success. Eventech then challenged the decision of the Parking Adjudicator but its action was dismissed by the High Court of England and Wales, Queen’s Bench Division. Eventech appealed to the Court of Appeal against the judgment of the Queen’s Bench Division. Eventech claimed that the bus lanes policy constituted state aid within the meaning of Article 107(1) TFEU, that benefited the operators of Black Cabs. Furthermore, the aid had not been notified to the Commission and so it was illegal.

The Court of Appeal decided to stay proceedings and refer several questions to the CJEU for a preliminary ruling concerning the interpretation of Article 107(1) TFEU.<sup>94</sup> By virtue of this provision, “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member states, be incompatible with the internal market”.

Two questions posed to the CJEU merit attention.

First, the referring court asked whether making a bus lane on a public road available for Black Cabs but not minicabs involved the use of “state resources” within the meaning of Article 107(1) TFEU.

Eventech made the argument before the referring court that the bus lanes policy entailed a budgetary burden for the state because Black Cabs were not charged for using the London bus lanes and were exempted from any liability to pay fines when they used those bus lanes. Eventech pointed to the case of *Commission v Netherlands*.<sup>95</sup> In that case, the Kingdom of Netherlands had given several companies the possibility of buying emission allowances to avoid the payment of fines for exceeding the statutory limits on their emissions of nitrogen oxide. Had such allowances not been available, they would have had to pay fines to the Dutch State.

The CJEU distinguished *Commission v Netherlands*. The CJEU held that the present case was different because Black Cabs were entitled to use the London bus lanes. The fact that they do not pay a fine when using the London bus lanes was not because the public

<sup>94</sup> *The Queen, on the application of Eventech Ltd v The Parking Adjudicator*, C-518/13, EU:C:2015:9.

<sup>95</sup> *Commission v Netherlands*, C-279/08 P, EU:C:2011:551.

authorities had decided not to collect a fine from them but because they were actually permitted to use them. Accordingly, the CJEU held that the fact that Black Cabs could use those bus lanes without paying fines was not an additional budgetary burden on the public authorities which entailed the commitment of state resources.

In other words, the CJEU ruled that there is a clear difference between a situation where a state decides to forgo the payment of fines by companies and the case where a state is not entitled to receive the payment of fines because it has expressly authorised companies to act in a certain way. In the first situation, the use of “state resources” is involved, whereas in the second situation it is not.

Second, the referring court asked whether the bus lanes policy conferred on Black Cabs a selective economic advantage within the meaning of the words of Article 107(1) TFEU: “favouring certain undertakings or the production of certain goods”.

Under the Court’s settled case law, this requires the assessment of whether undertakings are placed in similar factual and legal circumstances.<sup>96</sup> The referring court essentially asked the CJEU to assess whether the bus lanes policy introduced a distinction between two operators, Black Cabs on the one hand, and minicabs on the other hand, who were in a comparable factual and legal situations.

Whilst stating that this question was for the referring court to address, the CJEU nevertheless provided extended guidance. The CJEU pointed to the differences between Black Cabs and minicabs. Only Black Cabs can “ply for hire”, which means that they can solicit or wait for passengers without any pre-booking; they are subject to the rule of “compellability” which requires them to agree on driving a passenger wherever he wishes to go, once they have agreed to pick him up; they must be recognisable for their services, e.g., use a “Taxi” sign and comply with a certain number of standards, and they must be capable of conveying persons in wheelchairs; their drivers must set the fares for their services by means of a taximeter; and drivers must have a particularly thorough knowledge of the city of London. The CJEU considered that these elements were sufficient to conclude that Black Cabs and minicabs were in factual and legal situations that are distinct enough to permit the view that they were not comparable and the bus lanes policy did not therefore confer a selective economic advantage on Black Cabs.

This case provides an interesting illustration of a creative use of the Treaty’s provisions on state aid to challenge regulatory systems that give one category of operators an economic advantage over another category of operators. Since such cases do not generally involve a direct transfer of funds, it is difficult to show that they involve the use of “state resources” within the meaning of Article 107(1) TFEU. It is interesting that the Court did not refer to its case law on how the provision of infrastructure can, in certain circumstances, amount to state aid.<sup>97</sup>

<sup>96</sup> See *Mediaset v Commission*, C-403/10 P, EU:C:2011:533.

<sup>97</sup> See for example, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, C-288/11P, EU:C:2012:821.

7.3.2 Whether the granting of state guarantees to banks to support housing could constitute state aid

The preliminary ruling in *OTP Bank* demonstrates that beneficiaries of pre-accession aids need to be wary of the consequences arising from the classification of those aids as “new aid” rather than “existing aid”.<sup>98</sup> Amounts disbursed under “existing aid” measures are legal and are kept under review by the Commission pursuant to Article 108(1) TFEU. They are therefore protected against an order for recovery *ex post*. On the other hand “new aid” measures are subject to the prior notification requirements of Article 108(3) TFEU. If they are implemented in breach of those requirements they are illegal and can be recovered.

The judgment in *OTP Bank* was rendered in response to a request for a preliminary ruling from the Budapest Municipal Court. The case arose out of guarantees that the Hungarian State granted to OTP Bank in connection with loans to facilitate access to home ownership by individuals. These guarantees were introduced by a Decree adopted in 2001, before Hungary’s accession to the EU on 1 May 2004. In 2008, based on this Decree, OTP Bank, the Ministry of Local Government and the State Treasury entered into an agency agreement that entrusted OTP Bank with the task of making payments of aid for housing. OTP Bank requested the Hungarian State to implement this agreement and pay guaranteed amounts. Considering that with regard to loan agreements concluded on or after 1 May 2004 the guarantee provided by it under the 2001 Decree constituted state aid under EU law, the Hungarian State refused to pay OTP Bank.

Against this background, the Budapest Municipal Court asked the following three questions as reformulated by the CJEU:

- whether the state guarantee may be classified as “state aid” within the meaning of Article 107(1) TFEU;
- if so, whether it was subject to the obligation of notification laid down in Article 108(3) TFEU; and
- if appropriate, what are the consequences arising from the failure to fulfil the obligation of notification.

In responding to the first question, the CJEU examined whether the guarantee envisaged in the 2001 Decree fulfilled the three conditions laid down by Article 107(1) TFEU. These three conditions are: a) the measure is financed by the State or through State resources; b) the measure distorts competition by being selective; and c) the measure affects trade between Member States.

First, the CJEU found that the state guarantee at issue was granted by the state or through state resources because it was provided pursuant to the agency agreement between the Ministry for Local Government, the State Treasury and OTP Bank. Credit institutions such as OTP Bank sent their claims for payment under the guarantees to the Ministry of Local Government or the Ministry of the Economy.

<sup>98</sup> *OTP Bank Nyrt v Magyar Állam and Magyar Államkincstár*, C-672/13, EU:C:2015:185.

Second, the CJEU held that the state guarantee could be regarded as selective because the 2001 Decree stipulated that it was for the credit institutions to implement that decree and to benefit from the state guarantee. It is established case-law that an aid may be selective even where it concerns a whole economic sector.<sup>99</sup> The CJEU, however, left it to the referring court to determine whether the state guarantee was selective in this particular case, since the selectivity could be called into question in light of a possible expansion of the scope of beneficiaries to include other economic operators through an amendment to the 2001 Decree.

Last of all, the CJEU found that the state guarantee had the effect of strengthening the position of the credit institutions as compared with that of other operators in the market and made it more difficult for operators established in other Member States to penetrate the Hungarian market. The CJEU therefore held that the state guarantee was liable to affect trade between Member States and distort competition.

Assuming that the national court found that the state guarantee was selective and so constituted state aid, the CJEU addressed the question of whether or not the aid was lawful. The CJEU found that the state guarantee did not fulfil the conditions for aid measures to be regarded as existing aid at the time of Hungary's accession, as laid out in Annex IV to the Act concerning the conditions of accession. The question arose, therefore, whether Hungary had notified the state guarantee to the Commission after accession.

While noting that it appeared that Hungary had not notified the Commission of the state guarantee, the CJEU left it to the referring court to ascertain whether Hungary had in fact failed to comply with the notification obligation and, if this was the case, to declare the guarantee unlawful.

Concerning the consequences arising from the unlawfulness of any state aid, the CJEU recalled that it was for the national courts to draw the necessary conclusions with regard to both the validity of the acts giving effect to the aid and the recovery of unlawful financial support.<sup>100</sup> The CJEU then noted that the logical consequence of the finding that aid was unlawful is its removal by means of recovery.<sup>101</sup> It is only in exceptional circumstances that it would be inappropriate to order recovery of the aid.<sup>102</sup> Finding that no such exceptional circumstances existed, the CJEU observed that the national court would, in principle, be bound to order recovery of the aid.

The CJEU also noted that even if the Commission were to declare the state guarantee compatible with the internal market, this could not rectify *ex post* the measures implemented in violation of Article 108(3) TFEU. Moreover, the beneficiaries of a state guarantee granted

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<sup>99</sup> See *Belgium v Commission*, C-75/97, EU:C:1999:311, paragraph 33; and *Paint Graphos and Others*, C-78/08, EU:C:2011:550, paragraph 53.

<sup>100</sup> *Van Calster and Others*, C-261/01 and C-262/01, EU:C:2003:571, paragraph 64; *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 49; and *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 41.

<sup>101</sup> *Italy and SIM-2 Multimedia v Commission*, C-328/99 and C-399/00, EU:C:2003:252, paragraph 66, and *Mediaset v Commission*, C-403/10P, EU:C:2011:533, paragraph 122.

<sup>102</sup> *Residex Capitil IV*, C-275/10, EU:C:2011:814, paragraph 35.

in contravention of Article 108(3) TFEU do not have any remedies under EU law because they cannot have a legitimate expectation that the grant of the aid was lawful.<sup>103</sup>

### 7.3.3 Whether the power to register a mortgage without paying registration fees could constitute state aid

This preliminary ruling was delivered by the CJEU in the context of proceedings in Greece between Eurobank and Agrotiki Trapeza tis Ellados AE (“ATE”).

ATE was established in 1929 by statute as an independent organisation of public utility, with the object of providing all forms of agricultural credit, supporting cooperative organisations and improving the conditions under which agricultural operations generally and associated transactions are carried out. In order to compensate for the high level of risk involved in the granting of agricultural credit, the law conferred special privileges on ATE, namely (i) the right to register a mortgage over the property of its debtors without it being required to conclude a mortgage contract with them; (ii) the right to seek enforcement of the loan on the basis of an ordinary private document; and (iii) the exemption from all fees and duties when registering such a mortgage.

In 1987 and 1990, the objects of ATE were extended to cover the exercise of all banking activities but its privileges remained unchanged.

In the context of repayment procedures against Mr. Sidiropoulos, creditor of both ATE and Eurobank, Eurobank challenged ATE’s privileges, arguing that they were contrary to Article 107 of the TFEU. The Thrace Court of Appeal decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

- Do the substantive and procedural privileges conferred upon ATE by Greek laws fall within the scope of Article 107(1) TFEU?
- Does the same restriction apply even if it is assumed that ATE continues to engage in activity of “public utility” under its statutes?
- If the answers to the first two questions are in the affirmative, should Greece have observed the notification procedure provided for by Article 108(3) TFEU in order for the privileges in question to remain in force?
- Must this court not apply the contested laws inasmuch as they may be contrary to Articles 107(1) and 108(3) TFEU?

The CJEU considered that it was for the referring Court to determine whether the privileges held by ATE satisfied all the four conditions under Article 107(1) TFEU.

The CJEU was of the opinion that it could not be ruled out that the contested privileges could come within the scope of Article 107(1) TFEU due in particular to the exemption from fees provided for by the Greek Law concerning ATE. This exemption was capable of depriving

<sup>103</sup> *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 104.

the Greek Treasury of certain sources of liquidity thereby affecting its budget. Moreover, the CJEU found that such an exemption could confer on the bank an economic advantage over its competitors and thus make the penetration of the Greek market harder for banks established in other Member States.

The CJEU considered that it was for the referring court to determine whether, in particular, as a result of the extension of the activities and modifications to the statute of ATE, the privileges at issue in the main proceedings constituted compensation for the services provided by that bank in order to discharge public service obligations.

The CJEU first recalled that Article 108 TFEU provides for different procedures according to whether the aid is existing or new, and stated that it was necessary to determine whether privileges, such as those at issue in the main proceedings, were capable of constituting existing aid.

The CJEU considered that it was for the referring Court to determine whether the changes made to ATE in 1987 and 1990, and in particular the extension of ATE's activities, could be considered as having altered the privileges initially granted. In that case, the procedure set forth in Article 108(3) TFEU should have been followed provided that those privileges became new aid after the entry into force of the Treaty in Greece and that the ten-year limitation period provided for by Article 15(3) of Regulation No 659/1999 has not expired.

The CJEU considered that the national court would be required to set aside the national provisions only if the national court established that the privileges in question constituted new state aid that had not been notified to the Commission.<sup>104</sup>

#### **7.4 GCEU finds that a selective airline passenger tax reduction constitutes state aid but annuls the Commission's recovery order**

As from 30 March 2009 an "air travel tax" (ATT) was instituted in Ireland in respect of "every departure of a passenger on an aircraft from an airport" situated in Ireland. That tax was not applicable to transit and transfer passengers.

When it was introduced, the ATT was levied on the basis of the distance between the airport of departure and the airport of arrival, at the rate of €2 in the case of a flight from an airport to a destination no more than 300 km from Dublin airport (Ireland) and €10 in all other cases.

In July 2009, Ryanair filed a complaint with the Commission, criticising several aspects of the ATT implemented by Ireland. Ryanair claimed, *inter alia*, that:

- The non-application of the ATT to transit and transfer passengers constituted unlawful State aid to the advantage of the airlines Aer Lingus and Aer Arann, because those companies had a relatively high proportion of passengers and flights in those categories;

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<sup>104</sup> *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE)*, Pavlos Sidiropoulos, C-690/13, EU:C:2015:235.



- The flat-rate amount of the tax represented a significantly higher proportion of the ticket price for low-fares airlines than for traditional airlines; and
- The lower tax rate which applied depending on the distance travelled favoured Aer Arann, since 50% of its passengers travelled to destinations no more than 300 km from Dublin airport.

By decision of 25 July 2012, the Commission considered that the application of a lower rate for short-distance flights between 30 March 2009 and 1 March 2011 constituted State aid incompatible with the internal market. The application of that rate was liable to benefit domestic flights as opposed to cross-border flights.

The Commission therefore ordered the recovery of the aid from the beneficiaries, indicating that the amount of the aid corresponded to the difference between the lower rate of the ATT (€2) and the standard rate of €10 - that is to say, €8 - levied on each passenger.

Aer Lingus and Ryanair, who were beneficiaries of that state aid, challenged the Commission's decision before the GCEU.

Aer Lingus and Ryanair claimed, in essence, that the Commission (i) erred in finding that the €10 rate of the ATT was the "normal" rate in order to establish the existence of a selective advantage in favour of the airlines subject to the lower rate of €2, and (ii) made errors in the recovery decision.

The GCEU annulled the Commission decision in so far as it ordered the recovery of the aid from the beneficiaries for an amount set at €8 per passenger.

The GCEU found that the Commission did not err in characterising the higher rate of €10 as the reference rate, and in concluding that the application of the different rates in the present case constituted State aid in favour of airlines whose flights were subject to the lower rate of €2 during the period concerned. However, the GCEU also found that the Commission erred in quantifying the amount of aid to be recovered at €8 per passenger. The GCEU reasoned that, because the reduced rate of tax could have been passed-on, in whole or in part, to passengers, the Commission was not entitled to consider that the advantage enjoyed by the airlines amounted automatically, in all cases, to €8 per passenger.

The GCEU noted that the Commission did not explain why the airlines would have kept the advantage for themselves rather than passing it on, at least in part, to passengers.

Finally, the GCEU noted that the Commission had not established that the recovery of aid from the airlines at the rate of €8 per passenger was necessary in order to ensure the restoration of the situation which would have prevailed if the flights subject to the rate of €2 per passenger had in fact been subject to the rate of €10 per passenger. The GCEU considered that was not possible for the airlines to recover retroactively from their customers the €8 per passenger which should have been collected.

For all these reasons the GCEU annulled the Commission's decision in so far as it ordered recovery of the illegal aid.<sup>105</sup>

The Commission has appealed to the CJEU.<sup>106</sup>

This is an unusual case on state aid because it involves a tax which was charged in respect of passengers, but was charged to and collected from the airlines. Relying on this consideration the GCEU considered that it could not be said that the reduction in tax automatically benefited the airlines. This line of reasoning merits critical analysis. Suppose that a company is given a state subsidised loan to build a factory, and the aid is not notified to the Commission and so is illegal. The subsidised loan necessarily provides a financial benefit to the company concerned. That benefit is very likely to be reflected in the prices charged by the company to its customers. In other words the benefit of the aid is passed on in whole or in part to customers. It has never been suggested, however, that aid of this kind should not be recovered from the beneficiary.

#### **7.5 GCEU finds that the Commission did not have serious difficulties when considering a complaint and so was not obliged to open a formal investigation**

On 1 December 2011, the Greek authorities notified the Commission of two measures granted in favour of OPAP (Organismos Prognostikon Agonon Podosfairou AE, a football results forecasting body). These measures granted OPAP: (i) an exclusive licence to operate 35,000 Video Lottery Terminals ("VLTs") for a period of 10 years (ending in 2022), in exchange for a fee of €560 million; and (ii) a 10-year extension (from 2020 to 2030) of the exclusive rights already granted to operate 13 games of chance, in exchange for a €375 million lump sum payment and a levy by the Greek State of 5% of the gross gaming revenues.

On 4 April 2012, Club Hotel Loutraki and the other applicants filed a complaint with the Commission, alleging that the above measures constituted illegal State aid, because: (i) the Greek State would have been able to receive a better price if it had granted more than one licence to operate the VLTs and organised a public international call for tenders for their allocation; and (ii) the profits made by OPAP in connection with the exclusive operation of the VLTs were considerably higher than they would have been if OPAP had operated on the market with providers holding a licence for the VLTs in conditions of free competition.

On 3 October 2012 the Commission adopted a decision whereby it found that the above measures did not constitute illegal state aid under Article 107 TFEU.<sup>107</sup> Although the Commission evaluated each of the two measures separately, it also conducted a joint assessment given that they had been notified jointly by the Greek authorities and concerned the granting of exclusive rights to the same company, at the same time, for very comparable activities, and taking account of the announced privatization of OPAP in the short-term. In addition, during the discussions between the Commission and the Greek authorities within the context of the notification, it was agreed that a supplement to the originally envisaged

<sup>105</sup> *Aer Lingus v Commission*, T-473/12, EU:T:2015:78; *Ryanair v Commission*, T-500/12, EU:T:2015:73.

<sup>106</sup> *Commission v Aer Lingus*, C-164/15 P.

<sup>107</sup> Decision C(2012) 6777 final, SA.33988 (2011/N).

consideration for the agreement on the VLTs should be introduced. Therefore, by letter of 7 August 2012, the Greek authorities submitted a commitment to introduce an additional levy on the gross gaming revenues obtained by OPAP from the operation of VLTs, on top of the above mentioned €560 million fee.

The applicants sought the annulment of the decision claiming *inter alia* that the Commission had misused its power by failing to initiate the formal investigation procedure under Article 108 TFEU and that the decision infringed Article 107(1) TFEU given that it jointly assessed the two separate measures concerning the exclusive right to operate the 35,000 VLTs on the one hand, and the extension of the exclusive rights on the operation of the 13 games of chance on the other.

On 8 January 2015, the GCEU dismissed the application for annulment stating that “the Commission did not face serious difficulties in its assessment of the notified measures and was not therefore required to initiate the formal investigation procedure” under Article 108 TFEU. According to the GCEU, the extensive communication (not of a purely informative and explanatory nature) between the Commission and the Greek authorities during the preliminary investigation, including running of simulations and calculations, and the modification by the Greek authorities of the notified measures, could not be considered as sufficient evidence that the Commission was confronted with serious difficulties of assessment. In doing so, the GCEU reaffirms the pre-existing case law, according to which the Commission enjoys a certain margin of assessment in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties, and may engage in a constructive preliminary dialogue with the notifying State or third parties in order to overcome any difficulties encountered.

The GCEU also found that “the Commission was entitled to consider that the two notified measures were part of a single privatisation transaction, that they took place within the same economic context and that it was therefore appropriate and necessary to consider them jointly, in the context of a single notification”. According to the GCEU, when the Commission reviews whether a specific transaction contains State aid elements, “it is required to take into account the context in which that transaction takes place. [...] The examination of a transaction outside of its context could lead to purely formal results which do not correspond to economic reality”.<sup>108</sup>

Club Hotel Loutraki filed an appeal before the CJEU on 29 May 2015.

#### **7.6 The GCEU confirms that state aid granted by France to Sernam was wrongfully implemented<sup>109</sup>**

The GCEU confirmed that state aid in the sum of €503 million granted by France to Sernam SA and conditionally approved by the Commission was wrongfully implemented. In this context, the GCEU confirmed the assessment of “economic continuity” made by the Commission concerning the sale of SernamSA’s assets to Financière Sernam.

<sup>108</sup> *Club Hotel Loutraki and Others v Commission*, T-58/13, EU:T:2015:1.

<sup>109</sup> *SNCF v. Commission*, T-242/12, EU:T:2015:1003.

In 2001 the Commission conditionally gave an initial authorisation for restructuring aid of €503 million in favour of Sernam, a private delivery and express package and palette transport company wholly-owned by SNCF company.<sup>110</sup>

Finding that the conditions attached to that decision had not been satisfied and that new, incompatible aid of €41 million had been granted, in 2004 the Commission adopted a second decision in 2004 requiring recovery of the €41 million.<sup>111</sup> In this second decision, the Commission confirmed the compatibility with the internal market of the prior €503 million aid package but laid down new conditions. Regarding these conditions, France informed the Commission that it had opted to sell Sernam's assets "en bloc", the purchaser being la Financière Sernam (through the intermediary of Sernam Xpress, a company created by the former management team of Sernam SA).

After having received a number of complaints, the Commission adopted a third decision on 9 March 2012. In this third decision the Commission found that the condition that Sernam's assets should be sold "en bloc" had not been satisfied and that the incompatible aid of €41 million had not been recovered.<sup>112</sup> It concluded that the restructuring aid of €503 million had been wrongfully implemented and was therefore incompatible with the internal market. The Commission ordered that all the aid which Sernam SA had received (more than €642 million - excluding interest), should be recovered by France from la Financière Sernam and its subsidiaries because of the economic continuity between Sernam SA and those companies.

One of the main aspects of the decision concerns the assessment of the notion of "economic continuity" between Sernam SA and Sernam Xpress (which was later merged with Financière Sernam). Financière Sernam and its subsidiaries, and notably Sernam Services and Aster, were continuing the business of Sernam SA and Sernam Xpress and were therefore continuing to benefit from the aid of €41 million initially granted to Sernam SA.

SNCF brought an action before the CGEU seeking annulment of the Commission's decision of 9 March 2012. The CGEU confirmed the Commission's finding of economic continuity between Sernam SA and la Financière Sernam and rejected SNCF's claim for annulment.

The Commission's decision was based on a body of evidence: (a) the object of the transfer; (b) the identity of the shareholders or of the owners of the purchaser company; (c) the moment of the transfer; (d) the economic logic of the transaction; and (e) the price of the transfer.<sup>113</sup>

- a) Regarding the object of the transfer, the GCEU found that the Commission had properly considered that the integrality of Sernam SA had been sold to Sernam Xpress.

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<sup>110</sup> Commission Decision No. 122/00 of 23 May 2001.

<sup>111</sup> Commission Decision 2006/367/EC of 20 October 2004.

<sup>112</sup> Commission Decision 2012/398/EU of 9 March 2012.

<sup>113</sup> See *Italy and SIM 2 Multimedia SpA v Commission*, C-399/00, EU:C:2003:252, in which the Commission's approach to the finding of economic continuity between the original beneficiary of the aid, Seleco SpA, and SIM 2 Multimedia SpA was approved but the Commission's Decision 2000/536/EC annulled for failure to state adequate reasons.

- b) Concerning the identity of the shareholders or owners of the purchaser, the GCEU echoed the Commission's position, as Sernam SA was transferred within the group to Sernam Xpress (a fully owned subsidiary of Sernam SA). Thereafter, Sernam Xpress merged with la Financière Sernam company. The GCEU confirmed that the Commission had correctly concluded that Financière Sernam had benefited from the state aid regarding its merger with Sernam Xpress.
- c) The GCEU noted that the fact the Sernam SA had been transferred after the Commission's decision on the aid did not prevent the existence of circumvention. On the contrary, the fact that Sernam SA had knowledge of the Commission's decision weighed in favour of characterisation of the transfer as circumvention of that decision.
- d) As for the economic logic behind the transaction, the sole goal of the transfer seemed to have been to allow Sernam to continue its activity without respecting the Commission's decision.
- e) The price of the transaction was not determined according to market conditions in an open and transparent procedure.

Therefore, the GCEU confirmed the position of the Commission which stated that: "As regards firstly the transfer of all the assets and liabilities, with the exception of the three financial liabilities [...] from Sernam SA to Sernam Xpress, the Commission points out that this transfer covered the undertaking in its entirety. There is therefore economic continuity between Sernam SA and Sernam Xpress. [...] In addition, the transfer took place within a group. It took place after a final decision by the Commission ordering the recovery of the aid and its only economic logic is to allow the continuation of the Sernam SA's activities, without having to comply with the conditions imposed by Article 3 of the Sernam 2 Decision. All the criteria evidencing economic continuity within the meaning of the decision and the Seleco judgment are therefore met."

It should be noted that the GCEU's assessment of the first criteria concerning the "object of the transfer" seems to be, in itself, sufficient to establish the existence of economic continuity, while its analysis of the rest of the evidence served to confirm this finding.

#### **7.7 Commission finds that unauthorised bail-out of a credit institution by a mandatory deposit guarantee scheme constitutes state aid**

Cassa di Risparmio della Provincia di Teramo S.p.A. ("Tercas") was in serious financial difficulties and so, on 17 April 2012, the Bank of Italia proposed to the Ministry of Economy that Tercas be placed under special administration.

The Italian mandatory deposit guarantee scheme (Fondo Interbancario di Tutela dei Depositi, FITD) is entitled to intervene, after being authorised to do so by the Italian State, in restructuring plans designed to avoid a failure of a credit institution. The FITD has the legal form of a private consortium. Private credit institutions support the FITD through *ex post* contributions. Consequently, resources used by the FITD are provided by the private sector.

The aid granted by the FITD to Tercas on 7 July 2014, after approval by the Bank of Italia, included:

- a €65 million non-refundable contribution in order to cover equity losses;
- a €35 million three-year guarantee to cover the credit risk;
- a €30 million guarantee in order to cover potential losses due to the €65 million guarantee taxation.

Following an in-depth investigation, the Commission concluded in December 2015 that the FITD's support for Tercas constituted unauthorised state aid.

While deposit guarantee schemes are required by EU law to ensure a minimum level of protection for depositors if a credit institution becomes insolvent, such schemes are for the protection of depositors, not for restructuring the credit institutions. They do not therefore, in themselves, raise any state aid issues. However, if a mandatory deposit guarantee scheme intervenes beyond the depositor protection function and supports ailing credit institutions themselves, EU state aid rules may apply.

The FITD intervention triggered a competition distortion because the aid was specially aimed at Tercas, saving it from market exit, and was therefore selective. Moreover, the aid was not conditional on any commitment to implement consolidation measures. No evaluation of the proportionality of the aid, or whether it would redress the financial situation of Tercas was made.

Regarding the imputability of the aid to the State, the Commission considered that the fact that the FITD resources derived from the private sector was not sufficient to rule out the existence of state aid. The Commission applied the case law of the CJEU in *Ladbroke Racing*,<sup>114</sup> *Stardust Marine*<sup>115</sup> and *Doux Elevage*<sup>116</sup> according to which the principal determinant of state imputability is the degree of intervention by the public authorities. In particular, the Commission noted that the FITD interventions were prescribed by Italian law and served to fulfill a public policy mandate from the State. Indeed, the Italian Banking Act provides the basis for the FITD to intervene in the restructuring of credit institutions. Moreover, the statutes of the FITD are approved by the Bank of Italia. For these reasons, the Commission concluded that the FITD intervention to save Banca Tercas was imputable to the Italian State.

The Commission also concluded that the aid could not be found compatible with the internal market *a posteriori* because Italy did not implement a restructuring plan for Tercas, the burden-sharing principles were not respected and the side effects regarding possible distortions of competition were not sufficiently limited.

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<sup>114</sup> *France v Ladbroke Racing and Commission*, C-83/98P, EU:C:2000:248.

<sup>115</sup> *France v Commission*, C-482/99, EU:C:2002:294.

<sup>116</sup> *Doux élevage et Coopérative Agricole UKL-AREE*, C-677/11, EU: C:2013:348 .

