The present chronicle aims at providing a succinct and non-exhaustive overview of the most important developments in European competition law (antitrust, concentrations and state aid). Judgments of the Court of Justice and the General Court that are discussed below, but which were not yet published at the time of writing, can be consulted through the website of the Court: www.curia.europa.eu.

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1. General: access to documents

(a) Follow-on litigation and the gas insulated switchgear cartel: The Commission acting as Amicus Curiae before the High Court (UK)

By virtue of Article 15(3) of Regulation 1/2003 the Commission, acting on its own initiative, may submit written observations to courts of the Member States where the coherent application of Article 101 of Article 102 TFEU so requires. In November 2011, the European Commission introduced a so-called amicus curiae brief before the High Court of Justice, Chancery Division answering to a letter of Mr Justice Roth. The amicus curiae brief has been made available during the first trimester of 2012, and is therefore included in this chronicle.

The observations of the European Commission follow an application introduced by National Grid Electricity Transmission PLC (the “claimant”) before the High Court seeking pecuniary damages from the participants in the gas insulated switchgear cartel. Although the claimant requested access to different categories of documents before the High Court, the Commission limited its brief to the issue of access to leniency documents, or documents including material drawn from leniency documents in light of the judgment in Pfleiderer.

The main problem with courts granting access to leniency documents is the fact that leniency programmes require applicants to make self-incriminating statements, whereas defendants in cartel proceedings who did not make self-incriminating statements because they did not apply for leniency benefit from the burden of proof which rests with the party or authority alleging the infringement. The Commission’s opening remarks about the importance of its leniency programme to carry out its duties under the competition chapter of the Treaty circle around this main idea by explaining that “the Commission’s policy has been that undertakings voluntarily cooperating with DG Competition in revealing cartels should not be put in a significant worse position in respect of civil claims than other cartel members which refuse any cooperation.” Logically following this line of argument, the Commission holds that it is therefore for the High Court to assess whether, in the circumstances of the case, disclosure of leniency documents, or documents including material derived from leniency documents, would expose the leniency applicant to greater liability than those parties that did not cooperate with the Commission. The Commission thereby highlights that “ABB [i.e. the leniency applicant] appears to invoke the risk of such a disadvantage”, causing the Commission to respectfully submit that this particular factor argues in favour of non-disclosure.

Finally, the Commission refers to Pfleiderer’s emphasis on it being necessary to ensure that national rules applying to a person seeking to obtain damages are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation. According to the Commission, this paragraph of the Pfleiderer judgment must be interpreted as obliging national courts to weigh the respective interests in favour of disclosure of leniency documents and in favour of the protection of those documents.

According to the Commission, in weighing the different interests, the High Court of Justice should take into account whether the document for which disclosure is sought is at all relevant for the purpose of the claim, and whether there are other available sources of evidence that are equally effective for that purpose, which therefore do not give rise to concerns about the consequences of disclosure for the effective functioning of a leniency programme. On the facts of the case, the Commission concludes that taking into consideration the availability of other sources of equally effective evidence, it appears disproportionate to order disclosure of this material.

In sum, by its amicus curiae brief, the Commission – as could have been expected – argued again foreclosure of any leniency document or of any documents including material drawn from leniency documents.

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2. The first application ever from the European Commission acting as amicus curiae was in a French case concerning the application of the automotive block exemption: Garage Gremaux / Daimler DaimlerChrysler France SA.
2. antitrust: The application of Articles 101 and 102 TFEU

2.1. Commission decisions

On 28 March 2012, the Commission adopted four separate antitrust decisions, including two cartel decisions.

Freight forwarders fined for operating four price-fixing cartels

First, the Commission imposed a total of €169 million in fines on 14 international groups of companies providing freight forwarding services to businesses and consumers. The Commission found that in the period 2002-2007 the cartelists had established and coordinated four different surcharges and charging mechanisms, in particular in respect of the Europe-USA and the China/Hong Kong-Europe lanes. Thus, four separate cartelists were found to exist: the ‘new export system’ cartel (concerning a surcharge for a UK export reporting obligation); the ‘advanced manifest system’ cartel (concerning a surcharge for a regulatory requirement by US customs); the ‘currency adjustment factor’ cartel (concerning payment in RMB); and the ‘peak season surcharge’ cartel.

The Commission stresses that the freight forwarders took specific measures to conceal the cartel behaviour, for instance by creating a specific Yahoo email account so as to facilitate exchanges between cartelists, or by using code names based on vegetables (such as ‘asparagus’ and ‘baby courgettes’) when talking about fixing prices.

Deutsche Post (including its subsidiaries DHL and Exel) received full immunity from fines, Deutsche Bahn (including Schenker and BAX), CEVA, Agility and Ysen received reductions of 45% and 25% respectively in view of financial difficulties and inability to pay (Gretsch-Unitas) and cooperation in the investigation.

Producers of window mountings fined for price-fixing cartel

Second, the Commission fined nine European producers of window mountings a total of almost €86 million for price fixing cartels. The cartel was primarily organised by means of yearly meetings of the trade association in Germany, during which the parties sat together to set a price increase for the following year or agree on a surcharge for raw material costs and during which they informed one another about the steps taken to implement the previous price increase.

The Commission stresses that the cartelists had very high combined market shares (e.g. a share of more than 80% for turn-and-tilt mountings) and that the cartel had a direct impact on customers in the EEA.

One company (Roto) received full immunity from fines as it was the first to provide information about the cartel. Two other cartelists, Gretsch-Unitas and Maco, received reductions of 45% and 25% respectively in view of financial difficulties and inability to pay (Gretsch-Unitas) and cooperation in the investigation (Maco).

Third, the Commission imposed a total of €2.5 million in fines on Energetický a průmyslový holding and EP Investment Advisors, both active in the Czech energy sector, for obstruction of an inspection carried out by the Commission in November 2009 at their premises in Prague.

While it is customary at the beginning of inspections to block e-mail accounts of key persons, by setting a new password known only to the Commission inspectors, it was discovered that the password for one account had been modified in order to allow the account holder to access the account. In addition, the inspectors discovered that one of the employees had requested the IT department to divert all e-mails in certain blocked accounts away from these accounts to a computer server. Commissioner Almunia stressed that the fine was (in relative terms) higher than in previous cases in light of the gravity of the obstruction.

Commission amends sodium chlorate paper bleach cartel decision following General Court judgment

Finally, in light of the General Court’s judgments of 25 October 2011 in cases T-348/08 and T-349/08, which partially annulled the Commission’s chlorate paper bleach cartel decision, the Commission amended the latter decision on 28 March 2012. In particular, it reduced the fine imposed on Aragonesas/Uralita to €4,231,000 instead of almost €10 million.

2.2. Case Law

(a) President of the General Court dismisses Henkel’s request to order the ‘provisional’ disclosure of documents to the French Competition Authority, since disclosure would prejudice the decision of the Court in the main action (Case T-607/11 R)

(i) Background

On 13 April 2011, the Commission rendered its ‘consumer detergents’ cartel decision. While several undertakings received substantial fines, Henkel was granted full immunity as it was the first undertaking to inform the Commission, in 2008, of the cartel in question. In parallel proceedings before the French competition authority (ADLC), however, Unilever was regarded as the first undertaking to have revealed the cartel, whereas Henkel France was only granted a 30% fine reduction. Taking the view that the arrangements pursued by the Commission and the ADLC formed a single infringement or, at least, two closely related infringements, and arguing that they presented the same facts in their leniency submissions to both

10 Commission Decision of 13 April 2011 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (COMP/39579 – Consumer Detergents).
authorities, Henkel insisted that it was the first to reveal, not only to the Commission, but also to the ADLC, the link between the anti-competitive arrangements, and should therefore be granted full immunity also by the ADLC. According to Henkel, the Commission’s file contained documents that would corroborate this position. Henkel thus sought a way to produce the documents concerned before the ADLC.

Henkel itself had submitted an undertaking of confidentiality, which prevented it from itself transferring copies of documents submitted to the Commission to the ADLC. In light hereof, the ADLC made a request pursuant to Article 11(2) of Regulation 1/2003 to receive a copy of the documents. By letter of 30 September 2011, however, the Commission dismissed the request on the grounds that the leniency documents enjoyed a particularly high confidentiality protection and could, pursuant to Article 12(2) of Regulation 1/2003, only be used for the purpose for which they had been collected.

In response, Henkel lodged an action for annulment of the Commission’s decision of 30 September 2011. Shortly thereafter, it also lodged an application for interim measures, requesting that the Court ‘suspend operation of the contested decision’; that it ‘order the Commission to allow the provisional disclosure of the documents in the on-going ADLC proceedings or subsequent proceedings’ before the Paris Court of Appeal, and; that it ‘order any other measure deemed appropriate’. One week later, the ADLC adopted a cartel decision in which Unilever was granted full immunity from fines. Henkel, by contrast, was hit with a €92.3 million fine.

Pursuant to the ADLC decision, Henkel by fax informed the Registry of the Court that it wished to amend the forms of order sought to the effect that they were seeking an order that the Commission authorize them to rely on the documents at issue in the proceedings before the Paris Court of Appeal.

(ii) The President’s Order

By Order of 23 January 2012,11 the President of the General Court held the application for interim measures to be inadmissible. The President first observes that, in so far as Henkel’s claims refer to the procedure pending before the ADLC, they have become devoid of purpose, since that procedure has come to an end. In addition, the President finds that the forms of order sought in the application for interim measures (and in the main action) were not validly amended since Henkel’s fax of 16 September 2011 was not followed by the lodging of a signed original version as required by Article 43(1) of the Rules of Procedure.

More fundamentally, the heads of claim (see supra) were deemed inherently inadmissible. First, as regards the claim for suspension of the contested Commission decision (refusing to provide the ADLC with copies of the documents concerned), the President recalled that the application for suspension of the operation of a negative administrative decision is not conceivable, since the granting of the suspension sought cannot have the effect of altering the situation of the application. Suspension would be of no practical use to the applicants, inasmuch as a suspension could not take the place of a positive decision. Second, as regards the request that the President ‘order any other measure deemed appropriate’, the President found that the claim was too vague and imprecise to meet the requirements of Article 44(1)(d) of the Rules of Procedure. Last but not least, as regards the request that the President ‘order the Commission to allow the provisional disclosure of the documents’ concerned, the President rightly pointed out that the use of the word ‘provisional’ in the head of claim could not conceal the fact such disclosure of documents to the Paris Court of Appeal would prejudice the decision of the General court in the main action. Such disclosure would go against established case-law, since it would neutralize in advance the consequence of a judgment on the merits.

In the meantime, on 27 February 2012, Henkel filed a new appeal at the General Court, challenging a Commission decision of 7 December 2011 declining a request for information under EU transparency laws (Case T-64/12).

(b) Companies appealing the Chloroprene Rubber cartel decision come home empty-handed (Cases T-76/08, T-77/08, T-83/03)

(i) General

On 5 December 2007, the Commission imposed fines on several manufacturers of Chloroprene Rubber (CR) for having taken part in a cartel which, between 1993 and 2002, covered the entire territory of the European Economic Area.12 The amounts of the fines were partially amended by Decision of 23 June 2008 to remedy a factual error committed by the Commission. Three companies lodged applications for annulment against the infringement decision: E.I. du Pont de Nemours, Dow Chemical and Denka. By separate judgments of 2 February 2012,13 the General Court dismissed the applications in their entirety, thus fully upholding the fines imposed by the Commission.

(ii) Denka’s Participation in the cartel

The first plea of Denka held that the Commission had not shown to the requisite legal standard that it had participated in the cartel on the CR market. Denka admitted having ‘attended’ a limited number of meetings, either out of courtesy or because of the coercion exercised by the European CR producers, but claimed that, absent a common objective shared with the cartelists, that circumstance alone could not prove that it participated in the cartel.

Against this, the Court recalls that it is sufficient for the Commission to establish that an undertaking participated in meetings during which agreements of an anti-competitive nature are concluded in order to prove that the undertaking participated in the cartel. Where participation in such meetings is established, it is for the undertaking to demonstrate that it has publicly distanced itself from the anti-competitive arrangement. The notion of “publicly distancing oneself” must moreover be interpreted narrowly. The distinction drawn by Denka between merely ‘attending’ a meeting and having “participated” in such a meeting is rejected as artificial.

The Court finds that Denka had failed to establish that it had been coerced to participate in the meetings. In any event, the argument alleging the existence of coercion is deemed ineffective, since Denka could have reported the pressure and

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threats to the competent authorities or lodged a complaint with the Commission. The argument that Denka participated out of mere ‘courtesy’ is similarly found ineffective. The Court also stresses that, having regard to the fact that the undertakings involved had participated in meetings at which they had disclosed to each other their future intentions or conduct on the market, the Commission was not required to establish a concurrence of wills between participants at meetings relating specifically to price-fixing and market-sharing.

(iii) The question of parent liability

A substantial part of two of the three judgments is devoted to the question of parent liability. More in particular, both EIDuPont and Dow argued at length that the infringement committed by ‘DuPont Dow Elastomers’ (DDE) could not be imputed to the parent companies whose activities are autonomous and that any unlawful conduct on its part is not imputable to its shareholders. The Applicants essentially claimed that there exists a presumption that a full-function joint venture acts autonomously and that any unlawful conduct on its part is not imputable to its parent companies. In their view, the Commission had failed to rebut this presumption. Both Applicants moreover insisted that there was no evidence that either of DDE’s parent companies was aware of the collusive activities during the DDE period.

In reaction, the Court recalls that reactions of two companies resulting from their having distinct legal identity is not decisive for purposes of applying the competition rules. What matters is whether or not there is unity in their conduct of its subsidiary. In EIDuPont and Dow’s case, the Court asserts that the Commission cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary, but must also check whether that influence was actually exercised. Specific instructions are no sine qua non to this end. A single commercial policy may also be inferred indirectly from the totality of the economic and legal links between the parent company and its subsidiaries.

Applying the legal parameters to the case at hand, the Court notes that both Dow and EIDuPont held equal shares in DDE. Moreover, the companies set up a Members’ Committee, whose members were appointed in equal numbers by the two parent companies. This Committee was responsible for the day-to-day business affairs and took decisions by unanimity, with each shareholder having an absolute right of veto. In addition, DDE’s parent companies were present on the CR market only through their joint venture. The Court also observes that in its 1996 merger decision, the Commission had already established that the two parent companies held ‘joint control’ of DDE in the sense of the Consolidated Jurisdictional Notice. The Court finds that the Commission rightly concluded that the Members’ Committee had in fact exercised the powers reserved to it by the Formation Agreement (e.g., by appointing the top management posts in the joint venture) and that, therefore, the parent companies had exercised their management power over DDE. Furthermore, the Court notes that, upon being informed about the allegations of collusive activities, the parent companies had ordered, in 2003, an internal investigation to be carried out within their joint venture in order to examine whether DDE might have participated in the cartel. This is seen as an indication that the companies believed that they had the means of requiring their joint venture to conduct itself in accordance with the competition rules.

The Court reiterates that the possible lack of awareness of the existence of a cartel on the part of the parent companies cannot remove their parent liability. As for the applicants’ reliance on the ‘Rubber chemicals’ decision – in which a full function joint venture was found to be an undertaking separate from its parent companies – the Court stresses that economic operators have no grounds for a legitimate expectation that a previous decision-making practice, that is capable of being varied when the EU institutions exercise their discretion, will be maintained. Moreover, an applicant cannot possibly plead such an expectation on the basis of just one previous case.

The Court also rejects the argument of Dow according to which the Commission, in holding it liable for the infringement committed by DDE, could not apply stricter corporate governance standards inconsistent with those applied in US corporate law. The Court stresses in particular that there is no principle or public international law convention pursuant to which the Commission might be obliged, when imputing unlawful conduct under EU competition law, to take account of assessments made by the competent authorities of a non-member State in the area of competition law.

(iv) The application of the multiplier in respect of the duration of the infringement

As regards the application of a multiplier in respect of the duration of the infringement in the Commission’s fining guidelines, the Court recognizes that this method may have the effect of ignoring the difference which may exist between the exact durations during which undertakings participate in the infringement. At the same time, the fact that the multiplier is not strictly proportionate to the exact duration is merely the result of the method of assessing the duration of an infringement by progressive thresholds each of six months. That difference in treatment is objectively justified by the objective of general prevention and the taking of effective action against infringements of EU competition rules. Moreover, in light of the generally long duration of infringements, the setting of a progressive threshold of six months is coherent, objectively justified and not disproportionate. The Court thus concludes that the use of the multiplier does not result in the Commission overstepping the boundaries of its discretion.

As to the argument that the Court had itself chosen to fine-tune the amount in such a way as to reflect the exact duration of the participation in the cartel in BASF and UCB v Commission,14 the Court notes that it had done so, in the latter case, only after having partially annulled the Commission decision and in the exercise of its unlimited jurisdiction. In the absence of any finding that the contested decision in the case at hand is unlawful, however, it is not for the Court to recalculate the amount of the fines imposed.

(v) Other claims

Several other claims were submitted to the Court. For instance, both E.I. du Pont de Nemours and Dow claimed that the Commission should have granted a 30% fine reduction under the Leniency Notice. In reaction, the Court recalls that, even after finding that the evidence produced by an undertaking represents significant added value within the meaning of the Leniency notice, the Commission still has a margin of assessment when fixing the exact fine reduction. In the case at hand, the Applicants had provided evidence only four months after Tosoh had applied for leniency, which thus affected the relative added value of the information communicated. Ergo, the Commission had not committed an infringement of the principle of equal treatment in granting Tosoh the maximum

possible fine reduction, while granting a lower reduction to EIDuPont and Dow.

The Court rejects Denka’s claim that, by applying the 2006 Fining Guidelines instead of the 1998 Guidelines, the Commission had breached the principles of legal certainty and non-retroactivity. The Court recalls in particular that the Commission may at any time raise the level of fines if that is necessary to ensure the implementation of competition policy. The 1998 Guidelines did not therefore constitute a definitive self-imposed limitation of the Commission’s discretion to impose fines. The method laid down in the 2006 Guidelines indeed remained within the legal framework laid down by Regulation 1/2003.

Considering that its market share had increased considerably between 1993 and 2002, Denka also argued that the Commission ought to have used the value of sales of 1993, rather than those of 2001, for purposes of determining the fine. The Court finds by contrast that Denka had failed to demonstrate that the turnover during the last full calendar year of the infringement was not a proper indication of its real size, economic power or the scale of the infringement committed.

E.I. du Pont also claimed that the Commission had committed a manifest error in ODIE’s staff members, Mr. A, had participated in the cartel, and requested that his name be removed from the contested decision. Apart from contesting the validity of E.I. du Pont’s claim, the Court stresses that it is not entitled, when exercising judicial review of legality, to issue directions to the institutions, such as an instruction to alter the text of the contested decision. The claim is thus held both unfounded and partially inadmissible.

Denka also claimed that the Commission failed to take account of a number of mitigating circumstances, such as the alleged ‘non-implementation’ of the cartel and its ‘exclusively passive role’ therein. As for the former aspect, the Court nonetheless finds that Denka had failed to establish that it had opposed the cartel ‘to the point of disrupting its smooth functioning’, which is the standard laid down by the case-law. As for the latter aspect, the Court points out that although the ‘exclusively passive role’ of an undertaking was expressly cited as a possible mitigating circumstance in the 1998 Fining Guidelines, this is no longer the case under the 2006 Guidelines. This manifests a deliberate political choice no longer to ‘encourage’ passive conduct by those participating in an infringement of the competition rules. The choice of removing this mitigating circumstance from its Fining Guidelines fell within the discretion of the Commission.

(c) The Court of Justice issues a preliminary ruling on the impact of Article 101 TFEU and Articles 3(1) and 11(6) of Regulation 1/2003 vis-à-vis cartels that precede Member States’ accession to the EU (Case C-17/10)

(i) Background

Following the initiation of proceedings in September 2004, the Commission in January 2007 imposed fines on various participants in the ‘gas insulated switchgear’ cartel.15 The cartel was found to have constituted a single and continuous infringement of Article 81 EC from 15 April 1988 until 11 May 2004, in which the individual members had participated for differing periods of time.

Later in 2007, the Czech Competition Authority (UOHS) issued a parallel decision, fining several companies for having established a cartel in contravention of Czech competition law. The Czech gas insulated switchgear cartel was deemed to have lasted from 1 July 2001 until 3 March 2004. It thus predated the accession of the Czech Republic to the EU on 1 May 2004.

The UOHS decision was contested before the Czech national courts on the grounds that Article 11(6) of Regulation 1/2003 precludes proceedings at the national level after the Commission has initiated a proceeding at the European level in the same case. According to the Applicants, the UOHS decision infringed the ne bis in idem principle, prohibiting the accumulation of fines. After the decision was annulled by the Regional Court in Brno, UOHS appealed before the Supreme Administrative Court, which, in turn, submitted two questions to the Court of Justice for a preliminary ruling.16

(ii) The first preliminary question

By means of its first preliminary question, the referring court seeks to clarify the temporal scope of application of Article 81 EC and Regulation 1/2003. More in particular, it seeks to clarify whether this legislation applies retroactively to conduct prior to the accession of a Member State to the EU.

The Court’s Grand Chamber starts by recalling that, according to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules – such as Article 81 EC and Articles 3 of Regulation 1/2003 – are usually interpreted as not applying, in principle, to situations existing before their entry into force. This will only be different in so far as it clearly follows from the terms, objectives or general scheme of the substantive rules concerned that retroactive effect must be given to them. According to the Court, neither the wording, nor the purpose, nor the general system of Article 81 EC, Article 3 of Regulation 1/2003 and the Act of Accession contain any clear indications that those two provisions should be applied retroactively.

The Court subsequently goes on to observe that none of the arguments put forward by the Applicants call into question the aforementioned finding. Thus, the reliance on the Court’s judgment in Dow Chemical Iberica and others v Commission17 is considered misgiven since this case dealt with the application of procedural, rather than substantive, rules. The Court also rejects as impertinent the challenge to the case-law according to which a new rule applies immediately to the future effects of a situation which arose under the old rules. Neither does the fact that Czech competition law was essentially aligned with EU law prior to its actual accession alter the Court’s thesis. Finally, the Court rejects the Applicants’ reliance on the principle of the ‘retroactive application of the more lenient penalty’. Indeed, what is at stake in the present case is not simply the gravity of the penalty, but rather whether the authority ultimately has the power to penalise a cartel for the period before 1 May 2004.

In the end, the Court concludes that the provisions of Article 81 EC and Article 3(1) of Regulation 1/2003 must be interpreted as meaning that, in the context of a proceeding initiated after 1 May 2004, they do not apply to a cartel which produced effects, in the territory of a Member State which acceded to the Union on 1 May 2004, during periods prior to that date.


16 Court of Justice 14 February 2012, Case C-17/10, Toshiba Corporation et al. v Urad pro ochranu hospodarske souteze [2012] ECR I-000.

By its second question, the referring court essentially asks whether the initiation of proceedings by the European Commission after 1 May 2004 permanently prevents the national competition authority of a Member State which acceded to the EU on that date from prosecuting under domestic competition law a cartel which produced effects in its territory prior to its accession to the EU.

Looking first at the delimitation of the competition powers of the national authorities and the EU in cartel proceedings, the Court observes that Articles 3(1) and 11(6) of Regulation 1/2003 effectively prevent national competition authorities from applying not only EU competition law, but also provisions of national law prohibiting cartels once the Commission initiates proceedings. Nonetheless, having regard to the provisions of Regulation 1/2003 and its travaux préparatoires, the Court concedes that the power of the national competition authorities is restored once the proceedings initiated by the Commission are concluded. The Court refers in particular to Article 16(2) of Regulation 1/2003: “When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.” According to the Court, this provision illustrates that national competition authorities remain competent to apply EU competition law after the Commission has adopted an infringement decision (as long as they do not contradict that decision). The same must apply a fortiori where the national competition authorities intend to apply national competition law.

As far as the ne bis in idem principle is concerned, the Court subsequently affirms that the application of this principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. In the case at issue in the main proceedings, however, it is noted that the identity of facts is in any event lacking. The reason is that the Commission’s infringement decision expressly excluded from its scope the anti-competitive consequences of the gas insulated switchgear cartel in the territory of the Czech Republic in the period prior to 1 May 2004. Since the contested UOHS decision only imposed fines in relation to that territory and that period, it did not infringe the ne bis in idem principle.

While the lion’s share of the pleas raised by the applicants is rejected, the Court in each case proceeds to a reduction of the fines imposed.

First, as far as UPM-Kymmene Oyj is concerned, the Court finds that the Commission failed to establish to the required legal standard that there was a continuous infringement between 20 December 1994, the date on which RSFE (a 99%-subsidiary of UPM) first attended a meeting of the European Association of Plastic Valve Bag Manufacturers (Valveplast), and 10 October 1995, the date on which it began to take part in the ‘France’ sub-group (viz. the pillar of the cartel dealing with open-mouth bags). Indeed, the Court notes that the purpose of RSFE’s attendance at the meeting on 20 December was to have exploratory discussions seeking to ascertain the circumstances in which RSFE might, possibly, take part in the cartel within the framework of Valveplast. It was nevertheless clear from the documents before the Court that those discussions came to nothing and that RSFE did not joint Valveplast following that meeting. Moreover, nothing suggested that the subsequent participation of RSFE in the ‘France’ sub-group was in any way a consequence of the meeting of 20 December 1994.

In light hereof, the Court concludes that RSFE’s attendance at the meeting on 20 December 1994 represented an isolated infringement and that it became liable for the single and continuous infringement within the framework of Valveplast only from 10 October 1995, by reason of its participation in the meetings of the ‘France’ sub-group from that date and its participation in the meetings at Valveplast level from November 1997 onwards. For this reason, the Court partially annuls the contested fine and lowers the amount of the fine to € 50.7 million.

Second, with regard to the applications of FLS Plast A/S and FLSsmith & Co. A/S, the Court finds that the Commission has made an error in its application of the principles of parent liability. The reason for fining FLS Plast A/S consisted in the fact that in December 1990 it had acquired 60% of the share capital in cartel participant Trioplast Wittenheim. The remaining shares were acquired by FLS Plast A/S in December 1991. FLSsmith & Co. A/S for its part was the parent company of a group of companies operating in the engineering, mining and construction sectors, including FLS Plast A/S.

As far as the application of the principles of parent liability is concerned, the Court criticizes the Commission for not properly distinguishing between the year 1991 – when FLS Plast A/S only held 60% of the shares – and the remainder of the cartel period (1992-1998). As for the latter period, the Court reaffirms the well-established principle that, in the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the competition rules (OR: where a holding company holds 100% of the capital of an interposed company which, in turn, holds the entire capital of a subsidiary which has infringed the competition rules), there is a rebuttable presumption that the parent company (holding company) exercises decisive influence over the conduct of the subsidiary. In the absence of elements serving to rebut the presumption against the applicants, the Court confirms that parent liability is established for the period 1992-1998. By contrast, as for the year 1991, the Court finds that the personnel links between the companies which the Commission points at were insufficient to demonstrate that the applicants were in a position to exercise actual control over Trioplast Wittenheim. Neither did the Commission establish that the parent representatives knew, or ought to have known, that the subsidiary was involved in anti-competitive conduct. In those circumstances, the Court concludes that the contested decision must be partially annulled and lowers the amount for

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19 Commission Decision of 30 November 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/38354 – Industrial bags).


(d) General Court rules on three applications against the Commission’s Industrial Bags cartel decision (Cases T-53/06, T-64/06, T-65/06)
The Court also stresses that the mere fact that the French arguments raised by the Applicant were of a nature as to Community interest to pursue the investigation. None of the capacity of the French authorities to tackle the matter, the TFEU, the resources required for the investigation and the probability of finding an infringement of Articles 101 and 102 further investigate the complaint. In light of the very low framework. The French authorities seemed well-placed to complaint essentially related to the French regulatory alleged practices were localized in France. In addition, the parties concerned by the complaint and the effects of the aspects of the complaint as well as in respect of the complaint had the required competence to adopt the contested decision on behalf of the Commission.

The Court observes, however, that the complaint was clearly construed as a formal complaint in the sense of Article 7 of Regulation 773/2004. Thus, the Applicant had requested that its complaint be transferred to DG Competition; it had made reference on various occasions to Articles 101 and 102 TFEU and to the notion of ‘abuse of dominant position’. By contrast, the complaint did not contain any explicit allegation as to a possible violation of Article 28 of Regulation 1493/1999. In light hereof, the Commission was right to treat the complaint exclusively from the perspective of the competition rules. The Court adds that, since the contested decision only addressed the question of an alleged violation of Articles 101 and 102 TFEU, the Commissioner charged with competition policy was fully competent to adopt that decision on behalf of the Commission.

The Court also rebuts the Applicant’s allegations as to the presence of Community interest in pursuing the complaint. After observing that the Commission has a certain discretion in this context, the Court recognizes that the Commission had identified the reasons why it considered there to be no Community interest, both in respect of each of the individual aspects of the complaint as well as in respect of the complaint as a whole. Indeed, as the Commission had pointed out, both the parties concerned by the complaint and the effects of the alleged practices were localized in France. In addition, the complaint essentially related to the French regulatory framework. The French authorities seemed well-placed to further investigate the complaint. In light of the very low probability of finding an infringement of Articles 101 and 102 TFEU, the resources required for the investigation and the capacity of the French authorities to tackle the matter, the Commission had rightly concluded that there was insufficient Community interest to pursue the investigation. None of the arguments raised by the Applicant were of a nature as to demonstrate that the Commission’s reasoning was erroneous. The Court also stresses that the mere fact that the French Competition Authority had rejected a complaint from the Applicant in 2006 did not in any way demonstrate that it was somehow ill-placed to tackle the allegations raised.

The Applicant’s claim that the contested decision was improperly motivated is similarly dismissed by the Court.

(f) Post Danmark A/S: Court of Justice issues a preliminary ruling explaining when above-cost selective price cuts may amount to an abuse of dominant position (Case C-209/10)

By decision of 21 December 2007, the Danish Eastern Regional Court confirmed earlier decisions of the Danish Competition Authority and the Competition Appeals Tribunal which found that Post Danmark had abused its dominant position on the Danish market for the distribution of unaddressed mail. In particular, it confirmed that Danish Post had infringed competition law by charging, in 2003 and 2004, lower prices to former customers of its competitor Forbruger-Kontakt than to its own pre-existing customers, without being able to justify that difference on cost-related grounds. Upon appeal before the Højesteret, however, Post Danmark claimed that the prices offered to former clients of Forbruger-Kontakt could only amount to an abuse if an ‘intention to drive competitors from the market’ could be established. For its part, the Danish Competition Authority objected that such intention need not be demonstrated for a practice of selective prices below average total costs to give rise to an abuse. The Højesteret decided to refer the matter to the Court of Justice for a preliminary ruling.

In its Judgment, the Court recalls at the outset the approach adopted in the Akzo case. Thus, if prices charged by a dominant undertaking are below the average ‘variable’ costs, this must, in principle, be regarded as abusive, inasmuch as, in charging those prices, a dominant undertaking is deemed to pursue no economic purpose other than that of driving out its competitors. By contrast, if prices remain below average total costs, but above average variable costs, this must only be regarded as abusive if this conduct is part of a plan for eliminating a competitor. The Court notes that it could not be established in the Danish proceedings that Post Danmark had deliberately sought to drive out its competitor. Moreover, it stresses that charging different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.

The Court subsequently notes that, for purposes of carrying out a price-cost comparison, the Danish competition authorities did not rely on the notion of ‘variable costs’ as understood in Akzo, but on another concept termed ‘incremental costs’. This approach appeared to be inspired by the fact that there were considerable costs related both to the activities within the ambit of Post Danmark’s universal service obligation regarding the distribution of certain addressed items of mail and to its activity of distributing unaddressed mail. These ‘common’ costs were due, in particular, to the fact that Post Danmark used the same infrastructure and staff for distributing both types of mail. According to the Court, the Danish method of attribution identifies the great bulk of the costs attributable to the activity of distributing unaddressed mail. It states in this context that “to the extent that a dominant undertaking sets its prices at a level covering the bulk of the
costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are sustainable in the long term.*

While the appraisal of possible anti-competitive effects is left to the referring Court, the Court of Justice takes the liberty to note that Forbrugerrådet had apparently managed to maintain its distribution network despite losing customers to Post Danmark. In addition, it recalls that, even if the referring Court should find anti-competitive effects due to Post Danmark’s actions, the latter undertaking would still be free to offer evidence that its conduct was objectively necessary or that the exclusionary effect produced was counterbalanced by advantages in terms of efficiency that also benefit consumers. In a final lash at the Danish competition authority it also points out that the mere fact that a criterion based on economies of scale was absent from Post Danmark’s general terms regarding prices and reductions did not automatically preclude it from proving the existence of efficiency gains.

(g) General Court confirms Commission’s Telefónica margin squeeze decision (cases T-336/07 and T-398/07)

Background

Before full liberalization of the telecommunications market in 1998, Telefónica was owned by the Spanish State and enjoyed a legal monopoly over the retail provision of landline telecommunications services. Upon liberalization, Telefónica was therefore the only Spanish telecommunications operator which had a fixed telephone network throughout the country. Between September 2001 and December 2006, Telefónica provided services throughout the broadband network via ADSL technology. Apart from marketing retail broadband products to individuals, Telefónica, through its fixed telephone network, also provided wholesale broadband products to other telecommunications operators in order to allow them to provide retail broadband services to individuals. Three wholesale products were available to other telecommunications operators: (1) unbundling of the local loop (only marketed by Telefónica); (2) wholesale access at a regional level (only marketed by Telefónica), and; (3) several offers of wholesale access at a national level (marketed both by Telefónica and by other operators on the basis of the unbundling of the local loop and/or the wholesale product with regional access).

Following a complaint by Wanadoo España in 2003, the Commission opened investigations into a possible abuse of dominance. On 4 July 2007, the Commission decided that Telefónica had abused its dominant position in the Spanish market for wholesale access at a regional and national level during the period between September 2001 and December 2006.23 It held that Telefónica had imposed unfair prices on its competitors in the form of a margin squeeze between the prices of retail access to broadband and the prices of wholesale access to broadband at a regional and national level. A fine of €151,875,000 was imposed. Both Telefónica and the Kingdom of Spain lodged applications for annulment against the Commission decision. By separate judgments of 29 March 2012, the two applications were dismissed in their entirety. 24

By analogy with earlier case-law, the Court confirms that the existence of ex ante regulation does not by any means exclude ex post competition law enforcement: competition rules can be enforced against undertakings that have been subject to ex ante regulation as long as they still have the possibility of engaging in autonomous conduct.

Market definition and existence of a dominant position

According to Telefónica, the Commission had erred by identifying the unbundling of the local loop, the regional wholesale market and the national wholesale market as separate product markets, instead of a single one. Against this, the Court finds that the Commission acted properly in identifying separate markets. The Commission indeed demonstrated that an alternative operator wishing to substitute the national and regional wholesale product with the unbundling of the local loop would face very high investment costs. Such substitution was moreover a long-term process, which would require a minimal critical mass in terms of customers in order to become profitable.

The General Court also accepts that functional differences exist between the national wholesale products, the regional wholesale products and the unbundling of the local loop – as confirmed by all the parties. Moreover, the actual use of the local loop only started to a limited degree at the end of 2004 and the beginning of 2005.

The Court rejects the argument of Telefónica that, in order to demonstrate that a vertically integrated company commits an abusive pricing strategy contrary to Article 82 EC, the Commission has to establish that the company is dominant not only on the wholesale market, but also on the retail market.

The Court subsequently confirms that the Commission rightly held that Telefónica was in a dominant position in the regional and national wholesale markets during the period covered by the infringement. As for the regional wholesale market, it was not disputed that Telefónica had a de facto monopoly. As for the national wholesale market, Telefónica had been the only provider until the end of 2002. After 2002, its market share had constantly remained above 84%, i.e., eleven times higher than the share of the second largest operator on the market.

Abuse of dominant position – margin squeeze

According to Telefónica, the Commission had analyzed the alleged margin squeeze as an abuse the exclusionary effects of which are similar to those of a refusal to contract. Yet, the Commission had failed to apply the legal standard corresponding to such type of behavior. In particular, it had failed to demonstrate that the wholesale products constituted inputs or essential facilities and that the refusal was of such nature as to eliminate all competition in the retail market.

In response, the Court observes that the Commission in its contested decision does not analyze the margin squeeze as a refusal to contract. By reference to the TeliaSonera judgment of the Court of Justice,25 the General Court stresses that a margin squeeze in a relevant market is capable in itself of constituting an abuse of dominant position (without the Commission having to demonstrate that the conditions for refusal to contract are simultaneously fulfilled).

The Court recalls that a margin squeeze is the result of the spread between the prices for the wholesale services and

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those for retail services. In particular, a margin squeeze may result not only from abnormally low prices at the retail level, but also from abnormally high prices at the wholesale level. Contrary to what Telefónica alleges, the Commission was therefore not required to prove that Telefónica had charged excessive prices for its wholesale products with indirect access or that it had charged predatory prices for its retail products.

Furthermore, as regards the assessment of the lawfulness of Telefónica’s pricing policy, the General Court confirms the approach followed by the Commission, which refers to pricing criteria based on the costs incurred by Telefónica itself and on its strategy. In particular, the use of such analytical criteria can establish whether a dominant undertaking would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services. The Court observes moreover that this approach is also consistent with the general principle of legal certainty, in that a dominant undertaking knows what its own costs and charges are, whereas, as a rule, it does not know the costs and charges of its competitors.

Otherwise, by reference to TeliaSonera (§§ 45-46), the General Court reaffirms that it cannot be ruled out that the costs and prices of competitors may be relevant for examining the abusive character of pricing practices. However, as a rule, it is only when it is impossible to make use of the prices and charges of the dominant undertaking itself, that one should examine the prices and charges of the competitors.

Apart from alleging errors in law in the application of Article 82 EC, Telefónica also claims the Commission committed several factual errors in the application of the margin squeeze test. In particular, it argues that, according to the principle of the ‘as efficient’ competitor, the Commission should have applied the test based on the combination of wholesale products used by the alternative operators. This argument, like other allegations of factual errors, is nonetheless dismissed by the General Court. First, the Court stresses that the different wholesale products belong to separate product markets (cf. supra). In addition, the Court observes that Telefónica essentially suggests that an alternative operator could compensate losses due to the margin squeeze at the level of a wholesale product by means of revenues from the use in certain more profitable geographic zones of other Telefónica products which are not the object of a margin squeeze and which belong to another market, such as the unbundling of the local loop. Against this, the Court recalls that the use of the local loop would necessitate heavy investments. More fundamentally, it stresses that a system of undistorted competition can be guaranteed only if equality of opportunity is secured between the various economic operators. Such equality implies that Telefónica and its competitors should be on equal footing in the retail market. This is not the case if, having regard to the wholesale prices charged by Telefónica, alternative operators could only offer these products at a loss, which they would have to attempt to recoup by revenues from other markets.

The effects of the conduct of Telefónica

As for the effects of the conduct of Telefónica, the Court concludes that the Commission did not commit a manifest error in holding that the conduct of the undertaking had probably reinforced the barriers to the entry and expansion of the market, and that, absent the abuse, the competition would probably been stronger in the retail market, thus benefiting end consumers.

Foreseeability of the infringement

Furthermore, with regard to the determination of the fine, the Court rejects the arguments of Telefónica that it could not have reasonably foreseen that its behavior constituted a breach of Article 82 EC.

First, while acknowledging that Article 82 EC applies only to anticompetitive conduct engaged in by undertakings on their own initiative, the General Court confirms that the Spanish regulatory framework left Telefónica with sufficient discretion to determine its pricing policy. In particular, it was free to reduce the price of the national wholesale product (which was not subject to regulations) as well as the price of the regional wholesale product (which was subject to maximum prices only). Conversely, as for retail prices, Telefónica did not dispute that it was free to increase its prices at any moment.

Furthermore, the Court asserts that Telefónica should have known that compliance with Spanish telecommunications legislation – in particular, compliance with the decisions taken by the Spanish Telecommunications Market Commission (CMT) – did not protect it against an intervention by the European Commission on the basis of competition law. It is asserted in this context that the EU competition rules supplement, through ex post facto verification, the ex ante regulatory framework for the telecommunications markets.

Finally, while the CMT had laid down a pricing system for the regional wholesale product and had examined the existence of a margin squeeze effect in several decisions, the Court found that this left unaffected Telefónica’s responsibility under competition law. Indeed, Telefónica should have known that the pricing system and the decisions concerned had not been adopted on the basis of the actual costs of the undertaking, but rather on the basis of estimates which had not in actual fact been confirmed by the developments of the market.

In the end, the General Court confirms the € 151 million fine imposed on Telefónica.

(h) General Court ruling on requests for information relating to conduct of an undertaking in a period during which the undertaking’s Member State was not yet part of the European Union (Cases T-458/09, T-171/10)

On 22 March 2012 the General Court issued a judgment shedding a light on the interpretation of Article 18 of Regulation 1/2003. Although Slovak Telekom is not the first case where the Court is asked to interpret the said article, the case is interesting as it deals with the admissibility of requests for information relating to conduct of an undertaking in a period during which the undertaking’s Member State was not yet part of the European Union.

Slovak Telekom a.s. is a company incorporated on 1 April 1999 in the Slovak Republic and is majority owned by Deutsche Telekom AG. Slovak Telekom provides national and international telephone services, broadband internet services and a wide range of other telecommunications services. After inspections

27 See Court of Justice 19 May 1994, Case C-36/92 P, SEP v Commission [1994] ECR I-1911 and Court of Justice 18 May 1982, Case 155/79, AM & S Europe v Commission [1982] ECR 1575: in this case, the Court of Justice, in general terms, held that given its broad powers of investigation and assessment, it is for the Commission to decide whether particular items of information which it requests from the undertakings concerned are necessary.
between 13 and 16 January 2009, the Commission decided to initiate proceedings against the undertaking for infringement of Article 102 TFEU. The initiation of that procedure related to the possible existence on the part of Slovak Telekom and the companies under its control of anticompetitive practices (e.g., a margin squeeze and mixed bundling and tying with respect to wholesale and retail broadband access services). In April 2009 the Commission requested information from Slovak Telekom under Article 18(1) and (2) of Regulation 1/2003. As this request also related to a period before the date of accession of the Slovak Republic to the European Union, Slovak Telekom wished first to emphasise that the Commission could not find an infringement for the period before 1 May 2004 (the date of accession) or that the Commission could not systematically request information relating to that period. Slovak Telekom therefore proposed to provide general information relating to the period before 1 May and, as regards the provision of more detailed data and calculations, to limit its answers to the period after 1 May 2004. Although the Commission stated that there was no question in the present case of finding an infringement of the EU competition rules for the period before 1 May 2004, it insisted that the requested information be provided in its entirety. As Slovak Telekom continuously opposed to the far-reaching request and after new inspections by the Commission, the latter adopted a reasoned decision28 relating to a proceeding pursuant to Articles 18(3) and 24(1) of Council Regulation 1/2003, whereby it requested specific information relating to the period before 1 May 2004. The Commission also adopted a second decision relating to other specific information and documents of 200329.

By submitting three different pleas, Slovak Telekom appealed both decisions30.

In essence, Slovak Telekom’s first plea was based on the premise that the Commission’s request for information pursuant to Article 18(1) Regulation 1/2003 was not “necessary” as the Commission in any case was not permitted to search for an infringement of EU competition law before 1 May 2004. In that regard the General Court agrees, stating the obvious, that the Commission indeed could not find an infringement before the Republic of Slovakia’s accession to the European Union. It however adds that the term “necessary information” in article 18(1) of Regulation 1/2003 must be interpreted according to the objectives for the achievement of which the powers of investigation have been conferred upon the Commission. Any interpretation of Article 18(1) of Regulation 1/2003 which amounts to prohibiting the Commission, as a matter of principle, from requesting from an undertaking information relating to a period during which the competition rules of the European Union did not apply, even though such information is necessary for the detection of a possible infringement of those rules from the point at which they become applicable, would risk depriving that provision of its effectiveness and would go against the Commission’s duty to examine carefully and impartially all the relevant evidence in the case under investigation. Furthermore, the Court makes clear that it is incorrect to consider that information relating to a period during which the competition rules of the European Union were not applicable to an undertaking can explain only events which took place during that period. The General Court

29 Commission Decision C(2010) 902 of 8 February 2010 relating to a proceeding pursuant to Articles 18(3) and 24(1) of Council Regulation 1/2003: “Decision II”.
30 The application in case T-458/09 is directed against Decision I. The application in case T-171/10 is directed against Decision II.
thereby refers to its Bank Austria Creditanstalt ruling. Indeed, in that case the Court held that the inclusion, in a decision imposing fines, of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement. The first part of the first plea, claiming that the Commission, as a matter of principle, could not rely on information relating to the applicant’s conduct prior to the accession of the Slovak Republic to the European Union to assess whether its post-accession practices were compatible with the European Union competition rules was thus rejected. The second part of the first plea, alleging that conduct prior to 1 May 2004 cannot be relevant to the assessment as to whether it infringed Article 102 TFEU after 1 May 2004 was also rejected by the Court. First, the Court considers that information relating to the period prior to 1 May 2004 may have proved necessary for the determination of the possible existence of a margin squeeze. Third, for some data it is not possible to split them in a meaningful way. Finally, documents showing decisions taken by Slovak Telekom or agreements entered into by it before 1 May 2004, but implemented after the accession of the Slovak Republic to the European Union, may also be regarded as necessary by the Commission in order to enable it to establish the facts subsequent to that accession and to interpret them correctly. The Court therefore concludes that evidence showing a possible intention to eliminate competitors after the EU competition rules have become applicable may prove relevant for the application of Article 102 TFEU, in order to adequately investigate the case. Slovak Telekom did, particularly, not agree with this position of the Court. As the concept of abuse of a dominant position is an objective concept which does not require the showing of any intention to cause harm, looking for such an intention would be redundant. The Court makes clear that such reasoning cannot be followed because an intention to cause harm can still be taken into account to support the conclusion that the undertaking concerned abused a dominant position, even if that conclusion should primarily be based on an objective finding that the abusive conduct actually took place. Indeed, the Commission is entitled to examine the internal documentation of an undertaking alleged to have committed an infringement of EU competition law, since such documentation may indicate whether the exclusion of competition was intended or, on the contrary, suggest another explanation for the practices under consideration.

As the General Court had ruled that, as a matter of principle and as a matter of fact, the Commission was permitted to send information requests relating to the period before 1 May 2004, it logically follows that the second and the third plea were dismissed as well. According to the Court the Commission had indeed respected the principle of the fairness of the proceedings, nor did the Commission infringe the principle of proportionality by requesting information which was alleged to be “not necessary” by Slovak Telekom but was held to be necessary by the General Court.


32 See Article 41(1) of the Charter of Fundamental Rights of the European Union (OJ 2007, C 303, p. 1), which after the entry into force of the Treaty of Lisbon has the same legal value as the Treaties.
3. State Aid

3.1. State aid Decisions

(a) Commission rules on aid to postal operators in Germany, Belgium, France and Greece – orders recovery of aid granted to BPPost and Deutsche Post

On 25 January 2012, the Commission announced that it had adopted decisions on State aid granted to the incumbent postal operators in Germany, Belgium, France and Greece. While a number of measures were deemed either not to constitute State aid, or were deemed compatible with the internal market on the basis of Article 106(2) TFEU, the Commission did order Belgium and Germany to recover an amount of € 417 million and an amount ranging between € 500 million and € 1 billion from BPPost and Deutsche Post respectively.

The Commission’s investigations have focused first and foremost on the question to what extent the public service compensation granted to the different postal operators was in line with Article 106(2) TFEU, and in particular with the (old) 2005 Framework on Services of General Economic Interest (SGEI). As for Hellenic Post (ELTA), the Commission found that a €52 million grant from the Greek State allowed ELTA to partially cover the costs for modernising its infrastructure and for improving the quality of public service, and to earn a reasonable profit over the economic life of the subsidised investments, in line with the SGEI Framework. Accordingly, the grant was deemed compatible with Article 100(2) TFEU. In a similar vein, the Commission concluded that a tax relief of € 764 million granted by France as well as a grant of € 240 million/year to fund the tasks of transporting and delivering the press did not give rise to overcompensation of La Poste. The Commission arrived at the same conclusion in relation to the public service compensation of €5.6 million granted to Deutsche Post in the period 1990-1995. By contrast, it found that yearly compensations granted to BPPost for the delivery of newspapers and magazines (amounting to € 5.2 billion between 1992 and 2010) partly exceeded the net cost of delivering the public service entrusted to it, and ought therefore to be partially recovered.

The Commission also deals with the relief of pension liabilities granted to BPPost and Deutsche Post. In line with previous cases, it concludes that social security contributions borne by BPPost were equivalent to those of its private competitors, and accordingly did not confer any undue advantage to it. By reasonable profit over the economic life of the subsidized investments, in line with the SGEI Framework. Accordingly, the grant was deemed compatible with Article 100(2) TFEU. In a similar vein, the Commission concluded that a tax relief of € 764 million granted by France as well as a grant of € 240 million/year to fund the tasks of transporting and delivering the press did not give rise to overcompensation of La Poste. The Commission arrived at the same conclusion in relation to the public service compensation of €5.6 million granted to Deutsche Post in the period 1990-1995. By contrast, it found that yearly compensations granted to BPPost for the delivery of newspapers and magazines (amounting to € 5.2 billion between 1992 and 2010) partly exceeded the net cost of delivering the public service entrusted to it, and ought therefore to be partially recovered.

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Lastly, in relation to two capital injections of € 297.5 million and € 40 million respectively in BPPost, the Commission recognizes that these were carried out under conditions that a private market investor would have accepted. As a result, the capital injections are not qualified as State aid in the sense of Article 107(1) TFEU.

3.2. Case law

(a) The General Court confirms that financial support for an investment in the touristic sector in Brazil is liable to affect trade between Member States and distort competition – dismisses Djebel’s appeal against Commission State aid decision (Case T-422/07)

On 10 May 2007, the Commission adopted Decision 2007/582/EC, relating to an application for subsidies under the Portuguese ‘SIME’ legislation (“Sistema de Incentivos à Modernização Empresarial”) for an investment project by Djebel, part of one of Portugal’s largest hotel groups, in Brazil’s tourism sector. The Commission decided that the subsidies would amount to State aid in the sense of Article 107(1) TFEU and could not be considered compatible with the internal market on the basis of Article 107(3)(c) TFEU. By judgment of 18 January 2012, the General Court dismissed Djebel’s appeal against the decision and confirmed the reasoning followed by the Commission.

Part of the judgment deals with the question whether the envisaged funding for the Brazilian project was liable to ‘affect trade between Member States and distort competition’. The Court stresses in this context that, for the foregoing criterion to be met, it is not necessary that the beneficiary of the aid itself takes part in exchanges between Member States. Indeed, when a Member State grants aid to an undertaking, its internal activity within that State may be maintained or increased, which may affect the chances for undertakings established in other Member States of penetrating that market. Such aid may also enable an undertaking which has hitherto not taking part in exchanges between Member States itself to penetrate the market of another Member State. In such a case, the Court observes that the aid would have benefited one of Portugal’s largest hotel groups and that the internationalisation of the group would have permitted it to improve its results and its competitive position also in Portugal. In response to the Applicant’s argument that the group to which it belongs only represented 2% of the Portuguese market, the Court recalls its established case-law that the relatively modest size of an undertaking does not exclude the possibility that trade between Member States may be affected. The Applicant’s argument relating to the modest amount of the aid is rebutted in a similar vein, with the Court explicitly affirming that there is no threshold or percentage below which it may be considered that trade between Member States is not affected. In light of the fact that the aid could be deemed ‘susceptible’ of affecting trade between Member States and of distorting competition, the Commission was not under an obligation to proceed to an in-depth economic analysis of the actual market situation, but rightly concluded that the aid fell under the scope of Article 107(1) TFEU.

The Court next addresses whether, taking account of its margin of discretion, the Commission committed a manifest error of assessment by concluding that the aid could not be
declared compatible with the internal market in the sense of Article 107(3)(c) TFEU. The Applicant argued among other things that the aid was ‘necessary’ in light of the risks inherent in the Brazilian investment project and was moreover beneficial to the Portuguese tourism sector as well as the EU market. By contrast, the Commission took the position that the aid lacked the required stimulating effect and did not meet the necessity test. In support thereof, the Commission relied on several factors, including the fact that the investment had been implemented prior to the application for funding; that the undertaking was part of one of the largest Portuguese hotel groups, and; that it had already acquired experience in terms of internationalisation from a similar investment project in Mozambique. In sum, the Commission held that the aid was not ‘necessary’, but simply of a nature to provide a benefit/profit to the Applicant, to the detriment of its competitors. The Commission’s reasoning is fully upheld by the Court, which also underlines that the Commission was allowed to take account of facts and developments that took place after the implementation of the investment project in 1999 in assessing the necessity of the aid. These developments had effectively demonstrated that the hotel group had been able to successfully develop its activities on the Brazilian market (in spite of the aid not being granted). The aid not being necessary, the Court decides that there is no further need to examine whether it could have had a positive effect on the Portuguese market or at the EU level.

The Applicant’s final claim pertains to an alleged infringement of the principle of equality. More in particular, the Applicant points to the fact that funding for a similar investment project in Brazil by another undertaking (Project Vila Galé) was given the green light. In reaction, the Court observes that these are certain differences between Project Vila Galé and Djebel’s project. Thus, contrary to the latter project, in the former case the application for funding was made prior to the actual implementation of the project. Furthermore, in the former case, the undertaking had not disposed of prior internationalization experience (contrary to Djebel). The Court thus concludes that there can be no infringement of the principle of equality, since the situations were objectively different.

(b) General Court annuls Commission Decision allowing restructuring plan for an undertaking active in the sector of large home appliances (Cases T-115/09 and T-116/09)

On 14 February 2012, the General Court annulled[] a decision of the European Commission[] relating to State aid that France was planning to implement for FagorBrandt, an undertaking operating in the sector of the manufacture and marketing of large home appliances. In 2008 the Commission had decided that aid amounting to 31 million EUR which France was planning to implement for FagorBrandt was compatible with the common market, subject to conditions (hereafter the “contested decision”).

Two of FagorBrandt’s competitors, Electrolux AB and Whirlpool Europe BV (the “applicants”), sought the annulment of the Commission decision for two different reasons. By their first plea, the applicants, in essence, submitted that the conditions laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty[] were not met. The applicants’ second plea alleged that the Commission had failed to fulfil its duty to state reasons laid down in Article 253 EC [now Article 296 TFEU] in several respects. The General Court only judged on the first plea, as the other parts of that plea and the second plea had become redundant following the Court’s position on the applicants’ first plea.

As a preliminary point the General Court set out the legal framework relating to the Commission’s discretion with respect to the examination of the compatibility of restructuring aid with the common market and the General Court’s power of review in that area. The Court first explained that the Commission has a wide discretion the exercise of which involves complex economic and social assessments which must be made in a Community [now European Union] context[]. The Court also recalled that the Commission may lay down for itself guidance for the exercise of its discretion by adopting acts such as the guidelines on undertakings in difficulty[]. Judicial review of the manner in which the Commission’s discretion is exercised in the application of Article 107(3)(c) TFEU is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, and to verifying the accuracy of the facts relied on and that here has been no error of law, manifest error of assessment of the facts or misuse of powers[].

The first part of the judgment on the merits assessed whether (i) compensatory measures have been adopted in order to limit the negative effects of the grant of restructuring aid on competition and trade[], whether (ii) those measures were in proportion to the distortive effects of the aid[] and whether (iii) the said measures did not simply consist of write-offs and the closure of loss-making activities where they would not lead to a reduction of capacity or market presence of the relevant firm[]. First, the General Court notes that the Commission considered that the sale of Brandt Components could be treated as a compensatory measure. On the other hand, the Commission also recognised that that compensatory measure did not reduce FagorBrandt’s presence in the main market, i.e. the large electrical household appliance market. The sale of Brandt Components on its own was thus insufficient to limit the distortion of competition resulting from the grant of the aid at issue.

Then, the General Court notes that the sale of Brandt Components took place in March 2004, and that the French Republic notified the Commission of the aid at issue on 6 August 2007: almost three and a half years after the sale. In these circumstances, the General Court considers that even if the sale of Brandt Components was an integral part of the restructuring plan that France notified to the Commission, that measure, when it was adopted in March 2004, could not have had the effect of reducing, the distortions of competition and trade which the grant of the aid at issue.

37 Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ 2004, C 244/2.
38 This is settled case-law; Court of Justice 24 February 1987, Case 310/85, Deuff v Commission [1987] ECR 901, paragraph 18; General Court 15 June 2005, Case T-349/03 Corisca Ferries France SAS v Commission [2005] ECR II-2197, paragraph 137.
40 See also Court of Justice 13 February 2003, Case C-409/00 Spain v Commission [2003] ECR I-1487.
41 See points 38 to 40 of the Guidelines.
42 See point 39 of the Guidelines.
43 See point 40 of the Guidelines.

See point 40 of the Guidelines.
Regarding the possibility to adopt a compensatory measure before the implementation of the restructuring plan, the Court observes that a compensatory measure can be adopted before the implementation of the restructuring plan (Corsica Ferries France®). However, in Corsica Ferries the Court took account of specific circumstances in which the measure concerned had been decided almost one month before the adoption of the restructuring plan and that it had been implemented almost one month after the plan had been notified to the Commission. The Court holds that the case of the restructuring aid granted by France to FagorBrandt must be distinguished on the facts.

The General Court adds that the fact that the sale of Brandt Components was neither a write-off nor a closure of an activity did not mean that it was a compensatory measure able to reduce the negative effects on competition created by the grant of the aid at issue. Consequently, as that measure was not intended and, in any event, did not have the effect of limiting the negative effects of the grant of the aid at issue on trade and competition, it could not reasonably be regarded as a compensatory measure.

The Court concludes that the Commission committed a manifest error of assessment by holding that the sale of Brandt Components constituted a compensatory measure within the meaning of the Guidelines. As a consequence, the combination of that “compensatory measure” with that consisting in the cessation of the marketing of certain products for five years under the Vedette brand was also considered by the General Court to be insufficient to proportionally limit the negative effects on competition generated by the grant of the aid.

In the second part of the judgment, the Court deals with the applicants’ arguments based on the ruling of the Court of Justice in Deggendorf®. In this ruling the Court held that where unlawful aid has previously been granted to a firm in difficulty, in respect of which the Commission has adopted a negative decision with a recovery order, and where no such recovery has taken place, the assessment of any rescue and restructuring aid to be granted to the same undertaking shall take into account, first the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid. It therefore follows from Deggendorf (and from point 23 of the Guidelines in which the Commission refers to that judgment) that the Commission must in principle examine the cumulative effect of that aid with any earlier aid which has not been recovered. Indeed, such an examination is justified on account of the fact that the advantages conferred by the grant of earlier incompatible aid which has not yet been recovered continue to produce effects on competition.

In that regard the General Court first makes clear that it is common ground that when the contested decision was adopted, the Italian subsidiary of FagorBrandt remained liable for the repayment of incompatible Italian aid in an amount of less than €1 million. Second, the Court notes that the Commission of the EU made the grant of the aid at issue subject to the prior repayment of the incompatible Italian aid. The Court thereby refers to heading 6.6 of the contested decision where the Commission examined the factors tending to “limit the negative consequences of the distortion of competition” generated by the grant of the new aid alone. Furthermore, the compensatory measures, on which the compatibility with the common market of the aid at issue was conditional, relate to the distortion of competition generated by the grant of just that aid. Its cumulative effect with the incompatible Italian aid was not taken into account. As the Commission had failed to meet point 23 of the Guidelines, the General Court held that the Commission had committed a manifest error of assessment in its examination of the distortion of competition. Having concluded that the Commission made such a manifest error, the Court briefly turns to the Commission’s argument according to which the “true economic effect of the incompatible Italian aid was minimal”. The Court states that such an argument cannot justify the failure to take into consideration the cumulative effect of the aid at issue with the incompatible Italian aid. In other words, the fact that the amount of earlier aid outstanding is proportionally insignificant as compared with the planned aid does not exempt it from the duty to analyse the cumulative effect of the two items of aid.

In sum, the General Court annulled the decision of the Commission by reason of multiple manifest errors of assessment.

(c) General Court upholds Commission decision finding that long-term power purchase agreements concluded by Hungary entail State aid (Joined Cases T-80/06 and T-182/09)

**Background**

In the mid-1990s, Hungary entered into long-term power purchase agreements (PPAs) with a view to encouraging power generators to invest in Hungary. Under these PPAs, signed between 1995 and 2001, the Hungarian State-owned public undertaking Magyar Villamos Művek Zrt (MVM) undertook to buy a fixed quantity of electricity at a fixed price, guaranteeing a return on investment to the generators. On 4 May 2005, the Commission notified Hungary of its decision to open a formal investigation procedure. On 4 June 2008, the Commission eventually adopted Decision 2009/609/EC,® in which it found that the purchase obligations as set out in the PPAs between MVM and seven electricity generators constituted State aid. The exact amount of aid to be recovered was to be calculated by Hungary on the basis of an appropriate simulation of the wholesale electricity market as it would have stood if none of the PPAs had been in force since 1 May 2004.

By applications of 3 March 2006 and 4 May 2009 Budapestie Erőmű Zrt (BEZ), an EDF subsidiary, lodged applications for annulment against the decision opening investigations and the Commission’s final decision respectively. In September 2011, the President of the sixth chamber decided to join the applications.

**Admissibility**

In its Judgment of 13 February 2012,® the General Court first dismisses the pleas of the Commission according to which the action for annulment of the initial decision opening investigations ought to be deemed inadmissible. The Court held that, at the time the Commission decided to open the investigation into the PPAs, these agreements were in the course of being implemented. It was clear that the Commission took the view that the PPAs constituted new aid and that they were being implemented without prior notification to the Commission. This was clearly of direct and individual concern to BEZ, as beneficiary of the aid. In light hereof, the Court confirms that

this initial decision must, contrary to what the Commission suggests, be regarded as a challengeable act. The pleas raised by BEZ are, however, dismissed in their entirety.

Existence of State aid

The first argument raised by BEZ holds that the Commission erred in law by ascertaining that the PPAs fulfilled the constituent elements of State aid on 1 May 2004, the day of Hungary’s accession to the EU, rather than on the date on which they were concluded. Against this, the Court notes that State measures put into effect before accession, but which are still applicable after accession and which comply at the date of accession with the four cumulative conditions laid down in Article 87(1) EC are subject to the specific rules set out in Annex IV to the Act of Accession, either as ‘existing aid’ if they fall within one of the three categories mentioned in that annex, or as ‘new aid upon accession’. Noting that the aid concerned does not fall within any of the three categories of ‘existing aid’, the Court confirms that the PPAs entailed ‘new aid’, which, insofar as the measure concerned remains applicable after the date of accession of the new Member State, must be assessed in light of the criteria of Article 87(1) EC. The Court next goes on to consider that the fact that a measure which was not regarded as State aid when it was introduced can subsequently become State aid (e.g., following liberalisation of an activity by Community law as in the energy sector). This is confirmed by the wording of Annex IV to the Act of Accession and is accepted both in the case-law and in Regulation No. 659/1999.

According to the Court, this reasoning holds true both for aid schemes and for individual measures. The Court moreover draws attention to the fact that, at the time the PPAs were concluded, Hungary was, pursuant to its Association Agreement with the EC, already under an obligation to harmonise its competition rules with the EC Treaty. In the end, the Court concludes that the Commission did not err in law by taking the date of Hungary’s accession to the EU as the relevant date for its State aid assessment.

As regards the existence of an economic advantage on the part of the power generators, the Court agrees with the Commission that the combination of long-term capacity reservation, a minimum guaranteed offtake and price-setting mechanisms covering variable, fixed and capital costs as laid down by the PPAs did not correspond to the usual contracts on European wholesale markets. According to the Court, the Commission properly examined the commercial practices on the European electricity market as well as the constraints faced by MVM and its commercial objectives. On a related note, BEZ’s argument that the PPAs meet the Altmark-criteria is rejected on the basis that there is no document confirming that a service of general economic interest was defined and entrusted to it.

Recovery of the aid

The Court also confirms that the exact amount of the aid to be recovered could not, on the basis of the information available, be calculated during the formal investigation procedure. According to the Court, the Commission provided sufficiently detailed guidance in accordance with the applicable legal standard for the purposes of calculating the sum to be recovered. As regards the recovery calculation methodology, the Court further affirms that it was reasonable for the Commission to have insisted on the use of a ‘spot’ market model in the simulation of the wholesale market that was required to determine the ‘counterfactual scenario’ (i.e., the fictitious scenario whereby no PPA was in force between 1 May 2004 and the date of termination of the PPAs). In reaction to the Applicant’s criticism that the ‘counterfactual scenario’ does not incorporate the fact that, in the absence of the PPAs, the power generators would have received different revenues and borne different costs, the Court objects that such approach would subject the calculation of the recoverable amounts to speculative assumptions. According to the Court, the method of recovery rightly defined the amounts to be recovered as a difference in revenue and not as a difference in profits.

Other pleas

In the remainder of the judgment, the Court dismisses several other pleas raised by BEZ, including concerning alleged breaches of essential procedural requirements, the adequacy of the statement of reasons, concerning misuse of powers as well as an alleged infringement of Article 253 EC. One argument raised by the Applicant held that the aid at stake should be considered ‘not applicable’ after accession on the grounds that the payments made after accession were already precisely known before accession and that the decision to pay those amounts was taken unconditionally before accession. Against this, the Court finds that the payments made after accession, even if originating in contracts concluded prior to accession, depended on the unpredictable evolution of parameters such as the price of fuel. For this reason, the aid mechanism had to be considered ‘applicable after’ accession. In reaction to the argument that the Commission used its powers under the State aid rules not in order to remove the competitive advantage enjoyed by the alleged beneficiaries of the aid but in order to open up the Hungarian electricity market, the Court refers to its established case-law relating to misuse of powers. Thus, it recalls that where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that does make the decision invalid for misuse of powers, since it does not nullify the main aim. In any event, the Court adds that the applicant has not produced any evidence to demonstrate that the Commission had effectively used its power for a purpose other than that of determining whether the PPAs contained a State aid measure and ordering the recovery of that aid.

(d) General Court annuls State aid recovery decision – States and beneficiaries entitled to rely on the presumption of legality of decisions from the Council authorizing exemptions from harmonized excise duty (joined cases T50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV and T-69/06 RENV)

In the course of 1992, the Council adopted legislation on the harmonization of excise duties on mineral oils and fixed the minimum rate of duty on heavy fuel oils. At the same time, the legislation allowed the Council to authorize Member States to introduce further exemptions from the harmonized excise duty. On the latter basis, Ireland, Italy and France have had exemptions from the excise duty on mineral oils used for the production of alumina (a white powder principally used in smelters to produce aluminium) since 1983, 1993, and 1997 respectively. The Council authorized those exemptions and extended them until 31 December 2006.

Having opened the formal investigation procedure in 2001, however, the Commission on 7 December 2005 found that the exemptions gave rise to State aid within the meaning of Article

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87(1) EC. Decision 2006/323/EC\textsuperscript{31} ordered that aid granted between 3 February 2002 (the day following the publication of the decision to initiate the formal investigation procedure) and 31 December 2003 (the day before Directive 92/81 was repealed) be recovered (insofar as the beneficiaries had not paid the minimum rate).

Following applications for annulment lodged by the three Member States concerned and by the two alumina producers from Italy and Ireland, and following a first judgment of the General Court\textsuperscript{32} which was set aside by the Court of Justice,\textsuperscript{33} the General Court on 21 March 2012 quashed the contested Decision on the grounds that it infringed the principle of legal certainty and the principle of sound administration.\textsuperscript{34}

Recalling that acts of the institutions of the EU are in principle presumed to be lawful, the Court first examines the relevant rules on excuse duties as well as the State aid rules. It draws attention to Article 8(5) of Directive 92/81, according to which the Council, taking a unanimous decision on a proposal from the Commission, was to review its decisions of authorization if the Council concludes that the exemptions "are no longer sustainable, particularly in terms of unfair competition or distortion of the operation of the internal market." The Court asserts that the notion of "distortion of competition" must be regarded as having the same scope and meaning with regard to both Directive 92/81 and the State aid rules.

After confirming that the three Member States concerned fully complied with the restrictive conditions imposed by the Council's decisions of authorization, the Court finds that these decisions did not mention any possible contradiction with the State aid rules. Nor did they make any reference to the obligation to notify. Quite the contrary, in its reply to the questions put by the Court, the Council had effectively confirmed that, in the absence of any action on the part of the Commission, either by exercising the powers conferred on it by Article 230 EC or by submitting a fresh proposal under Articles 8(4)-(5) of Directive 92/81, Member States were entitled to rely on the authorizations to maintain the contested exemptions.

In short, insofar as the Commission was of the opinion that the exemptions distorted competition, it should have used the powers available to it to seek amendment or abolition of the Council's decisions of authorization, whether on the basis of Directive 92/81 itself or by lodging an application for annulment before the Court. Absent such action, the authorizations benefited from the presumption of legality.

It is also interesting to note that, insofar as the Member States concerned granted the advantages in question in reliance of the Council's decisions of authorization, the Court finds that the advantages were in any event not attributable to a unilateral and autonomous decision of the Member States concerned. The implication is that one of the constitutive elements of Article 87(1) EC was not fulfilled.

\textsuperscript{31} Commission Decision 2006/323/EC of 7 December 2005 concerning the exemption from duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia respectively implemented by France, Ireland and Italy, CJ 4 May 2006, L 119/12.


\textsuperscript{34} General Court 21 March 2012, Joined Cases T-50/06 RENV, T-58/06 RENV, T-63/06 RENV, T-62/02 RENV and T-68/06 RENV, Ireland and others v Commission [2012] ECR I-000.

(e) General Court confirms that the Commission did not act unlawfully by deciding not to open the formal investigation procedure in relation to the sale of Alitalia assets in 2008 (Case T-123/09)

Background

After several failed attempts to redress Alitalia's financial situation, the Italian authorities in 2006 decided to sell their stake in Alitalia's capital. In 2008, Italy granted the company a loan of EUR 300 million and subsequently gave it the option of counting the value of the loan as part of its own capital. Alitalia was placed in extraordinary administration and a bank was appointed as an independent expert in order to verify that the sale price for its assets was in accordance with the market price. Upon receiving a bid by the Compagnia Aerea Italiana ("CAI"), Italy notified the procedure to the Commission.

Following the notification, the Commission adopted two decisions. First, it found that the loan granted to Alitalia and the possibility to count that loan as part of its capital gave rise to State aid.\textsuperscript{51} Second, following a preliminary examination of the notified procedure concerning the sale of Alitalia's assets, the Commission concluded that, subject to full compliance with the undertakings by Italy, according to which the sale would be carried out at market price, the notified measure did not involve the granting of State aid to the buyers.\textsuperscript{52}

The judgment

In 2009, Ryanair brought actions for annulment against both Commission decisions. In its judgment of 28 March 2012,\textsuperscript{53} the Court nonetheless finds the action against the first decision inadmissible on the grounds that Ryanair fails to demonstrate that it is individually concerned. As for the second decision, the Court reaffirms that, in relation to a decision not to open the formal investigation procedure, it is sufficient to demonstrate to be an 'interested party' in the sense of Article 11(1) of Regulation No. 659/1999 in order to fulfil the requirement of 'individual and direct concern'.\textsuperscript{54} Considering the competitive link between Ryanair and Alitalia, the second application is deemed admissible.

The remainder of the judgment is concerned with the question whether the Commission acted lawfully by deciding not to open the formal investigation procedure in relation to the sale of Alitalia’s assets. Two questions are pivotal in this context. First, was the preliminary examination sufficiently complete?

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54 Ibid., § 197: “However, it must be held that the Applicant has not demonstrated that the fact of ordering immediate recovery of the aid from Alitalia and not CAI has the effect of substantially affecting its competitive position. Similarly, the applicant has not demonstrated that the time granted by the Commission to the Italian Republic, which allegedly allowed the obligation of the beneficiary to recover the aid to be circumvented, affected its interests. Finally, the applicant has also failed to demonstrate to what extent the fact of not having ordered the suspension of the aid, having the effect of allowing Alitalia to convert it into own capital, affected the applicant.”
Second, did the examination reveal any ‘serious difficulties’ that should have prevented the Commission from closing the procedure?

Having recalled the purpose of the review, the Court discards the objections of Ryanair one by one. Thus, the Court affirms that the Commission has taken account of all the available information and has properly convinced itself that the sale would take place at the market price. In light hereof, the Commission was under no obligation to examine alternative options (e.g., judicial liquidation or the injection of fresh capital) other than the procedure chosen by the Italian authorities. The Court also rejects Ryanair’s argument that the sale was subject to an implied condition that the buyer should be of Italian origin, which allegedly reduced the sale price below the market price. The Court concludes, on the contrary, that the Commission had verified that the call for declarations of interest did not contain any discriminatory clause based on the nationality of the bidders, and had taken note of the fact that the call was widely publicized both nationally and internationally.

The Court also rejects the applicant’s argument that, since the procedure for the sale of assets was not open, transparent and non-discriminatory, it was not capable of guaranteeing a sale at market price. Indeed, it was precisely because the procedure did not in itself offer a sufficient degree of transparency to ensure a sale at the market price that the Commission had verified that the bid had been subjected to an independent assessment. The intervention of an independent expert, an independent financial adviser and the final intervention of the agent entrusted with the control operation were deemed to offer sufficient guarantees to ensure that the assets would be sold at the market value.

Having discarded Ryanair’s objections, the Court thus confirms the Commission’s decision, adopted at the conclusion of a preliminary examination phase, that the sale of assets did involve the granting of State aid.

(f) The Court of Justice condemns Greece and Italy for failure to recover State aid (Cases C-354/10 and C-243/10)

(i) Commission v. Greece (Case C-345/10)

By Decision of 18 July 2007, notified to Greece on 19 July 2007, the Court found that a Greek law establishing a tax-exempt reserve fund entailed State aid to a large number of beneficiaries. Greece was ordered to proceed to the immediate and effective recovery of that aid insofar as the Commission had found it to be incompatible with the internal market and insofar as it exceeded the de minimis thresholds. The operative part of the Decision ordered Greece to provide further details on the aid granted under the law concerned within a two-month delay as well to execute the decision within a period of four months.

On 18 October 2007, the Greek authorities communicated to the Commission a draft version of a law aimed at recovering the aid. In light of the unsatisfactory reactions of the beneficiaries, the amount/intensity of the aid granted and the progress in terms of recovering the aid, in light of the unsatisfactory reactions of Greece, the Commission eventually brought a case before the Court of Justice on the basis of Regulation 659/1999 and Article 108(2) TFEU.

(ii) Commission v. Italy (Case C-243/10)

On 29 March 2012, the Court of Justice moreover condemned Italy for failing to recover unlawful State aid in accordance with Decision 2008/854/EC of the Commission. In the latter Decision, the Commission had concluded that investment aid granted to the Sardinian hotel business was incompatible with the internal market insofar as relevant construction works had already started prior to the submission of the applications for investment aid.

The Court of Justice notes in its judgment that none of the aid had been recovered at the time the Commission filed its application; that the national measures aiming at the recovery of the aid were only notified to the undertakings involved after the expiry of the deadline for recovery, and that; Italy had never requested the Commission to amend its Decision in light of difficulties encountered in the implementation of the recovery order. It affirms that the Commission had complied with its duty of loyal cooperation with the Member State, as evidenced by the fact that it had accepted the severability of investment projects for purposes of identifying the amount of unlawful aid to be recovered. The idea that the alleged good faith of the beneficiaries of the unlawful aid had an impact on Italy’s duty to speedily and effectively implement the recovery order is rebutted unequivocally. Such approach would indeed deprive Articles 107 and 108 TFEU of its effet utile. The Court also refuses to accept that Italy can hide behind the fact that national courts had ordered the suspension of the authorities’


recovery measures. According to the Court, these orders by the national judges were not compatible with the Court’s case-law on the matter and were in any event adopted after the expiry of the deadline for implementation of the decision.

(g) State aid to ING Groep N.V. during the financial crisis: the General Court does not agree with the Commission’s finding of additional aid (Cases T-29/10 and T-33/10)

On 2 March 2012 the General Court rendered an important judgment64 on the assessment of the repayment terms of the capital injected into ING Groep N.V. by the Netherlands in November 2008.

Background

In an initial decision65 of 12 November 2008 the Commission considered that where a capital injection of 10 000 000 000 EUR was given through special securities issued by ING Groep N.V. and purchased by the Netherlands State, that purchase contained an element of aid within the meaning of Article 107(1) TFEU. The state’s intervention showed that it was based on “considerations […], which no private investor would consider”: i.e., maintaining the stability of the financial market in the Netherlands. The Commission however observed that the capital injection was compatible with the common market within the meaning of article 107(3)(b) TFEU, in so far as it sought to remedy a serious disturbance in the economy of a Member State as a result of the financial crisis. Consequently, the Commission raised no objections to the measure and approved it as an emergency measure for a period of six months. At the end of this six-month term the Commission66 would review the capital injection, in particular as regards the manner in which ING’s long-term viability was to be ensured. If the Netherlands submitted within that six-month period a viable plan in that regard (“a restructuring plan”), the validity of the November 2008 decision would automatically be extended until the Commission adopted a decision on the plan. After lengthy negotiations far exceeding six months, the Commission eventually, on 18 November 200967, approved the restructuring plan proposed by the Netherlands. This November 2009 decision (the “contested decision”) however considered that as a consequence of an amendment to the agreement for repayment of the special securities68, ING Groep had received additional aid in the amount of approximately 2 billion EUR. The Commission opined that if the initial terms for repayment of the injected capital were compared to the amended terms the conclusion could be drawn that the amount of aid had increased. A proper understanding of this case requires quoting paragraphs 33 and 34 of the contested decision:

“(33) The issue price for an injection of EUR 10 billion of Core-Tier 1 capital was EUR 10 per security. On the initiative of ING, the securities can either be repurchased at EUR 15 per security (a 50 % redemption premium to the issue price), or, after three years, be converted into ordinary shares on a one for one basis. If ING triggers the conversion option, the Netherlands has the choice to opt for the alternative redemption of the securities at a rate of EUR 10 per security plus accrued interest. A coupon will only be paid for the Netherlands if a dividend is paid on the ordinary shares.

(34) In the framework of the restructuring plan the Netherlands has submitted an amendment to the agreement for the repayment of the Tier 1 securities by ING. According to the amended terms ING is liable to repurchase up to 50 % of the Core-Tier 1 securities at the issue price (EUR 10), plus […] accrued interest […] (around EUR 253 million), plus an early repayment penalty when the ING share price trades above EUR 10. […] The early redemption penalty could amount to a maximum of EUR 705 million assuming that the EUR 5 billion are repaid 400 days after the date of issue. Furthermore the penalty/premium has a floor of EUR 340 million, ensuring a minimum internal rate of return for the Netherlands of 15%. In other words, considering that ING would normally have to pay a EUR 2.5 billion redemption premium this amendment would result in an additional advantage for ING between EUR 1.79 and 2.2 billion depending on the market price for ING shares.”

This review will focus on the General Court’s appraisal of the Commission correctly applying the principle that no state aid per the meaning of Article 107(1) TFEU exists if the State granting the sums to a private undertaking meets the private investor test. In the case of a capital injection this test requires to assess whether, in similar circumstances, a private investor of a dimension comparable to that of a public authority could have been prevailed upon to make capital contributions of the same size, having regard in particular to the information available and foreseeable developments at the date of those contributions69. In the case at hand the Commission opined that the amendment to the repayment could not or should not be assessed pursuant to the private investor test because it regarded that amendment as “an additional measure in favour of the recipient of State aid which is being restructured”. The General Court held that, in so doing, the Commission tried to evade its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor principle solely on the ground that the capital injection subject to repayment already itself constitutes State aid. Indeed, it is only after an assessment of the economic rationale that the Commission can be in a position to conclude whether

64 See e.g., Court of Justice 21 February 1991, Joined cases C-143/88 and C-92/89, Zuckerfabrik Süderlügumer und Zuckerfabrik Söest GmbH v Hauptzollamt Paderborn [1991] ECR I-415: “Suspension of enforcement of a national measure adopted in implementation of a Community measure may be granted by a national court only if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court of Justice, itself refers that question to the Court of Justice, if there is urgency and a threat of serious and irreparable damage to the applicant and if the national court takes due account of the Community’s interests.”

65 General Court 2 March 2012, Joined cases T-29/10 and T-33/10, Kingdom of the Netherlands and ING Groep N.V. v European Commission, [2012] ECR II-000.


67 For the sake of simplicity, this case review does not cover the impaired assets measure in favour of ING Groep N.V. which the Netherlands notified to the Commission on 4 March 2009 and which was approved by the Commission for a period of also six months although the Commission had doubts as to the compatibility of certain aspects of the measure with the Commission’s Communication on the treatment of impaired assets in the Community banking sector.


69 In the contested decision referred to as Core-Tier 1 capital.

an additional advantage within the meaning of Article 107(1) has been granted. In unequivocal terms the General Court makes clear that the Commission should have made that assessment both at the date of making the capital contribution (in autumn 2008) and at the date of the amendment to the repayment terms (in autumn 2009)71.

Second, having decided that the amendment to the repayment terms must be assessed separately, the Court examined whether classification of the amendment as additional aid was subject to a comprehensive review by the Court. In that regard the Court recalled that if the identification of the aid called for a complex economic assessment by the Commission, in particular regarding the question whether, by accepting the amendment to the repayment terms, the State acted as a prudent investor of a comparable size would likely have acted, the Court’s review would be limited. The Court however, does not clearly answer the question whether its review in the case before it should be limited or comprehensive72. Rather, the Court verifies in over forty paragraphs whether the contested decision was not affected on procedural grounds, thereby, in reality, undertaking a substantive review, i.e., the Court assessed whether the Commission had met the requirement to examine carefully and impartially, everything relevant to the particular case and whether the rights of the person concerned to put forward his point of view before the decision is taken and to have sufficient reasons given for that decision were respected73.

In sum, the Court found that the Commission did not carry out an examination in the contested decision to determine how a return of between 15 % and 22 % in favour of the Netherlands State following the amendment to the repayment terms did not correspond to that which could reasonably be expected by a private investor confronted by a similar situation, that is to say a holder of securities of the type issued at the time of the capital injection which can be repaid by the issuer. Consequently, the Commission misinterpreted the concept of aid by not assessing whether, by accepting the amendment to the repayment terms, the Netherlands State acted as a private investor would have done in a similar situation, inter alia because the Netherlands State could have been repaid early and because when the amendment occurred it obtained a greater certainty of being repaid in a satisfactory manner taking the existing market conditions into account.

The General Court then proceeds by determining the consequences for the operative part of the errors made by the Commission. It concludes that, in the absence of proof by the Commission in the contested decision that the amendment of the repayment terms constituted an advantage for ING which a private investor in the same situation as the Netherlands State would not have granted and because the Commission erred as to the amount of that advantage, the contested decision should be invalidated to the extent that it is based on the finding that the amendment to the capital injection repayment terms constitutes additional aid of approximately € 2 billion.

4. Merger control

4.1. Merger decisions

(a) Commission blocks proposed merger between Deutsche Börse and NYSE Euronext

A year after the deal was announced, and reportedly following an unusually fierce debate among the 27 commissioners, the Commission on 1 February 2012 decided in accordance with Article 8(3) of the Merger Regulation to block the proposed merger between Deutsche Börse and NYSE Euronext.74 The Commission found that the merger would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges. In particular, the merger would bring together Eurex (operated by Deutsche Börse) and Liffe (operated by NYSE Euronext), the two largest exchanges in the world for financial derivatives based on European underlyings (and each other’s closest competitors).

While the Commission acknowledged that there were other companies, such as the Chicago Mercantile Exchange, that provided similar services worldwide, none of these achieved significant volumes in the asset classes concerned. Due to high barriers to entry, no other player was deemed capable of developing trading in European financial derivatives on a sufficient scale to keep the market competitive. Accordingly, it was found that the merger risked resulting in higher prices and lower incentives to innovate.

While the parties concerned offered remedies, in particular the sale of Liffe’s European single stock equity derivatives products where these compete with Eurex, the Commission found that they were insufficient to overcome its concerns and also expressed concerns about their workability. The Commission concluded that the concentration would significantly impede effective competition in the internal market or a substantial part of it.

4.2. Case law

(a) The General Court rejects the action for annulment by Groupe Partouche against a merger decision of the Commission as manifestly inadmissible due to lack of precision and clarity (Case T-315/10)

Following the approval by the European Commission of a full-function joint venture (for on-line poker games) set up by Française des Jeux and Groupe Lucien Barrière, Groupe Partouche on 23 July 2010 introduced an application for annulment against the Commission’s merger decision.75 By Order of 20 January 2012,76 adopted on the basis of Article 111 of the Rules of Procedure, the General Court found that there was no need to continue the proceedings as the application was manifestly inadmissible.

Upon closer scrutiny, the Court finds that the Application rested on a single plea in law, more in particular on the allegation that the Commission should have transferred the notified concentration back to the French authorities in accordance with Regulation 139/2004. Absent such transfer to the national level, it was argued that the non-opposition to

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71 The initial repayment agreement was concluded on 11 November 2008, the amended agreement on 24 October 2009.
72 The Court seems to suggest that its review should be limited. See paragraph 105: “Assuming however that the Court were to take the view that the identification of the aid called for a complex economic assessment by the Commission[,] and paragraph 107: “Where the Commission enjoys a broad power of appraisal, respect for those guarantees is of even more fundamental importance.”
the operation by the Commission deprived the parties affected by the concentration of a specific redress. In light hereof, Groupe Partouche claimed, the Court should annul a Commission decision which did not respect ‘les principes de concurrence communautaires’.

The Court’s Order gives short shrift to the Application. Thus, it observes that the Applicant does not in any way explain what legal provision would have compelled the Commission to transfer the case back to the French national level or to what extent the competitive situation on the market for online games would have been of a nature as to impose such obligation on the Commission. Even leaving aside the foregoing, the Court observes that the Applicant does not shed any light as to the ‘principes de concurrence communautaires’ the Commission would have violated. It moreover notes that the Applicant has not contested the treatment of the notified operation by means of the simplified procedure and has not accused the Commission of having committed any manifest error of assessment.

After restating the established case-law regarding the interpretation of Article 44(1)(c) of the Rules of Procedure, the Court concludes that the subject-matter of the Application and the summary of the pleas in law lack precision. The Application is rejected as manifestly inadmissible.