Developments in the case law of the EU Courts in Competition Law in 2016

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In this report we intend to briefly describe some of the most relevant cases of the General Court and the Court of Justice adopted during 2016 in Competition Law. During this year, there have been many interesting developments in what concerns both Article 101 of the Treaty on the Functioning of the European Union and State aids. There haven't been many cases on mergers or Article 102 TFEU, where the Court of Justice's decision in Intel's case is still awaited.¹

I. Case law – Article 101 TFEU

1. Judgment of the Court of Justice of 20 January 2016, DHL Express Srl and DHL Global Forwarding SpA v. Autorità Garante della Concorrenza e del mercato, Case C-428/14²

Overlapping leniency procedures and the autonomous nature of leniency applications.

In 2007, DHL submitted to the European Commission an application for immunity from fines concerning several infringements of EU competition law in the sector of international freight forwarding. As a result, the Commission granted DHL conditional immunity for the entire international forwarding sector (i.e. maritime, air and road transit).

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¹ *Intel Corporation v. Commission*, case C-413/14 P.

² Judgment of 20 January 2016, *DHL Express Srl and DHL Global Forwarding SpA v. Autorità Garante della Concorrenza e del mercato*, C-428/14, EU:C:2016:27.

In the meanwhile, DHL had submitted to the Italian Competition Authority (ICA) a summary application for immunity under the national leniency programme. In that application, DHL provided information concerning unlawful conduct in the international freight forwarding and transport market. The ICA was of the opinion that the application concerned only the international sea and air freight transport sectors and not the road sector. However, DHL claimed that the summary application concerned the entire international freight forwarding and transport market. Later, DHL submitted an additional summary application for immunity, in order to expressly extend that application to the international road freight forwarding sector.

In between DHL's applications to the ICA, another infringer – Schenker – submitted a summary application for leniency to the said Authority, providing information on the road freight forwarding market.

In the infringement decision adopted by the ICA, Schenker was considered to be the first company to have applied for immunity from fines in Italy for road freight forwarding and was accorded immunity. DHL, on the contrary, was ordered to pay a fine.

DHL brought an action for partial annulment of the decision at issue before a Regional Administrative Court but the action was rejected. DHL then lodged an appeal before the Council of State, which decided to refer a couple of questions to the Court of Justice (CJ).

The first question posed by the Council of State was whether the instruments adopted in the context of the European Competition Network (ECN) are binding on national competition authorities.

According to the CJ, the ECN was created to encourage discussion and cooperation in the implementation of competition law but it does not have the power to adopt legally binding norms nor does it have any binding effect on the national courts or tribunals.

The Council of State also posed the question whether Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Regulation no. 1/2003³ must be interpreted as meaning that there is a legal link between the application for immunity which an undertaking submits to the Commission and the summary application submitted to a national competition authority in respect of the same cartel, which requires the

³ Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, 1-25.

national authority to assess the summary application in the light of the application for immunity submitted to the Commission. Furthermore, the national court posed the question whether, in the event that the summary application submitted to the national authority has a more limited material scope than the application to the Commission, the national competition authority is required to contact the Commission or the undertaking itself in order to establish whether that undertaking has found specific examples of unlawful conduct in the sector allegedly covered by the application for immunity, but not by the summary application.

The Court held that the leniency programmes adopted by national competition authorities are autonomous both in respect of other national programmes and of the EU leniency programme. This autonomy reflects the system of parallel competences, established by Regulation no. 1/2003, between the Commission and national competition authorities. The autonomous nature of the leniency programmes is not affected by the fact that the various applications refer to the same infringement. There is no provision of EU law that requires national competition authorities to interpret leniency applications in the light of an immunity application submitted to the Commission. Therefore, the CJ held that there is no legal link between the application submitted to the Commission and the summary application submitted to a national competition authority in respect to the same competition law infringement, requiring the authority to interpret the summary application in the light of the application submitted to the Commission.

Furthermore, the CJ held that, when the material scope of the summary application for immunity submitted to the national competition authority has a more limited material scope than the application to the Commission, there is no obligation of the national competition authority to contact the Commission or the leniency applicant. It is for the leniency applicant to ensure that any application submitted is devoid of ambiguities regarding its scope.

Another question posed by the referring court was whether EU law must be interpreted as meaning that, where a first undertaking has submitted an application for immunity to the Commission, only that undertaking may submit a summary application to a national competition authority or if other undertakings, which submitted an application for a reduction of the fine to the Commission, are also entitled to do so.

The CJ was of the opinion that the effective application of Article 101 TFEU does not preclude a national leniency system which allows the

acceptance of a summary leniency application submitted by an undertaking which had not submitted an application for full immunity to the Commission. This approach is in fact in line with the purpose of the leniency system, which intends to encourage the submission of applications and not to limit them, in order to uncover conduct contrary to Article 101 TFEU. The CJ thus considered that it is possible for an undertaking, which was not the first to submit an application for immunity to the Commission, to lodge a summary application for immunity before the national competition authority regarding the existence of the same cartel and, consequently, be granted full immunity under the national leniency programme.

2. Judgment of the Court of Justice of 20 January 2016, *Toshiba Corporation v. European Commission*, Case C-373/14 P⁴

Restrictions of competition “by object”. Calculation of fines – considering the market share on a territory broader than the agreement.

The Commission adopted a decision holding that Toshiba had participated in a cartel which consisted of an oral agreement between European and Japanese producers of power transformers to respect their respective territories and refrain from selling in each other’s markets (“the Gentlemen’s Agreement”). Toshiba brought an action for annulment of the decision at issue in the General Court (GC), which declared the action unfounded in its entirety. Toshiba appealed to the CJ.

The CJ held that an agreement such as the Gentlemen’s Agreement had to be classified as a “restriction by object”. The CJ then added that market-sharing agreements, such as the one at issue, constitute a particularly serious breach of competition law. As the Court has held before, agreements which aim to share markets have, in themselves, an object restrictive of competition and fall within a category of agreements expressly prohibited by Article 101(1) TFEU. Such object cannot be justified by an analysis of the economic context of the anticompetitive conduct concerned. The CJ considered that the GC and the Commission were right in holding that, in respect of such agreements, the analysis of the economic and legal context of the practice may be limited to what is strictly necessary in order to characterise its anticompetitive object.

⁴ Judgment of 20 January 2016, *Toshiba Corporation v. European Commission*, C-373/14 P, EU:C:2016:26.

Concerning the determination of the basic amount of the fine, Toshiba argued that the GC did not correctly apply point 18 of the 2006 Guidelines on the method of setting fines,⁵ in particular as regards the concept of “relevant geographic area (wider than the EEA)”. Although the cartel concerned only the territories of the EEA and of Japan, the GC took into account, in order to reflect the parties’ weight in the infringement, the worldwide market shares of the power transformer producers. Toshiba claimed that this approach would have been justified only in the absence of barriers to entry to the EEA market. In the presence of such barriers, which Toshiba claimed to be the case, the Japanese producers could not achieve in that territory market shares equivalent to those held at worldwide level.

The CJ held that the provisions on fines are designed to ensure that they have a sufficient deterrent effect, this justifies taking into consideration the economic power of the undertakings concerned. In the present case, the Court was of the opinion that interpreting the concept of “relevant geographic area” as only the territories affected by the unlawful cartel would run counter to this objective. If only the sales in the EEA had been taken into account, Toshiba would have avoided any fine, since it did not make any sales in the EEA during the reference year used by the Commission. In addition, even if the sales in Japan had been taken into account, such an approach would have ignored the fact that the parties to the Gentlemen’s Agreement are power transformer producers active at worldwide level. The CJ therefore concluded that limiting the relevant geographic area to those two territories (Japan and the EEA) would not have appropriately reflected the weight of the undertaking in the cartel and would not have ensured the deterrent effect of the fine.

The CJ dismissed the appeal.

3. Judgment of the Court of Justice of 21 January, *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, Case C-74/14⁶

The problem of applying the requirements of Article 101(1) TFEU to computerised sales systems.

Through a computerised information system, designed to enable travel agencies to sell travel packages on their websites, an administrator sent a

⁵ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation no. 1/2003. OJ 2006 C 210, 2.

⁶ Judgment of 21 January 2016, *Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, Case C-74/14, EU:C:2016:42.

message informing the economic operators that a technical restriction had been implemented which limited to 3% the discounts that could be applied to bookings made via that system.

In the context of a preliminary ruling, a Lithuanian court questioned the CJ whether it may be presumed that those operators were aware or ought to have been aware of that message and, in the absence of any opposition on their part to such a practice, it could be considered that those operators participated in a concerted practice within the meaning of Article 101(1) TFEU.

According to the CJ, the answer to the question of whether the mere dispatch of a message may constitute sufficient evidence to establish that the economic operators were aware of its content does not follow from the concept of a “concerted practice” nor is it intrinsically linked to that concept. Instead, this question relates to the assessment of evidence which is – in accordance with the principle of procedural autonomy – governed by national law and subject to the principles of equivalence and effectiveness.

The referring court also had doubts as to the possibility, in view of the presumption of innocence, of finding that the travel agencies were aware, or ought to have been aware, of the message. The CJ held that while the presumption of innocence precludes the referring court from inferring from the mere dispatch of the message that the travel agencies knew about its content, it does not preclude the referring court from considering that the dispatch of the message may, in the light of other indicia, justify the presumption that the operators were aware of the content of that message, provided that those operators still have the opportunity to rebut it.

Furthermore, the CJ recalled that the concept of a concerted practice is not limited to the undertakings concerting with each other but it also implies a subsequent conduct on the market and a relationship of cause and effect between the two. Therefore, if it cannot be established that the travel agencies were aware of the message, their participation in the concertation cannot be inferred from the mere existence of a technical restriction implemented in the system, unless it is established, on the basis of other objective and consistent indicia, that they tacitly assented to an anticompetitive action. The CJ was also of the opinion that the travel agencies may rebut the presumption that they participated in a concerted practice by proving that they publicly distanced themselves from that practice or reported it to the administrative authorities. However, these are not the only means of rebutting the presumption, other evidence may also be adduced to this

effect, such as evidence of a systematic application of a discount exceeding the cap in question.

4. Judgment of the Court of Justice of 21 January 2016, *Galp Energía España SA and Others v. European Commission*, Case C-603/13 P⁷

The concept of full jurisdiction and the limits to the exercise of unlimited jurisdiction by the GC under Article 261 TFEU.

The Commission had adopted a decision fining a group of companies for participating in a series of agreements and concerted practices in the marketing of bitumen on Spanish territory. The companies applied for annulment of the decision. The GC partly dismissed the action.⁸ The companies then appealed to the CJ alleging among other grounds that the GC had exceeded its powers of unlimited jurisdiction as defined in Article 261 TFEU and Article 31 of Regulation no. 1/2003.

The CJ held that the system of judicial review, foreseen in Article 263 TFEU, of Commission decisions relating to proceedings under Articles 101 TFEU and 102 TFEU, consists in a review of the legality of those acts. This review may be supplemented, according to Article 261 TFEU and Article 31 of Regulation no. 1/2003 and at the request of applicants, by the GC's exercise of unlimited jurisdiction with regard to the penalties imposed. When the GC exercises its unlimited jurisdiction, it is empowered, in addition to the mere review of the legality of the penalty, to substitute its own assessment in relation to the determination of the amount of that penalty for that of the Commission. However, the scope of that unlimited jurisdiction is strictly limited to determining the amount of the fine and excludes any alteration of the constituent elements of the infringement lawfully determined by the Commission. The CJ was therefore of the opinion that the GC erred in law when it held, in the context of its unlimited jurisdiction, that Galp was aware of the other cartelists' participation in the monitoring system and knew about the compensation established by the cartel, based on evidence which was not present in the Commission's decision.

The CJ further reduced the fine.

⁷ Judgment of 21 January 2016, *Galp Energía España SA and Others v. European Commission*, C-603/13 P, EU:C:2016:38.

⁸ Judgment of 16 September 2013, *Galp Energía España, SA and Others v. European Commission*, T-462/07, EU:T:2013:459.

5. Judgment of 29 February 2016, *UTi Worldwide, Inc. and Others v. European Commission*, Case T-264/12⁹

Derived liability of parent company may not surpass combined liability of its subsidiaries.

In this action for annulment of a Commission decision, fining a number of companies active in the international air freight forwarding sector for their participation in various agreements and concerted practices, the GC found that the Commission committed an error by imposing a higher fine on the parent company than that imposed on its subsidiaries. The differences in fines between the subsidiaries and the parent company resulted from the fact that the duration of their participation in the infringement differed in duration. The Commission rounded down the duration of the subsidiaries' participation which resulted in a combined reduction of about one month in their favour, however this favour was not accorded to the parent company.

The Court has held before that when the liability of the parent company is purely derivative of that of its subsidiary and no other factor individually distinguishes the conduct for which the parent company is held liable, the liability of the parent company cannot exceed that of its subsidiary. In this case, the GC decided that, by analogy, when the liability of the parent company is entirely derived from that of several subsidiaries, the liability of the parent company cannot exceed the total of the subsidiaries. However, the GC held that the Commission was right in affirming that circumstances specific to the parent or the subsidiary could lead to different amounts of fines. Nevertheless, those circumstances were not present in this case, since the only relevant factor at issue was the duration of the participation in the infringement. In relation to the parent company, the duration of participation in the infringement is derived from that of its subsidiaries.

The GC reduced the fine of the parent company by the amount that exceeded the total of the fines imposed on the subsidiaries.

⁹ Judgment of 29 February 2016, *UTi Worldwide, Inc. and Others v. European Commission*, Case T-264/12, EU:T:2016:112.

6. Judgment of 10 March 2016, *HeidelbergCement AG v. European Commission*, Case C-247/14 P¹⁰

Obligation to state reasons of a decision requesting information

After carrying out a number of inspections at the premises of a group of companies active in the cement industry for suspecting an infringement to Article 101 TFEU, the Commission adopted a decision requiring HeidelbergCement to provide answers to extensive information requests.

HeidelbergCement brought an action before the GC for the annulment of the decision but the application was dismissed.¹¹ HeidelbergCement appealed to CJ submitting that the GC had erred in law in holding that the plea alleging a failure to state reasons in the contested decision was unfounded.

The CJ held that Article 18 (3) of Regulation no. 1/2003 defines the essential elements of a decision requesting information and these consist of: a statement of the legal basis, the purpose of the request, a specification of what information is required, and a time limit to present such information.

The purpose of the request is therefore a fundamental requirement. The purpose must be indicated with sufficient precision in order to determine the necessity of the information requested and to allow the EU judicature to exercise its power of review.

The CJ was of the opinion that the statement of reasons was excessively brief, vague and generic. The Court admits that the question of whether a decision meets the above-mentioned requirements depends on the context in which the decision is adopted. Nonetheless, in this case the alleged infringement was described in a very vague manner, the products which the investigation concerned were mentioned only by way of example and the geographical scope of the alleged infringement was quite ambiguous. The CJ concluded that the generic and ambiguous nature of the statement of reasons in the decision requesting information meant that it did not fulfil the requirements specified in Article 18 of Regulation no 1/2003.

¹⁰ Judgment of 10 March 2016, *HeidelbergCement AG v. European Commission*, C-247/14 P, EU:C:2016:149.

¹¹ Judgment of 14 March 2014, *HeidelbergCement AG v. European Commission*, T-302/11, EU:T:2014:128.

7. Judgment of the Court of Justice of 16 June 2016, *Evonik Degussa GmbH and AlzChem AG v. European Commission*, Case C-155/14 P¹²

Reverting the capitalist presumption that triggers parental liability

Evonik Degussa and AlzChem asked the CJ to set aside a judgment of the GC which partially rejected their action for annulment of a Commission decision regarding their involvement in an infringement of Article 101 TFEU.¹³

The two companies were held responsible for the infringement due to the direct participation in it of staff members of a subsidiary wholly owned by them.

In their appeal to the CJ, Evonik Degussa and AlzChem claimed that the GC infringed Article 101 TFEU and the principles of personal responsibility, the presumption of innocence and the fault principle by making the rebuttal of the presumption of actual exercise of decisive influence by the appellants over their subsidiary dependent on very strict requirements. They alleged, in particular, that their subsidiary participated in the cartel in clear disregard of their explicit instructions.

The CJ started by recalling the case law on this subject according to which the responsibility for the conduct of a subsidiary may be attributed to the parent company when the subsidiary does not act independently in the market, but carries out the instructions given to it by the parent company. In such case, the parent and the subsidiary company are deemed to be part of the same economic unity and hence to form a single undertaking. The Commission may therefore address a decision imposing fines to the parent company without having to establish its personal involvement in the infringement. Furthermore, the Court has also established in previous case law that when a parent company holds the totality of the capital in a subsidiary which has committed an infringement, there is a rebuttable presumption that the parent company exercises decisive influence over the subsidiary. Once the presumption is established it is solely for the parent company to rebut it by demonstrating that the subsidiary decides independently upon its conduct in the market. The EU judicature may take into account all relevant factors and these may vary from case to case.

¹² Judgment of 16 June 2016, *Evonik Degussa GmbH and AlzChem AG v. European Commission*, C-155/14 P, EU:C:2016:446.

¹³ Judgment of 23 January 2014, *Evonik Degussa GmbH and AlzChem AG v. European Commission*, T-391/09, EU:T:2014:22.

Regarding, in specific, the existence of express instructions given by the parent company to its subsidiary not to participate in anticompetitive practices, the CJ held that the existence of these instructions might actually constitute a strong indication of the actual exercise of decisive influence by the parent over the subsidiary. However, the subsidiary's non-compliance with the instructions does not suffice, by itself, to establish the absence of actual exercise of decisive influence.

Therefore, the CJ concluded that the GC did not err in law when stating that the parent companies had failed to prove, to the requisite legal standard, that they did not exercise decisive influence over the subsidiary during the period of the infringement.

8. Judgments of the General Court of 28 June 2016, *Portugal Telecom SGPS, SA v. European Commission*, Case T-208/13, and *Telefónica, SA v. European Commission*, Case T-216/13¹⁴

Qualification of a non-compete clause as a restriction by object. Failure to qualify as an ancillary restriction. Calculation of the fine.

Portugal Telecom (PT), the primary telecommunications operator in Portugal, and Telefónica, the main telecommunications operator in Spain, entered into a stock purchase agreement through which Telefónica acquired sole control of Vivo Participações (Vivo), a Brazilian telecommunications operator.

This agreement contained a non-compete clause according to which PT and Telefónica had to refrain, to the extent permitted by law, to invest or engage in any project in the telecommunications business that could be deemed to be in competition with the other within the Iberian market.

The Commission adopted a decision stating that the non-compete clause amounted to a market sharing agreement and constituted a restriction of competition by object. Consequently, the Commission imposed fines on both operators.

The parties lodged appeals to the GC.

The GC agreed with the Commission that it was not required to perform a detailed analysis of the structure of the markets or the potential competition among the parties in such markets since the mere existence of such clause, according to the GC, was a strong indication that the parties were

¹⁴ Judgment of 28 June 2016, *Portugal Telecom SGPS, SA v. European Commission*, T-208/13, EU:T:2016:368; and Judgment of 28 June 2016, *Telefónica, SA v. European Commission*, T-216/13, EU:T:2016:369.

potential competitors. The object consisted in a market sharing agreement with a vast applicability and it took place in a liberalised economic context.

Furthermore, the GC stated that the non-compete clause could not be qualified as an ancillary restraint. The appellants had tried to justify this clause in relation to a call option, initially contained in the agreement, and to the resignation of the members of the board of PT nominated by Telefónica. However, the GC held that the question of whether a restraint may be qualified as ancillary has to be examined in relation to the main transaction, in this case the Vivo transaction.

The appellants had also argued that the non-compete clause was not incompatible with Article 101 TFEU, since according to its wording it was only valid “to the extent permitted by law”. So the main obligation imposed by the clause, according to the appellants, was a self-review obligation under which the parties had to assess the legality of the clause and if they arrived to the conclusion that it was illegal the clause would be deemed void. The GC rejected this argument and stated that the appellants failed to justify why such review did not take place prior to the conclusion of the agreement.

However, the GC held that the Commission had to check whether the appellants were correct when alleging that the value of sales regarding markets where there was no potential competition between the two should have been excluded for the purpose of calculating the fine. According to the GC, from the moment the Commission decides to determine the amount of a fine in relation to the value of sales directly or indirectly related with the infringement, such value must be calculated with precision.

9. Judgment of the Court of Justice of 21 July 2016, *SIA VM Remonts v. Konkurences padome*, Case C-542/14¹⁵

Clarification of the circumstances under which the anti-competitive acts carried out by a service provider may be attributed to the undertaking using those services. This judgment refers to a preliminary ruling where the referring court asked the CJ whether Article 101 (1) TFEU must be interpreted as meaning that an undertaking may be held liable for a concerted practice on account of the acts of an independent service provider supplying it with services.

In this case, three companies submitted tenders in response to a call. One of the companies, Pārtikas Kompānija, asked a service provider – MMD

¹⁵ Judgment of 21 July 2016, *SIA VM Remonts v. Konkurences padome*, C-542/14, EU:C:2016:578.

lietas – to provide it with legal assistance in the preparation and submission of its tender. MMD lietas had, in parallel, undertaken to prepare the tenders of the other two companies. An employee of MMD lietas drew up the two tenders on the basis of the prices given by Pārtikas. The national competition authority adopted a decision considering that the three tenderers had infringed competition law.

In order to answer the national court, the CJ started by reminding that where a service provider offers services in a market on an independent basis, that provider must be regarded as a separate undertaking from those to which it provides services. The relationship between an undertaking and service provider is, in principle, not comparable with the relationship between an undertaking and its employees. However, in certain circumstances, a service provider is in fact acting under the direction or control of an undertaking that is using its services. In such case the conduct of the service provider may be attributable to the undertaking using the services.

If the service provider is genuinely independent, the concerted practice carried out by the provider might still be attributable to the undertaking using the services under two alternative conditions, namely: (i) the undertaking using the services was aware of the anti-competitive objectives pursued by its competitors and its service provider and intended to contribute to them by its own conduct; (ii) or if the undertaking using the services could reasonably foresee that the service provider would share the commercial information with the competitors and if it was prepared to accept the risk which that entailed.

10. Judgment of the Court of Justice of 14 September 2016, *Ori Martin SA and Siderurgica Latina Martin SpA v. European Commission*, joined cases C-490/15 P and C-505/15¹⁶

Court confirms the retroactive application of the Guidelines on the method of setting fines.

This judgment concerns an appeal from a GC's decision¹⁷ lodged by two suppliers of prestressing steel who had been accused by the Commission of infringing Article 101 TFEU. The case is of interest because the appel-

¹⁶ Judgment of 14 September 2016, *Ori Martin SA and Siderurgica Latina Martin SpA v. European Commission*, joined cases C-490/15 P and C-505/15, EU:C:2016:678.

¹⁷ Judgment of 15 July 2015, *Siderurgica Latina Martin SpA and Ori Martin SA v. European Commission*, joined cases T-389/10 and T-419/10, EU:T:2015:513.

lants argued that the GC had infringed the principle of non-retroactive application of harsher criminal norms by applying the Guidelines on setting fines of 2006 instead of the ones of 1998,¹⁸ which were the applicable ones at the time of the infringement.

The CJ held that to determine whether the non-retroactive principle was observed, one has to verify if the modification concerned was reasonably predictable at the time the infringements were committed. The CJ stated that the 2006 Guidelines and the new method for calculating fines that they set were reasonably predictable for the undertakings concerned. In any event, the Guidelines of 2006 do not constitute the legal base for fixing the amount of the fine, they only give guidance on the application of Article 23 of Regulation no. 1/2003. Even in the absence of the 2016 Guidelines, the appellants would always be capable of predicting the legal consequences of their behaviour and could always expect being imposed a fine of a dissuasive character. Furthermore, regarding the appellants' argument that the Commission adopted a different approach about the imposition of fines, the CJ stated that the Commission's previous decisional practice does not serve as a legal framework regarding the fines. The CJ, therefore, accepted the retroactive application of the Guidelines and dismissed this argument.

11. Judgment of the General Court of 13 December 2016, *Printeos, SA and Others v. European Commission*, Case T-95/15¹⁹

Court annulled for the first time a Commission's cartel settlement decision.

The Commission's decision under appeal was adopted in the context of a settlement procedure through which the Commission imposed on the applicants a fine due to an infringement of Article 101 TFEU, which consisted in a cartel on the European stock/catalogue and special printed envelopes market.

The settlers brought an action to the GC claiming that the decision was vitiated by a failure to state adequate reasons.

The GC held that, according to settled case law, the obligation to state reasons is an essential procedural requirement. This requirement varies depending on the circumstances of each case and the content of the measure

¹⁸ Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation no. 17 and Article 65 (5) of the ECSC Treaty. OJ C 9, 14.1.1998, 3-5.

¹⁹ Judgment of the General Court of 13 December 2016, *Printeos, SA and Others v. European Commission*, T-95/15, EU:T:2016:722.

in question. According to the GC, the Commission is under the obligation to state the reasons for its decision on imposing fines even if it is adopted at the conclusion of a settlement procedure and the parties are familiar with the contents of the case file. These facts do not mean that the Commission's duty to state reasons is subject to lighter requirements. Furthermore, when, as in the present case, the Commission decides to depart from the general methodology set out in the Guidelines, the requirement relating to the duty to state reasons must be complied with all the more rigorously. The Commission was required to explain the way in which it intended to use its discretion and had to comply with the principle of equal treatment when determining the different amounts of fines applicable to each infringer. However, the GC believed that the Commission failed to do so, namely it failed to justify why it had applied different rates of reduction to the undertakings concerned. The Commission's brief and succinct statement of reasons did not allow the applicants to dispute the merits of the decision in the light of the principle of equal treatment nor did it allow the Court to fully exercise its powers of judicial review. The GC concluded that the decision was vitiated by failure to state adequate reasons and annulled it.

II. Case law – Article 102

1. Judgment of the General Court of 15 September 2016, *Morning Star, Inc. v. European Commission*, Case T-76/14²⁰

Commitments and the Commission's obligation to state reasons.

After carrying out an investigation, the Commission came to the conclusion that the Canadian company – Thomas Reuters (TR) – occupied a dominant position in the worldwide market for consolidated real-time data feeds and that it had abused its dominant position by imposing certain restrictions regarding the use of Reuters Instrument Codes (RICs), which are alphanumeric codes that identify securities and their trading locations. Such practice prevented the interoperability with consolidated real-time data feeds of other providers and created substantial barriers to switching providers.

²⁰ Judgment of 15 September 2016, *Morning Star, Inc. v. European Commission*, T-76/14, EU:T:2016:481.

The Commission adopted a decision accepting a set of commitments proposed by TR and took the view that those commitments were sufficient to address the competition concerns identified.

Morning Star, a competitor of TR, lodged an action asking the GC to annul the decision. Morning Star claimed that the Commission accepted commitments which did not address the competition concerns.

The GC started by affirming that its role is limited to establishing whether the Commission had not committed a manifest error of assessment. In other words, the GC has to determine whether a balance has been achieved between the concerns raised by the Commission and the commitments proposed by TR. Demands put forward by competitors in relation to the content of those commitments are irrelevant, what does matter are the Commission's concerns.

The GC came to the conclusion that the Commission was correct in its assessment of the commitments proposed, as these were capable of resolving the competition concerns identified.

Regarding the applicant's claim that the Commission had breached its obligation to state reasons, the GC held that in relation to decisions making commitments binding, this obligation is complied with when the Commission sets out the factual and legal elements which led it to conclude that the commitments were sufficient to address the competition concerns. Since those details enable the GC to review effectively the Commission's exercise of its discretion, it must be concluded that the decision is sufficiently reasoned.

The GC dismissed the action in its entirety.

III. Case law on Mergers

1. Judgment of the Court of Justice of 28 January, *Éditions Odile Jacob v. European Commission*, Case C-514/14²¹

Court accepts retroactivity of a Commission decision taken pursuant of a judgment of the GC.

In 2004, the Commission approved Lagardère's proposal of acquiring the publishing assets of Vivendi Universal Publishing (hereinafter Vivendi). The approval of this acquisition was subject to conditions, namely the

²¹ Judgment of 28 January 2016, *Éditions Odile Jacob v. European Commission*, C-514/14, EU:C:2016:30.

divestment of part of the assets of Vivendi (which became known as Editis) to a purchaser independent of Lagardère.

Lagardère received many purchase offers, among them the offer of Odile Jacob. After being approved as a suitable purchaser by the Commission, Lagardère sold the assets to another company – Wendel.

Odile Jacob lodged two appeals: one against the Commission's decision approving the merger²² and the other against the decision that considered Wendel to be a suitable purchaser.²³

The GC rejected the appeal against the Commission's conditional clearance decision but annulled the Commission's decision on the ground that the sale was made based on a report elaborated by a trustee that did not fill the independence requirements.

Lagardère submitted to the Commission a new request to approve Wendel as a suitable purchaser and proposed the name of another trustee.

The Commission adopted a decision approving retroactively Wendel as the acquirer of the assets.

Lagardère lodged an appeal against this decision in the GC, which dismissed the action.²⁴ The current judgment refers to Lagardère's appeal to the CJ.

The appellant alleged that the new contested decision did not neutralise the illicit effects arising from the lack of independence of the first trustee and therefore the Commission had not complied with the GC's previous judgment. The CJ held that in order to determine whether the Commission had complied with the GC's judgment it was required to follow the operative part and the supporting reasoning of the GC. In practice, this meant that it was enough for the Commission to appoint a new trustee and adopt a new decision accepting a suitable purchaser. The Commission had fulfilled these requirements even if the purchaser was the same. This claim was therefore dismissed.

Odile Jacob also criticised the GC's validation of the retroactive effects of the decision. The CJ, in agreement with the GC, held that exceptionally an act may produce retroactive effects, if it fulfils some conditions. Namely, if the act seeks to attain an objective of general interest (which in this case was the administration of legality and the force of *res judicata*) and the

²² Judgment of 13 September 2010, *Éditions Jacob v. Commission*, T-452/04, EU:T:2010:385.

²³ Judgment of 13 September 2010, *Éditions Jacob v. Commission*, T-279/04, EU:T:2010:384.

²⁴ Judgment of 5 September 2014, *Éditions Odile Jacob SAS v. European Commission*, T-471/11, EU:C:2016:55.

legitimate expectations of the persons concerned are not affected (this condition was also verified).

The CJ dismissed the appeal in its entirety.

IV. Case law – State Aids

1. Judgment of the General Court of 26 May 2016, *French Republic and IFP Énergies Nouvelles v. Commission*, joined cases T-479/11 and T-157/12²⁵

Clarification of the Status of Public Establishments of an Industrial and Commercial Character under State Aid Rules

IFP was a legal person governed by private law which operated under the economic and financial supervision of the French Government. In 2006, IFP was converted into a legal person governed by public law, more specifically a publicly-owned industrial and commercial establishment (EPIC).

Under French law, EPICs are a category of legal persons governed by public law which perform economic activities. Their legal personality is separate from that of the State, they are financially independent and they exercise certain special powers, namely the performance of one or more public service tasks. EPICs are not subject to the ordinary law applicable to bankruptcy and insolvency procedures by virtue of a general principle of immunity from seizure enjoyed by public assets.

The European Commission adopted a decision considering that the conversion of the IFP into an EPIC constituted State aid since it entailed an implied and unlimited State guarantee to the benefit of the IFP. Taking into account that IFP's competitors did not benefit from a comparable guarantee and were thus subject to common law insolvency proceedings, the conversion of IFP resulted in a selective advantage within the meaning of Article 107 (1) TFEU. However, the Commission concluded that the State aid granted to IFP was compatible with the internal market, subject to certain conditions. The decision imposed a number of information obligations.

The French Republic and IFP brought an action of annulment against the Commission Decision alleging that the conversion of IFP into an EPIC should not be classified as State aid.

²⁵ Judgment of 26 May 2016, *French Republic and IFP Énergies Nouvelles v. Commission*, joined cases T-479/11 and T-157/12, EU:T:2016:320.

The Court focused its analysis on whether the existence of an implied and unlimited guarantee inherent in the EPIC status should be considered as State aid. In particular whether such guarantee conferred a selective advantage on IFP.

The Court scrutinised the Commission's reasoning leading to the conclusion that the EPIC status conferred an economic advantage to IFP in its dealings with creditors (namely suppliers, customers and financial institutions). The Commission's idea being that an implied and unlimited State guarantee might influence the perception the creditors form of the undertaking which benefits from it. These creditors might then attribute a more favourable treatment to the undertaking knowing that they will be able to enforce the guarantee in the event of a non-payment or non-performance of an obligation. This might lead to a reduction in the charges of the undertaking or a maximisation of its profits.

According to the GC, even though the Commission's method of examining the advantages which emerged in IFP's dealings with its creditors was not wrong in law, there were serious flaws in the way in which the Commission applied the said method in the present case. The Court criticised the Commission for following a purely hypothetical line of reasoning lacking both in clarity and consistency. According to the Court, the Commission failed to adduce evidence to prove that the assumptions on which its reasoning rested were well founded. Therefore, the Commission failed to discharge its burden of proof and its obligation to state reasons.

The Commission tried to make use of a previous judgment²⁶ where the Court concluded that there is a rebuttable presumption according to which the EPIC status confers automatically a selective advantage to the undertaking concerned, due to the unlimited and implied State guarantee, and therefore amounts to State aid within the meaning of Article 107(1) TFEU. However, the GC clarified that the possibility of resorting to this presumption depended on the plausibility of the assumptions. Such plausibility was lacking in the assumptions on which the Commission relied in order to conclude that there were advantages in the relations between the IFP and its customers and suppliers.

Therefore, the Court annulled the Commission decision in so far as it classified as State aid the guarantee conferred to IFP at the moment of its conversion into an EPIC.

²⁶ Judgment of 3 April 2014, *French Republic v. European Commission*, C-559/12 P EU:C:2014:217.

2. Judgment of the Court of Justice of 19 July 2016, *Tadej Kotnik v. Državni zbor Republike Slovenije*, Case C-526/14²⁷

Burden-sharing measures by shareholders and subordinated creditors as a prerequisite for the authorisation of State aid to banks' capital shortfalls.

This judgment was given in the context of a preliminary ruling regarding the validity and interpretation of some points of the Communication from the Commission on the application of State aid rules to support measures in favour of banks in the context of the financial crisis²⁸ and some norms of Directives 2012/30/EU²⁹ and 2001/24/EC.³⁰

As a consequence of the global financial crisis, five Slovenian banks showed capital shortfalls. The Bank of Slovenia adopted several measures to effect the recapitalisation, the rescue or the winding up of the banks. The Commission authorised the concession of State aid to the banks concerned. Affected creditors initiated proceedings before national courts alleging that the Commission's banking guidelines were contrary to the Slovenian Constitution, the Charter of Fundamental Rights of the EU and the above mentioned Directives. The Slovenian Constitutional Court decided to refer some questions to the CJ.

As an answer to the first question of the Slovenian court, the CJ held that guidelines, such as the Banking Communication, are not capable of imposing independent obligations on Member States. The Banking Communication only establishes the conditions designed to ensure that State aid granted to banks in the context of the financial crisis is compatible with the internal market. The Commission must then take into account these conditions in the exercise of its discretionary powers. As such, the Banking Communication is not binding on Member States.

With the second question the Constitutional Court asked whether the conditions of burden-sharing in the banking communication, according to which both shareholders and subordinated creditors must be involved in

²⁷ Judgment of 19 July 2016, *Tadej Kotnik v. Državni zbor Republike Slovenije*, C-526/14, EU:C:2016:570.

²⁸ Communication from the Commission on the application of State aid rules to support measures in favour of banks in the context of the financial crisis. OJ 2013, C 216, 1.

²⁹ Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards of companies. OJ L 315, 14.11.2012, 74-97.

³⁰ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions. OJ L 125, 5.5.2001, 15-23.

meeting the costs of restructuring distressed banks in order to reduce their capital shortfalls, are contrary to arts. 107 to 109 TFEU.

The CJ was of the opinion that the conditions of burden-sharing were not contrary to the Treaty. According to the reasoning of the CJ, burden-sharing measures are designed to prevent recourse to State aid merely as a tool to overcome banks' financial difficulties. These measures ensure that, before the concession of a State aid, troubled banks adopt steps to reduce the capital shortfall, thereby reducing the amount of State aid that needs to be granted. Distortions of competition could result if shareholders and subordinated creditors were not required to contribute to the reduction of capital shortfall, since larger amounts of aid would go to banks whose shareholders and creditors had not contributed.

The Constitutional Court also referred the question of whether the burden-sharing conditions did not violate the principle of protection of legitimate expectations and the right to property. According to the CJ, shareholders and subordinated creditors cannot rely on the principle of protection of legitimate expectations, since they were given no guarantee from the Commission to the effect that it would approve State aid designed to overcome the capital shortfall of those banks and they received no assurance that the measures designed to deal with the capital shortfalls would not be liable to be prejudicial to their investments. This conclusion is not affected by the fact that, in the first phases of the international crisis, the subordinated creditors were not called upon to rescue the credit institutions.

Regarding the question of whether Member States should be allowed a transitional period in order to adjust to the Commission's new requirements in relation to burden-sharing, the CJ believes that the need to ensure the stability of the financial system constitutes an overriding public interest which precludes transitional measures from being adopted.

The Court was also of the opinion that the burden-sharing measures did not interfere with the right to property of the shareholders and the subordinated creditors. Since the Banking Communication is not capable of imposing an obligation on Member States to adopt burden-sharing measures, these measures have to be adopted voluntarily by the shareholders by means of an agreement between the credit institution concerned and its subordinated creditors. Furthermore, in accordance with the general rules applicable to the status of shareholders of public limited liability companies, shareholders must fully bear the risk of their investments. They are liable for the debts of the bank up to the amount of its share capital.

The Constitutional Court also had doubts about the compatibility of the Banking Communication with certain Articles of Directive 2012/30 which provide, in essence, that any increase or reduction in the capital of a public limited liability company must be subject to a decision by the general meeting of the company. According to the referring Court, the Banking Communication seems to run counter to those provision since it provides that certain alterations to the share capital of banks do not have to be decided upon or approved by the general meeting.

The CJ held that the Banking Communication contains no specific provision on the legal procedures through which the burden-sharing measures are to be implemented. Therefore, in certain situations, Member States may find it necessary to adopt burden-sharing measures without the agreement of the general meeting of the company. This circumstance does not call into question the validity of the Banking Communication in light of the provisions of Directive 2012/30. According to the CJ, the objective of Directive 2012/30 is to attain freedom of establishment in the internal market through the protection of the interests of shareholders and others; by contrast, the Banking Communication deals with exceptional measures that can be adopted when there are serious disturbances in the economy of Member States in order to prevent a systemic risk and ensure the stability of the financial system. Thus, the CJ concluded that Directive 2010/30 does not preclude, in exceptional circumstances, the adoption of measures relating to share capital, such as those mentioned in the Banking Communication, without the approval of the company's general meeting.

The Constitutional Court also referred the question of whether, in the event that a bank does not meet the minimum regulatory capital requirements, it is obliged to adopt measures to ensure the writing down of subordinated rights in such a way that they offset in full all the identified losses of the bank or whether those measures may be applied partially, in a proportionate manner.

According to the CJ, a Member State is not compelled to impose on banks in distress an obligation to convert subordinated rights into equity or to effect a write-down of the principal thereof, or an obligation to ensure that those rights contribute fully to the absorption of losses. However, in such circumstances, it will not be possible for the envisaged State aid to be regarded as having been limited to what is strictly necessary and the Member State runs the risk that the Commission will find the aid to be incompatible with the internal market. Nonetheless, the Court adds that

measures for converting subordinate rights or writing down their value must not exceed what is necessary to overcome the capital shortfall of the bank concerned.

Finally, the CJ held that burden-sharing measures fall within the scope of the concept of “reorganisation measures” as defined by Article 2 of Directive 2001/24.

3. Judgment of the General Court of 15 September 2016, *Ferracci v. European Commission*, Case T-219/13³¹

Impossibility to recover an illegal State aid.

The contested Commission’s decision referred to an Italian municipal tax regime which granted an exemption regarding a tax on property to non-commercial entities when such property was used for certain specific ends. The Commission had considered that such exemption constituted a State aid and was incompatible with the internal market. However, the Commission did not order the recovery of the aid because it considered that it was absolutely impossible for Italy to do so. The decision was challenged on the ground, among others, that the Commission had not ordered the recovery of the illegal aid when it was legally obliged to do so.

The Commission alleged that it was absolutely impossible for Italy to recover the illegal aid since the data available did not reveal the type of activity carried out in the properties concerned nor did Italy have available the data necessary to calculate objectively the amount of tax that had to be retrieved.

The GC held that the Commission and the Member States are obliged to observe duties of loyal cooperation and to act in good faith in the application of the Treaty and, in particular, of the rules regarding State aids. The GC confirmed the practical impossibility alleged by the Commission of recovering the State aid.

According to the GC, the argument that it is absolutely impossible to recover the aid is normally invoked during the implementation phase of the Commission decision and not during prior administrative proceedings leading to the adoption of a State aid decision. However, contrary to the appellant’s allegation, there is nothing in the applicable law or in the relevant case law determining that the impossibility of recovery cannot be

³¹ Judgment of 15 September 2016, *Ferracci v. European Commission*, T-219/13, EU:T:2016:485.

alleged during the mentioned administrative proceedings. Indeed, cooperation between the Commission and the Member State might take place before the adoption of the final decision if the impossibility of recovery is detected during the investigation phase. There is nothing preventing the Commission from recognising the impossibility even before ordering the recovery of the aid. Furthermore, the Commission may not impose on Member States obligations that are, since their origin, objectively and absolutely impossible to perform.

Therefore, the GC considered that the Commission did not err when declaring the impossibility of the recovery and dismissed all the other grounds of appeal.

4. Judgment of the Court of Justice of 26 October 2016, *Dimosia Epicheirisi Ilektrismou v. Alouminion tis Ellados*, Case C-590/14³²

The extension of the period of validity of existing State aid stemming from a national court's decision.

In 1960, Alouminion entered into a contract with the Greek public electricity company Dimosia Epicheirisi Ilektrismou (DEI) under which it was granted a preferential tariff for the supply of electricity. This preferential tariff was classified by the Commission as State aid compatible with the internal market. Under an agreement between Alouminion and the Greek State, the contract was due to end on 31 March 2006, unless it was extended in accordance with its provisions. In 2004, DEI informed Alouminion of its intention to terminate the contract. Alouminion challenged such termination before the competent national court, which held that that termination was not consistent with the provisions of the contract and the applicable domestic legal framework. Through interim measures, the Greek Court suspended the effects of that termination, which meant that between 2007 and 2008 Alouminion continued to benefit from the preferential tariff. The Commission considered that Greece had granted unlawful State aid, since Alouminion continued to benefit from a preferential tariff between the said period. Alouminion lodged an action for annulment of the contested decision. The GC annulled the decision, holding that the order for interim measures of the Greek Court could not be regarded as granting or altering

³² Judgment of 26 October 2016, *Dimosia Epicheirisi Ilektrismou v. Alouminion tis Ellados*, C-590/14, EU:C:2016:797.

aid within the meaning of Article 108(3) TFEU.³³ DEI appealed from the decision of the CJ.

The CJ began by reminding that Article 1 c) of Regulation no. 659/1999/EC³⁴ defines new aid as “all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid”. An alteration of existing aid is defined by Article 4 (1) of Regulation no. 794/2004³⁵ as “any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market”. The period of validity of existing aid is a factor likely to influence the evaluation of the compatibility of that aid with the internal market. The CJ held therefore that, in accordance with the mentioned Regulations, the extension of the duration of existing aid must be considered to be an alteration of existing aid and therefore constitutes new aid.

The CJ was of the opinion that the order for interim measures of the Greek Court, by reinstating the application of the preferential tariff during 2007 and 2008, had the effect of altering the time limits of application of the preferential tariff, as agreed in the contract, and therefore the time limits of the aid scheme, as authorised by the Commission. Consequently, the order for interim measures had to be regarded as constituting alteration of existing aid and thus a new aid that needed to be notified to the Commission.

Regarding the GC’s ruling that a national court’s decision on interim measures cannot result in the grant of aid, the CJ held that the application of State aid rules is based on a duty of cooperation between the national courts and the Commission. National courts must take all the necessary measures to ensure the fulfilment of EU law obligations and must refrain from adopting decisions which jeopardise the attainment those objectives. In particular, national courts must avoid taking decisions that conflict with a decision of the Commission. National courts have to verify whether the arrangements for the implementation of an aid have been modified and whether they lead to the existence of a new aid which must be notified to the Commission. Therefore, the CJ concluded that the GC erred in law by finding that national courts may escape the obligations incumbent upon

³³ Judgment of 8 October 2014, *Aluminion AE v. European Commission*. T-542/11, EU:T:2014:859.

³⁴ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. OJ L 83, 27.3.1999, 1-9.

³⁵ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999. OJ 2004 L 140, 1, and corrigendum OJ 2005 L 25, 74.

them in the context of the control of State aids on the ground that they are ruling in interlocutory proceedings.

The CJ annulled the judgment of the GC and referred the case back to it for further consideration.

5. Judgment of the Court of Justice of 21 December 2016, *European Commission v. World Duty Free Group*, joined cases C-20/15 P and C-21/15 P³⁶

Assessing the selective nature of a tax advantage.

According to a provision of Spanish corporate tax law, if an undertaking taxable in Spain acquires a shareholding in a foreign company equal to at least 5% of that company's capital and retains that shareholding for an uninterrupted period of at least one year, the goodwill resulting from that shareholding can be deducted from the basis of assessment for the corporation tax for which the undertaking is liable.

The Commission adopted two decisions (one regarding the application of this regime to acquisitions of shareholdings in undertakings established in the EU and the other regarding acquisitions of shareholdings in undertakings outside the EU) declaring the Spanish corporate law provision to be incompatible with the internal market.

Three companies established in Spain brought actions before the GC seeking the annulment of the mentioned decisions. The GC annulled the decisions on the grounds that the Commission had failed to establish the selectivity of the aid scheme. The Commission then brought an appeal before the CJ claiming that the GC's judgment should be set aside.

The CJ held that in order to assess the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of "State aid", within the meaning of Article 107(1) TFEU, it is necessary to determine whether such measure introduces a distinction between operators that are, in the light of the objective pursued by the system concerned, in a comparable factual and legal situation and whether such distinction cannot be justified by the nature and general structure of that system. The CJ found that the Commission, in order to establish whether the measure was selective, correctly relied on the fact that the consequence of that measure was that resident undertakings were not treated equally, since only resident

³⁶ Judgment of 21 December 2016, *European Commission v. World Duty Free Group*, joined cases C-20/15 P and C-21/15 P, EU:C:2016:981.

undertakings who acquired at least 5% shareholdings in foreign companies could qualify for the tax advantage, whereas resident undertakings making the acquisition of such a shareholding in undertakings taxable in Spain could not obtain that advantage, notwithstanding the fact that they were in a comparable situation in the light of the objective pursued by the Spanish tax system.

The CJ considered that the GC erred in law by considering that the measure at issue was not a selective measure on the grounds that it did not affect any particular category of undertakings or the production of any particular category of goods, but was applicable regardless of the nature of an undertaking's activity and that it was accessible, a priori or potentially, to all undertakings that wanted to acquire shareholdings of at least 5% in foreign companies. According to the CJ, the Commission cannot be required, in order to establish the selectivity of a measure, to identify certain specific features that are characteristic of and common to the undertakings that are the recipients of the tax advantage, by which they can be distinguished from those undertakings that are excluded from the advantage. What matters is that the measure has the effect of placing the recipient undertakings in a position that is more favourable than that of other undertakings, even though they are in a comparable factual and legal situation in the light of the objectives pursued by the tax system concerned.

Therefore, the CJ did not uphold the judgment of the GC and referred it back the case.

6. Judgment of the Court of Justice of 21 December 2016, *European Commission v. Aer Lingus, Ryanair and Ireland*, joined cases C-164/15 P and C-165/15 P³⁷

Calculating the amount of unlawful State aid to be recovered.

Ireland introduced an air travel tax (ATT) payable by every passenger embarking on an aircraft departing from an airport situated in Ireland. The ATT was calculated on the basis of the distance between the departure and the arrival airports and imposed two separate rates on airline operators, namely EUR 2 per passenger in the case of a flight to an airport located no

³⁷ Judgment of 21 December 2016, *European Commission v. Aer Lingus, Ryanair and Ireland*, joined cases C-164/15 P and C-165/15 PEU:C:2016:990.

more than 300 km from Dublin airport (“the lower rate of ATT”) and EUR 10 per passenger in all other cases (“the higher rate of ATT”).

The Commission adopted a decision concluding that the lower rate of ATT constituted a State aid incompatible with the internal market. Ireland was therefore required to recover the unlawful aid. The Commission believed that the amount of aid to be recovered was the difference between the lower rate of ATT and the higher rate, namely EUR 8 per passenger carried. Aer Lingus and Ryanair, who were identified as beneficiaries of this aid, lodged actions for the annulment of the Commission decision.

The GC partially annulled the decision on the grounds that the Commission had failed to show that the advantage enjoyed by the airlines was, in all cases, EUR 8 per passenger, as it was possible for the economic advantage obtained from the application of the lower rate of ATT to be passed on to the passengers.³⁸

The Commission appealed against the decision of the GC.

The CJ started by stating that the obligation on the Member State to recover unlawful aid has as its purpose to restore the situation as it was before the aid was granted. When unlawful aid is granted in the form of a tax advantage, the recovery of aid means that the transactions carried out by the beneficiaries of the aid must be subject to the tax treatment which the recipients would have received in the absence of the unlawful aid. In this particular case, the tax advantage conferred by ATT consisted in the application of different tax rates, which had the effect of conferring a benefit on airlines in Ireland that payed the EUR 2 tax rate by comparison with other airlines that had to pay EUR 10 per passenger during the same period. The CJ concluded that the restitution of the advantage conferred by the aid measure required, as the Commission had held, the Irish tax authorities to recover from the beneficiaries of the lower rate of ATT the difference between the amount of ATT which, in the absence of unlawful aid, should have been paid; in other words, the difference between the amount of the higher rate and the lower rate of ATT.

In this regard, the CJ, unlike the GC, considered that the notion of “economic passing on” is irrelevant. The Commission was not required to analyse to what extent the airlines concerned actually retained the economic advantage arising from the application of the lower rate, such as offering more competitive prices. According to the CJ, the recovery of aid consists in

³⁸ Judgment of 5 February 2015, *Aer Lingus Ltd v. European Commission*, T-473/12, EU:T:2015:78.

the restitution of the advantage conferred by the aid to the beneficiary, not the restitution of the economic benefit gained as a result of the exploitation of such advantage. There is, therefore, no need to examine whether and to what extent those airlines actually utilised the economic advantage arising from the application of the lower rate.

The CJ decided to set aside the part of the GC's judgment vitiated by that error and dismissed, in their entirety, the actions brought by Aer Lingus and Ryanair against the Commission's decision.

V. Comments

The *DHL* judgment made clear that the leniency programs of the Commission and the national competition authorities are autonomous and there is no legal link between applications submitted to the different national competition authorities and presented to the Commission. The lesson to be drawn by leniency applicants, if their infringement is sanctionable in various jurisdictions, is that they should address the Commission and all the relevant national competition authorities and provide, at both levels, all the information in the most accurate and detailed fashion and try to be as clear as possible regarding which market segments the application refers to.³⁹

Regarding Article 101 TFEU and restrictions of competition “by object”, the cases adopted this year seem to demonstrate that the Court believes that when the Commission is dealing with an obvious hard-core restriction, such as market sharing agreements, its duty to analyse the economic and legal context of the object of the agreement is lighter than in other cases which, even though referring to an “object restriction”, are more atypical or complex.⁴⁰ Both *Toshiba* and *Telefónica* cases serve to illustrate this point.

The distinction between restrictions of competition “by object” and “by effect” is not new and is inherent in the Treaty. According to the case law of the Court, in order to determine whether the agreement or practice under analysis refers to a restriction of competition “by object” there is no need to examine its effects on the market but, in order to determine the anti-competitive nature of its object, regard must be had to the content of its

³⁹ Cristoforo Osti, “DHL Express (Italy) v. Commission: Guidance on Parallel Immunity/Leniency Applications”, *Journal of European Competition Law & Practice* 7, 7 (2016): 460-461.

⁴⁰ See Opinion of Advocate General Wathelet, delivered on 25 June 2015, *Toshiba Corporation v. European Commission*, C-373/14 P, EU:C:2015:427.

provisions, the objectives which it seeks to attain and the economic and legal context of which it forms part. However, in a recent judgment,⁴¹ the Court blurred the distinction between restrictions “by object” and “by effect” because it identified a number of additional factors to be taken into account in the assessment of the economic and legal context of the agreement (such as the nature of the goods or services affected, the real conditions of the functioning and structure of the markets, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned). After this judgment the distinction between the examination of the anti-competitive object of an agreement and the analysis of its effects on competition became quite hard to make. This is unfortunate, since the boundaries between restriction of competition “by object” and “by effect” should be clearly defined.

Advocate-General Wathelet, in the *Toshiba* case, urged the CJ to use this opportunity to clarify the case law. He suggests that it is possible to classify into three different categories agreements or practices that breach Article 101 TFEU. On the one hand, we have agreements that do not have a restrictive object but produce anti-competitive effects and, on the other, we have agreements that have an anti-competitive object and among these it is possible to distinguish between those that are so obviously restrictive of competition that there is no need for a deep assessment of their legal and economic context and those that might be restrictive of competition by object but to come to that conclusion it is necessary to carry out a more detailed analysis of their economic and legal background.⁴² Some believe, however, that the Court in *Toshiba* failed to use this opportunity to clarify the case law leaving doubts about the distinction between restriction “by object” and “by effect”.⁴³

As shown, for instance, in *Toshiba* and *Portugal Telecom and Telefónica*, when it comes to calculating fines, the CJ has adopted a quite rigorous

⁴¹ Judgment of 14 March 2013, *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal*, C-32/11, EU:C:2013:160.

⁴² Patrick Harrison, “Toshiba v Commission: Do Two Wrongs Make a Right? The CJEU Takes another Step Away from Allianz Hungaria”, accessed February 1, 2017, <http://kluwercompetition-lawblog.com/2016/03/14/toshiba-v-commission-two-wrongs-make-right-cjeu-takes-another-step-away-allianz-hungaria/>.

⁴³ Pallavi Guniganti, “ECJ failure to clarify by-object analysis is ‘really frustrating’”, says Whish, accessed January 1, 2017, <http://globalcompetitionreview.com/article/1068064/ecj-failure-to-clarify-by-object-analysis-is-%E2%80%99really-frustrating%E2%80%9D-says-whish>.

approach and will not accept it if the Commission limits itself to a succinct assessment of the markets affected by the illicit behaviour.

Regarding parental liability, the CJ kept the trend, developed in previous years, of making it extremely hard to rebut the presumption that the mother company does not exercise decisive influence over the subsidiary when it holds all or almost all of the share capital.

The *Eturas* case is a good illustration of how competition law concepts have to adapt to new realities, namely those that arise out of technical advances. For Competition law to remain effective it must keep an eye open for new forms of cooperation arising out of new technical developments and public enforcers have to ensure that new sophisticated tools do not put at risk the independence of economic operators.⁴⁴

The Courts have taken the Commission's duty to state reasons when adopting decisions imposing fines very seriously, applying a strict standard, even when the decisions are adopted at the end of a settlement procedure, as in the *Printeos* case. The statement of reasons must always allow the addressee of the decision to assess its merits and allow the Court to exercise its powers of judicial review. The Commission also has to rigorously comply with this duty, as seen in *HeidelbergCement*, when it issues decisions requesting information during investigations of competition law infringements. As a result of this judgment, it is expected that the Commission considers more closely what information it will request, under what reasons and what the optimal time for doing so is.

Nonetheless, the CJ was quite ready to accept the retroactive effects of acts adopted by the institutions. In the *Ori Martin* case the reasoning of the Court is not totally convincing and questions remain whether the solution adopted does not violate the principle of non-retroactive application of harsher criminal norms. In *Éditions Odile Jacob*, both the GC and the CJ showed no problems in accepting the Commission's attribution of retroactive effects to its second decision after the annulment of the first.

⁴⁴ Andreas Heinemann and Aleksandra Gebicka, "Can Computers Form Cartels? About the Need for European Institutions to Revise the Concertation Doctrine in the Information Age", *Journal of European Competition Law & Practice* 7, 7 (2016).

SIA Remonts highlights the danger of companies being held liable for competition infringements carried out by contractors engaged by them. To avoid such risk, especially if the company has to provide commercially sensitive information to the contractor and there is the possibility of the contractor passing it along to other competitors, great care should be taken when drafting the contract for the provision of services, which should include clauses limiting the engagement of the contractor with competitors, clauses protecting sensitive commercial information and a commitment of the contractor to comply with competition law. Companies should also train and educate employees about the competition law risks of outsourcing to third-parties.⁴⁵

Regarding the case law on State aids, the GC seems to be applying a higher degree of scrutiny to Commission decisions than the CJ. In *IFP Énergies Nouvelles*, the GC is highly critical of the Commission's approach, criticising it for failing to adduce enough evidence and lacking in both consistency and clarity.⁴⁶

In the controversial *World Duty Free* case, the CJ overturned the GC's decision by adopting a questionable definition of "selectivity" which considers a measure discriminatory based on the behaviour of the companies. The decision⁴⁷ under appeal is one among various Commission's decisions adopted in these last few years scrutinising the "tax planning practices" of Member States.⁴⁸ In several cases, the Commission has considered as unlawful State aid tax measures granted by some Member States to multinational

⁴⁵ Christopher Thomas, Gianni de Stefano and Dina Jubrail, "Liability for anti-competitive behaviour by your employees and outside contractors: when you are off the hook and when you are not", accessed February 1, 2017, <http://kluwercompetitionlawblog.com/2016/08/04/liability-anti-competitive-behaviour-employees-outside-contractors-off-hook-not/>, and Marcin Alberski and Siobhan Kahmann, "Contractors and Cartels: Limiting the Risk", accessed February 1, 2017, <http://www.complawblog.com/contractors-cartels-2016/>.

⁴⁶ The case *Frucona Košice a.s. v. European Commission* (Judgment of 16 March 2016, *Frucona Košice a.s. v. European Commission*, T-103/14, EU:T:2016:152), although not described in this report, is also a fine example of the GC's willingness to thoroughly scrutinise Commission decisions, in this specific case regarding the practical application of the "private creditor" test.

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⁴⁸ Commission Decision of 30 August 2016, Case SA.38373, Aid to Apple; Commission Decision of 11 January 2016, Case SA.37667 Excess profit tax ruling system in Belgium; Commission Decision of 21 October 2015, Case SA.38374 Aid to Starbucks; Commission Decision of 21 October 2015, Case SA.38375 Aid to Fiat. During 2016, the Commission also published the Notice on the notion of State aid as well as the Working Paper on State Aid and Tax Rulings.

taxpayers. These decisions raise a degree of controversy since many believe that the Commission is encroaching on the sovereign rights of Member States to determine their internal tax systems. Indeed, taxation is a domain exclusively reserved to Member States as long as it is genuinely used as a strategic policy to influence the economy at a macroeconomic level and not to carry out particular purposes.⁴⁹ The joined cases in *World Duty Free* represent the first of such Commission decisions to be challenged before the CJ. As mentioned above, the CJ followed the Advocate-General's advice⁵⁰ and quashed the GC's judgment, thereby extending the circumstances under which a tax measure may be considered to be selective. The question of whether a measure fulfils the "selectivity" requirement is currently one of the main problems in the interpretation of the concept of State aid. The case law of the CJ has also lacked clarity and has failed to draw a clear line between lawful tax competition and disguised State aid. In *World Duty Free*, the Advocate-General had criticised the General Court's approach as "excessively formalistic and restrictive"⁵¹ in considering as selective only measures which favour a particular category of undertakings or the production of certain goods. As mentioned above, the Advocate-General and the CJ held that a tax measure should be considered selective if it favoured some undertakings over others in a comparable legal and factual situation. However, as pointed out by some authors,⁵² the approach of the Advocate-General and the CJ is also formalistic, it implies that it is unnecessary, in order to fulfil the selectivity requirement, to verify whether the measure affects the economy as a whole or if it is tailored to specific needs of special categories of undertakings, even if all undertakings are eligible to benefit from such regime. The selective nature of the measure thus depends only on whether the undertakings perform a certain transaction. However, after performing the transaction the undertakings will be in a different factual and legal situation and therefore the use of this criterion – "being in a comparable factual and legal situation" – loses all its significance. *World Duty Free* illustrates the need for the Commission and the Courts to develop a suitable methodology to deal with fiscal aid measures.

⁴⁹ Massimo Merola, "The Rebus of Selectivity in Fiscal Aid: A Nonconformist View on and Beyond Case Law", *World Competition* 39, 4 (2016).

⁵⁰ Opinion of Advocate General Wathelet, delivered on 28 July 2016, *World Duty Free*, joined cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:624.

⁵¹ *Ibid.*, paragraph 85.

⁵² Merola, *op. cit.*

In the *Aer Lingus and Ryanair* case, the GC was of the opinion that the Commission had not established the requisite legal standard that the recovery of EUR 8 per passenger was necessary in order to ensure the re-establishment of the *status quo ante*. The GC had held that the Commission should have entered into a more complex analysis of how the economic advantage arising from the application of a lower rate was used by the airlines. The CJ, on the other hand, following the Advocate General's opinion, decided to follow a simpler route, claiming that the Commission did not have to perform this analysis and the amount to be recovered was simply the difference between the higher and the lower rate applied to each passenger. This case is relevant because it provides important guidance on how to calculate the amount of aid to be recovered when such aid is granted in the form of tax advantages. The CJ seems to be of the opinion that when doing such calculation the advantage conferred by the State aid is not equivalent to the economic benefit that the undertakings might have derived from the tax measure. The incompatible aid has to be recovered regardless of whether it has been passed on or not to other economic agents, namely consumers.

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