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

1.1. The General Court annuls the Commission decision refusing access to the statement of contents of a cartel case file

CDC Hydrogene Peroxide Cartel Damage claims (hereafter ‘CDC’) is a limited company that defends the interests and the recovery by judicial and extrajudicial means of the claims of undertakings affected by the hydrogen peroxide cartel. The latter cartel involved the participation of nine undertakings that exchanged information on prices and sales volumes, agreed on prices and reduced production capacity and monitored the anti-competitive agreements made. CDC sought full access to the statement of contents of the case file in the hydrogen peroxide decision but was refused access by the Commission on the ground that it did not constitute a document within the meaning of article 3 (a) of Regulation No 1049/2001. In response to the objections of CDC the Commission moreover expressed its view that the disclosure of the statement of contents would undermine the protection of the purpose of the investigation activities referred to in the third indent of article 4(2) of Regulation No 1049/2001, as well as the protection of the commercial interests of the undertakings which took part in the cartel and the institution’s decision-making process. Accordingly, CDC’s confirmatory application was rejected as well.

On 15 December 2011 the General Court however, contradicts the view of the Commission and insists that the statement of contents should be disclosed. CDC had claimed that the Commission had infringed both the first and third indent of article 4(2) Regulation 1049/2001.

In its judgment, the General Court emphasises that in general the public must be given the fullest possible right of access to documents held by institutions. Although this right is subject to some limitations, it is for the Commission to explain how disclosure of a document could specifically and effectively undermine the interest protected by the exceptions provided for in article 4 of Regulation No 1043/2001. The lawfulness of a decision to refuse access to a document has to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. Thus, the fact that the applicant may have been able to reach an agreement with one of the companies whose commercial interests the Commission was seeking to protect cannot be taken into account in the context of that assessment. In the present case the General Court notes that CDC is only seeking access to the statement of contents as such and not to the documents listed in the statement. Hence, it has to be established whether the Commission erred in its assessment by finding that the statement of contents was covered by one of the limitations contained in Regulation 1049/2001.

(a) The protection of commercial interests

The Court starts of by recalling that not all information concerning a company and its business relations can be considered as requiring the same level of protection that must be guaranteed to commercial interests. In this respect the General Court notes that the statement of contents cannot be regarded as itself forming part of the commercial interests of the companies mentioned therein by name as authors of some of the documents in the Commission case-file listed in that statement. Only if that statement of contents makes reference to the origin, the addressee and the description of the documents listed in the non-confidential version and would contain information concerning the business relations of the companies concerned, the prices of their products, their cost structure, market share or similar information, disclosure of the statement of contents could be regarded as prejudicing the protection of the commercial interests of those companies. The Commission’s arguments to justify the non-disclosure, however, only concern the risk that the intervener or other companies involved in the hydrogen peroxide cartel would face actions for damages as a result of the disclosure of the statement of contents. The Court underlines that it has not been argued that the information contained in the statement of contents would affect commercial interests of the undertakings concerned. According to the General Court, a statement of contents is a mere inventory of documents with only a relative probative value in the context of an action for damages. Even though disclosure could enable CDC to identify the documents useful for such action, any decision to order production of those documents or not is for the Court having jurisdiction over the action for damages. Disclosure of the statement of contents itself would not as such affect the commercial interest relied on by the Commission to justify its negative decision. Moreover, the interest of a company which took part in a cartel in avoiding any action for damages, is no commercial interest or an interest deserving protection having regard to the fact that any individual has a right to claim damages for loss caused to him by conduct liable to restrict or distort competition.

(b) Protection of the purpose of the investigation

Regarding the Commission’s reliance upon the protection of the investigation activities as justification for its refusal to grant access to the statement of contents, the Court recalls that the aim of that exception is not to protect the investigations as such, but rather their purpose to determine whether an infringement of competition has taken place and to penalise the companies responsible in that case. Therefore, documents relating to various acts of investigation may remain covered by the exception in question so long as the goal has not been attained, even if a particular investigation or inspection that gave rise to the document to which access is sought has been completed. In the present case, the Commission, on the date of the adoption of the contested decision already adopted the hydrogen peroxide decision that established the infringements more than two years earlier. Consequently, it cannot be disputed that there was no investigation in progress to demonstrate the infringement in question which could have been jeopardised by the disclosure of the requested documents. Despite the fact that actions for annulment were pending before the Court, an investigation must be regarded as closed once the final decision is adopted. Furthermore, any exception to the right of access must be interpreted and applied strictly. The disclosure of documents that concern a protected interest must actually undermine the protection of the purpose of its investigations concerning the infringements in question. If all documents would be covered by the exception at issue until all possible legal procedures have been decided,

3 CDC also claimed a breach of the fundamental principles of Regulation 1049/2001 and of the right to compensation for an infringement of EU competition law. However, the specific application of the first and third indent of article 4(2) of Regulation 1049/2001 must take account of the more general principles set out in the first two pleas.

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access to those documents would be dependent on uncertain events, namely the outcome of the actions and the conclusions the Commission might draw from it. The General Court notes that such interpretation would be contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions, with the aim of giving citizens the opportunity to monitor effectively the lawfulness of the exercise of public powers. In addition, the actions brought against the hydrogen peroxide decisions did not challenge the existence of anti-competitive conduct found by the Commission but merely maintained that there were errors regarding the duration of those practices, the attribution to parent companies for the conduct of their subsidiaries and the calculation of fines or infringements of procedural rights. Even if the Court decided that the procedure had to be re-opened, this would not lead the Commission to adopt a different position on the finding of the infringement or the participation of the producers concerned.

Subsequently, the General Court discarded all arguments regarding the ambit of this limitation. The Commission had argued that the concept of the protection of the purpose of the investigation activities is more general in scope and includes the entire policy regarding the punishment and prevention of cartels. This would, however, amount to permitting the Commission to avoid access to any documents in a competition case without any limit in time by referring to the possible adverse impact on its leniency programme in the future. Moreover, in the present case this would mean refusing access to a document which was not itself submitted by an applicant for leniency. Furthermore, nothing in Regulation No 1049/2001 indicates that EU competition policy should enjoy a treatment different from other EU policies. The General Court believes there is no reason to interpret the concept “purpose of the investigation activities” different in the context of competition law and indicates that the Commission’s reasoning is based on a confusion between the different exceptions. In essence, the facts by which the Commission justifies the existence of an adverse impact on the purpose of the investigation activities are identical to those relied on in support of the exception regarding the protection of commercial interests. As set out, regarding that argument the Commission failed to meet the requisite legal standard. In this respect, the General Court recalls that leniency and co-operation programmes are not the only means of ensuring compliance with EU competition law. Actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the EU.

Finally, the General Court stresses that the purpose for which the Commission drew up a document is a fact which is not, in itself, to be taken into account in a decision concerning access to that document. Therefore, the Commission’s argument that the statement of contents was drawn up solely to permit the undertakings concerned to defend themselves is irrelevant. Only circumstances relating to the consequences of disclosure of the documents requested qualify as exceptions, as per the meaning of article 4 of Regulation 1049/2001.

2. ANTITRUST: THE APPLICATION OF ARTICLE 101 AND 102 TFEU

2.1. Commission decisions

(a) Bananas: Commission has fined the Pacific Fruit group a total of €8.9 million in second cartel decision in the banana sector.

The decision concerns a cartel operated by Pacific Fruit and Chiquita from July 2004 until April 2005 in Italy, Greece and Portugal. The importers acted in violation of EU antitrust rules, by fixing weekly prices and exchanging price information in relation to their respective brands. Pacific Fruit was fined €8,919,000 for its participation in the cartel. Chiquita received full immunity under the Commission’s leniency programme.

It is already the second decision the Commission has taken regarding the banana sector. In 2008, the Commission found that Banana importers Chiquita, Dole and Weichert participated in a cartel in Austria, Belgium, Denmark, Finland, Germany, Luxembourg, The Netherlands and Sweden between 2000 and 2002. The parties concerned had coordinated the setting of their quotation prices for bananas by discussing and disclosing their pricing intentions. Chiquita also participated in the cartel but then too was the first to inform the Commission, consequently benefiting from full immunity of fines.

(b) CRT glass: three producers fined for a total of €128 million in fourth cartel settlement

The European Commission has fined three producers of Cathode ray tube (CRT) glass, used in televisions and computer screens, for their participation in a cartel from 23 February 1999 until 27 December 2004. The cartel consisted of four producers, Asahi Glass, Nippon Electric Glass (NEG), Schott AG and Samsung Corning Precision Materials (SCP), coordinating prices through bilateral or trilateral meeting in the European Economic Area (EEA). In addition, they exchanged information, on an ad hoc basis, of sensitive and confidential market information.

SCP was granted full immunity under the Commission’s leniency programme. NEG received a 50% fine reduction for its cooperation under the leniency notice and Schott an 18% reduction for its cooperation outside the leniency notice. In addition, all parties were granted a 10% reduction as part of the settlement procedure.

(c) Refrigeration compressors: producers fined for a total of €161 million in fifth cartel settlement

The Commission has fined four producers of household and commercial refrigeration compressors, used in household appliances, for their participation in a cartel that covered the whole European Economic Area (EEA) from April 2004 until October 2007. The parties concerned coordinated European

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pricing policies and exchanged sensitive market information through bilateral, trilateral and multilateral meetings.

Tecumseh received full immunity under the Commission’s leniency programme. ACC, Danfoss, Embraco and Panasonic, the other Parties concerned, were granted reductions for cooperation under the leniency Notice. Embraco was given a further reduction for its cooperation outside the leniency notice. In addition, all parties benefited from a 10% reduction in their fines under the Commission’s settlement notice.

2.2. Case Law

(a) The Court of Justice rules that a prohibition on the sale and use of foreign TV decoder cards for viewing football matches is in breach of article 101 TFEU

FAPL runs the Premier League, the leading professional football league competition in England. They organise the filming of Premier League matches and exercise television broadcasting rights in their regard. With a view on the most optimal exploitation of the copyright for live transmission of its football matches, the FAPL grants licenses in respect of those broadcasting rights, on a territorial basis for three-year terms. The rights are awarded to broadcasters under an open competitive tender procedure in which bids on global, regional and territorial basis can be submitted. As a rule, the basis is national since there is only a limited demand from bidders for global or pan European rights given that broadcasters mostly operate on a territorial basis and serve a domestic market, either in their own country or in a few neighbouring countries with a common language. The FAPL grants its licensees an exclusive right to broadcast and economically exploit the matches within the broadcasting area. To safeguard different exclusive rights, the licensees are required to prevent their broadcasts from being able to be received outside the broadcasting area. Therefore, all broadcasts need to be encrypted securely and cannot be received in unencrypted form. Moreover, no device can be knowingly authorised so as to permit anyone to view their transmissions outside the territory concerned.

However, in the United Kingdom some restaurants and bars had begun to use foreign decoders to broadcast Premier League matches, as the subscription fees from foreign dealers are cheaper compared to BSkyB’s fees, the licensee in the United Kingdom. The FAPL started criminal proceedings against a pub owner that used decoder cards from Greece to show the games, for the use of an ‘illicit’ decoder card. In addition, some suppliers tried to circumvent the exclusive right of BSkyB by importing decoder cards and devices from abroad. Accordingly, the FAPL started civil-law actions against a number of those as well. Finally it also instigated proceedings against licensees or operators of four public houses that have screened live Premier League matches by using a foreign decoding device, for several copyright infringements.

In the course of these proceedings the competent courts referred several questions to the Court of Justice for a preliminary ruling. More specifically, the referring courts wanted to know whether the territorial exclusivity agreements put in place by the FAPL are compatible with article 101 TFEU. On 4 October 2011, the Court of Justice ruled that clauses of

an exclusive licence agreement concluded between a holder of intellectual property rights and a broadcaster which oblige the broadcaster not to supply decoding devices enabling access to that right holder’s protected subject-matter with a view to their use outside the territory covered by that licence agreement, constitute a restriction of competition.

As a starting point the Court first referred to its case law in Coditel(10) from which follows that the mere fact that a right holder has granted an single exclusive license to broadcast a protected subject matter from a Member State, and consequently to prohibit its transmission by others during a specified period of time, is not sufficient to qualify such agreements as having an anti-competitive object. Moreover, the Court points out that article 1 (2) (b) of the Satellite Broadcasting Directive(11) confirms that right holders may in principle grant such exclusive licenses to sole licensees.

However, the Court subsequently stated that agreements that are aimed at partitioning national markets according to national borders or that make the penetration of national markets more difficult must be regarded, in principle, as having an anti-competitive object within the meaning of article 101 (1) TFEU. This case-law is fully applicable to the cross-border provision of broadcasting services. The current proceedings do not call into question the actual grant of exclusive licences, but concern the additional obligations to ensure compliance with territorial limitations upon exploitation of the exclusive licences, contained in the contracts between the right holder and different broadcasters. Such clauses guarantee absolute territorial exclusivity in the area covered by the license and preclude the cross-border provision of broadcasting services. Consequently, those clauses have an anti-competitive object and are caught by article 101 (1) TFEU.

According to the Court, the clauses at issue do not qualify for an exemption under article 101 (3) TFEU. First of all the Court rejects the argument by FAPL and others, that territorial exclusivity is necessary for the protection of intellectual property rights. Indeed, the subject matter of intellectual property is to ensure for right holders protection of the right to exploit commercially the marketing or making available of the protected subject matter, by the grant of licences in return for the payment of remuneration. Such remuneration must be reasonable in relation to the economic value of the service protected, and regarding broadcasting as such correspond to the actual and potential audience as well as the language version. Therefore, a broadcaster can ask remuneration based upon available data regarding audience even outside the Member State of broadcast. Given that the possession of a decoding device is required to view satellite broadcasts, it is possible to determine with a very high degree of precision the total number of viewers the potential and actual audience consists of both inside and outside the area of broadcast. Moreover, the remuneration can take into account the character of the broadcast at issue. However, a premium that is paid in order to guarantee absolute territorial exclusivity and that as a consequence creates artificial price differences between the partitioned markets, is irreconcilable with the

4 ECLI, 4 October 2011, Football Association Premier league and others v QC Leisure and Others; Karen Murphy v Media Protection Services Ltd, Case C-403/08 and C-429/08.

5 These questions concern many interesting issues regarding the conditional access directive, the free movement of goods and services, the copyright directive, the satellite broadcasting directive and competition law. Given the scope of this chronicle only the latter will be dealt with.

10 ECLI, 6 October 1982, Coditel SA and others v Ciné-voi films (Coditel II), Case 262/81, [1982] ECR 3381, para 15


contribution from Mindo, even though more than five years
debtor Alliance One International. The latter had not claimed
that the applicant had not demonstrated its vested and present
limited financial resources.

Consequently, the General Court reduced the fine imposed
actual part Romana Tabbachi had in the infringement.
May 2001, it was classified in the wrong category. Therefore,
according to their market shares during the last full year of the
weight of the undertakings that participated in the cartel
principle of equal treatment in assessing the impact of the
May 2001 and 19 February 2002, the end date of the
enough indications regarding the participation between 29
Romana Tabacchi’s participation in the cartel. The Court found
The General Court now rejects the action brought by
Tobacco cartel
On 5 October 2011 the General Court rendered its judgments
regarding the appeals by Romano Tabacchi, Transcatab and
Mindo against the Commission decision establishing the
existence of a horizontal cartel on the Italian raw tobacco
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(c) Pierre Fabre Dermo-Cosmétique SAS: a
general ban on internet sales in a selective
distribution agreement amounts to a
restriction on competition by object, unless objectively justified
Pierre Fabre Dermo Cosmétique SAS (‘Pierre Fabre’) manufactures and markets cosmetics and personal care products. It has several subsidiaries, including Galénic and Avene laboratories. The products distributed under those brands, are mainly sold through pharmacists on the European market. Distribution contracts for those products stipulate that sales must be made exclusively in a physical space, in which a qualified pharmacist is present. Consequently, all forms of Internet sales are de facto excluded. In June 2006, the French competition authority opened ex officio investigations in the distribution sector for cosmetics and personal care products. As a result, it started administrative proceedings against Pierre Fabre leading to the conclusion that the ban imposed by Pierre Fabre on its authorised distributors on selling via the internet amounted to a restriction of competition contrary to article [101 TFEU] and Article L.420-1 of the Commercial Code. Pierre Fabre was ordered to remove all terms from its distribution agreements that are equivalent to a ban on internet sales of its products and had to make express provision in its contracts for an option for its distributors to use that method of distribution.

Pierre Fabre brought an action for annulment, and alternatively, for amendment of the contested decision before the Cour d’appel de Paris, that referred the following question to the Court of Justice for a preliminary ruling: ‘Does a general and absolute ban on selling contract goods to end-users via the Internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a “hardcore” restriction of competition by object, for the purposes of Article 81 (1) EC [101 (1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under article 81 (3) [101 (3) TFEU]?’
The Court of Justice rendered its judgment on 13 October 2011. First, the Court noted that it is clear that the contract at


issue de facto prohibits authorised distributors from selling through the internet, and considerably reduces the ability to sell the contractual products to customers outside the contractual territory of activity. Subsequently, the Court recalls its earlier case law regarding selective distribution agreements. Such agreements necessarily affect competition in the common market and in the absence of an objective justification they are considered as a restriction by object. However, the organisation of such a network is not prohibited by article 101 (1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary. Consequently, given the nature of a preliminary reference, it is for the referring court to examine whether the clause at issue satisfies the aforementioned conditions. The Court, however, provides the point of interpretation of European Union law which enables the referring court to reach a decision.

In light of the above, the Court finds that Pierre Fabre has chosen its resellers on the basis of objective criteria of a qualitative nature. Moreover, the criteria are laid down uniformly for all potential distributors. As for the alleged legitimate aim that is pursued by de facto banning online sales, the Court's guidance is rather vague. It just makes an (unmistakable) reference to its former case law where the Court has found the need to provide individual advice to the customer to ensure protection against the incorrect use of non-prescription medicine and contact lenses, not to justifying a ban on internet sales. In addition, contrary to Pierre Fabre's claim, the aim of maintaining a prestigious image cannot constitute a legitimate aim and, therefore, cannot justify a finding that the clause at issue does not fall within the scope of article 101 (1) TFEU.

Subsequently, the Court turns to the points of assessment under 101 (3) TFEU. It concludes that the selective distribution contract at issue could not benefit from the vertical block exemption since this exemption does not apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operation out of an unauthorised place of establishment. A clause de facto prohibiting the internet as a method of marketing, such as the clause at issue, has at the very least as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system. Contrary to Pierre Fabre's claim, the Court states that a prohibition on internet selling cannot be equated with a prohibition to operate out of an unauthorised place of establishment per the meaning of article 4 (c) of Regulation No 2790/1999. Indeed, ‘place of establishment’ only concerns outlets where direct sales take place and should not encompass the place from which internet sales services are provided. As an undertaking, in all circumstances, can qualify for an individual exemption on the basis of article 101 (3) TFEU, it is not necessary to give a broad interpretation to provisions that bring a restrictive agreement or practice within the block exemption. Regarding the assessment whether the selective distribution system can qualify for an individual exemption, the Court states it does not have sufficient information available to examine the issue. Therefore, it cannot provide further guidance to the referring Court.

(d) The General Court dismisses Schenker's applications to intervene in the air cargo cartel appeals

On 9 November 2010, the European Commission established the existence of a cartel between a large number of airlines.21 Many of those airlines have brought an action for annulment of the contested decision in so far as it concerns each one of them and, in the alternative, for a reduction of their fine. Schenker AG, the parent company of a group of companies providing road, air and maritime transport services and related services worldwide, applied to intervene in these appeals in support of the form of order sought by the Commission. Schenker claims that it has a legal, economic and real interest in having the contested decision upheld. More specifically, it considers itself directly affected by the cartel as a customer of its members. Indeed, as a provider of logistics services it suffered heavy economic losses due to the considerable fuel and security surcharges it had to pay. Secondly, Schenker argues that it has a direct interest in the final termination of the air cargo cartel, as well as the prevention of its reoccurrence and, therefore, has a protected interest in having the cartel decision upheld. Lastly, Schenker takes the view that it has a direct interest in having the contested decision upheld, as that decision forms the legal basis for the damages claims, it intends to bring before the national courts. However, neither argument succeeded in convincing the General Court that dismissed all applications.22

In its judgment the General Court notes that, according to article 40 of the Statute of the Court of Justice,23 any person establishing an interest in the result of a case other than a case between Member States, between institutions of the Union or between Member States and institutions of the Union is entitled to intervene in that case. It has consistently been held that the concept of an interest, within the meaning of that provision, must be defined in the light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law put forward. It is necessary, in particular, to ascertain whether the intervener is directly affected by the contested act and whether his interest in the result of the case is established. An interest in obtaining the final termination of a cartel and the prevention of its reoccurrence does not however constitute a direct, existing interest in the result of the case within the meaning of article 40

21 Air Canada, Air France – KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas.
23 Pursuant to the first paragraph of Article 53 thereof, this is also applicable to the procedures before the General Court.
of the Statute of the Court of Justice. First of all, such interest is too general for the purposes of that provision. Moreover, an interest in the termination of a cartel is meaningful only to the extent that the participants of the cartel have not already done so. In the present case, the action does not refer to the operative part of the contested decision and the obligation for the undertakings concerned to refrain from same or similar restrictive conduct in the future, results from the prohibition in article 101 (1) TFEU itself.

Secondly, Schenker failed to establish that the outcome of the appeals is liable to harm its commercial activity of supplying logistics services given that the decision does not concern exclusivity agreements or similar practices foreclosing the market. In addition, the outcome of the case will not affect downstream customer’s capacity to conclude contracts with Schenker or alter Schenker’s contractual rights and obligations vis-à-vis the applicants. Lastly, the Court feels strongly about the fact that Schenker never filed a complaint with the Commission regarding the conduct referred to in the contested decision or participated in the administrative procedure before the Commission.

In general, the Court is of the opinion that the objective of an intervention such as that of Schenker, is not to ensure economic freedom of the intervenor’s commercial activity but as its sole object to warrant all claims for damages against undertakings alleged to have participated in the cartel at a later stage before national or non-Member State courts. Schenker, however, was required to prove it has an interest going beyond that of the other consumers of airfreight services that claim damages, but failed to do this. According to the Court, Schenker is just one of a very large number of undertakings which might potentially have been affected by the alleged cartel in question. Therefore, it cannot distinguish itself from the other consumers of airfreight services.

Besides, the General Court stated that the adoption of a decision confirming that the undertakings participated in a cartel is neither a necessary nor sufficient decision for a successful claim for damages. Indeed, Schenker’s right to claim damages can be exercised independently of any prior decision by the Commission, as practices caught by article 101 (1) TFEU which do not qualify for an exemption under article 101 (3) TFEU, are prohibited without it being necessary that a prior decision is taken. Indeed, the purpose of a request to intervene is not to facilitate civil actions in the national legal system, or to make such actions possible. Most importantly, the purpose is to review the legality of a decision of the Commission in which the existence of a cartel is established, or to review the amount

(e) Back to square one: the Court of Justice sets aside the General Courts judgments in Solvay appeals

On 13 December 2000 the Commission adopted two decisions regarding Solvay, imposing a fine of EUR 3 million and EUR 20 million respectively for participating in a pricing agreement with a competitor and abusing its dominant position by applying loyalty rebates and discounts with the intention of tying customers to Solvay in respect of all their requirements and of cutting out competitors. Those decisions are substantially identical to two decisions adopted by the Commission in 1990. The latter had been annulled by the Court of First Instance in 1995 on the ground that the Commission decisions had not been properly authenticated. The appeals against those judgments were dismissed by the Court of Justice.

Once again, Solvay contested the Commission decisions. Most importantly, they claimed a breach of their right of access to the file. Indeed, in the course of proceedings, the Commission had admitted that some files were missing. It could provide an enumerative list of all documents in the file, however, some files had been mislaid and the Commission was unable to draw up the list of the documents which they contained because the indexes to those binders could not be found. Nevertheless, the General Court dismissed the actions by Solvay in 2009. Hence, Solvay seeks to have set aside the judgment of the General Court.

In two judgments of 25 October 2011 the Court of Justice sides with Solvay and is of the opinion that the General Court erred in law in holding that the fact that Solvay has not had access to all documents in the investigation file has not prevented it from defending itself. The Court of Justice found that the General Court had based its findings on a theory regarding the content of the missing documents which it was itself unable to test. The Court considers that the observance of the rights of the defence in a proceeding before the Commission requires that the undertaking under investigation must have been afforded the opportunity to make known its views on the truth and relevance of the facts alleged and on the documents used by the Commission to support its infringement claim. Moreover, access to the file implies that the undertaking concerned has had the opportunity to examine all documents in the investigation that could be relevant for it defence, comprising both inculpatory and exculpatory evidence. Exception is made for business secrets of other undertakings, internal documents of the Commission and other confidential information. A refusal of access to these documents during the procedure prior to the adoption of a decision can infringe the rights of defence of the undertaking and, consequently, cause the Commission’s decision to be annulled. This is not remedied by the fact that access was made possible during judicial proceedings. First of all because the examination by the General Court is limited to review of the pleas put forward. Secondly, because belated disclosure does not return the undertaking under investigation to the situation in which it would have been if it had been able to rely upon those documents in presenting its written or oral observations to the Commission. If access to the file, and especially the exculpatory documents, was only granted at the stage of judicial proceedings, the undertaking concerned only has to proof that the document could have been useful to its defence. Although the General Court rightly referred to these principles, it nevertheless ruled that Solvay was not prevented from defending itself against the substantiative objections of the Commission. To this end the General Court had to examine these objections as well as the material evidence the Commission relied on. Hence the Court of Justice points out

that the General Court does not only take basic assumptions as regards the document mislaid but also as regards the knowledge which Solvay ought to have had of their content. As the Commission asserts, the missing sub-files probably contained replies to requests for information. Accordingly, it cannot be excluded that Solvay could have found evidence of use for its defence in those sub files originating from other undertakings which would have enabled it to offer an interpretation of the facts different from the interpretation adopted by the Commission. Since Solvay had not had access to those documents and their content, the General Court erred in law by requiring it to state arguments which it would have had, had those documents been available to it, something which was neither certain nor capable of being ascertained. The latter prevails even more now that whole sub-files have been lost, which could have contained essential documents for Solvay’s defence and which cannot be reconstructed from other sources in the file.

Moreover, the General Court had erred in law in holding that the Commission had not infringed the rights of the defence by failing to hear Solvay before the adoption of the contested decision. The hearing of an undertaking before adoption of the contested decision forms an integral part of the rights of defence. Although the Commission is not obliged to conduct a new hearing of the undertakings concerned when its adopts a fresh decision with substantially the same content and based on the same conditions than an infringement decision that has been annulled because of a procedural defect, the question of hearing Solvay could not be separated from the issue of access to the file. In the present case, the adoption of the first decision was also affected by a procedural irregularity, namely the fact that the Commission had not granted Solvay access to all the documents in its file. Hence, the General Court failed to take into account the specific circumstances of the case at issue. Therefore, the Court quashes the judgment of the General Court and annuls the contested decisions that found Solvay to have breached article 101 and 102 TFEU for infringement of the rights of defence.

(f) Industrial bags cartel: the General Court annuls the Commission’s decision in so far as it imposes a fine on Stempher and reduces the fine imposed on Low & Bonar

Late November 2005, the Commission adopted a decision imposing fines totalling more than €290 million on several undertakings for their participation in a complex of agreements and concerted practices in the plastic industrial bags sector in Belgium, Germany, Spain, France, Luxembourg and the Netherlands from 13 September 1991 to 28 November 1997. The undertakings concerned were accused of price fixing and concerted practices in the plastic industrial bags sector in

Several of the undertakings concerned brought actions for annulment before the General Court. On 16 November 2011, the General Court issued its judgment in the appeals by Fardem Packaging BV, Kendron NV, RKW SE and JM Gesellschaft für industrielle Beteiligungen, Low & Bonar plc and Bonar Technical Fabrics, Stempher and Koninklijke Verpakkingindustrie Stempher, Groupe Gascogne, Plasticos Espanoles SA, Armando Alvarez SA, and Sachsa Verpackung against the Commission. The Court has annulled the decision as far as it concerns Stempher since the Commission could not provide any precise and consistent evidence to support the firm conviction that Stempher continued to participate in the cartel after 20 June 1997. The Commission had found Stempher to be guilty of its participation in the Teppema group. More specifically, Stempher was thought to be engaged in illegal agreements and exchange of information concerning the sale of open mouth bags. Although the evidence relied upon by the Commission made no reference to any employee of Stempher, the Commission was of the opinion that Stempher must have contributed to those exchanges as especially detailed and precise figures could not have been effected without its contribution. Moreover, there was evidence in the form of testimonies indicating that data were often sent to private e-mail addresses. In addition, the Commission held that the communication of sales figures to a research bureau for statistical data was part of the illegal cartel arrangements and it was clear that Stempher provided such data to the bureau after June 1997. The General Court, however, did not follow that reasoning. In the present case, it was clear that the Commission has much less written evidence of the infringement for the year 1997 compared to the preceding years. Basically, the evidence was limited to a few statistical charts. Only one meeting of the Teppema group had taken place, and no reports had been drafted. It was moreover impossible to know who had formulated those statistical charts and clear that the other undertakings involved had exchanged individualised data both before the involvement of Stempher in Teppema (before 1993) as well as afterwards (1997). In addition, the fact that Stempher provided individual data to an independent research bureau could not lead to a reproach that they participated in the drawing up of anonymised statistics even though these statistics clearly facilitated the functioning of the cartel. The decision concerned only confirms this, as it does not condemn the participation of the undertakings concerned to a system of anonymous data. Finally, although there was proof that the statistical charts regularly circulated, the

25 The General Court already dismissed the action of Trioplast Wittenhem SA on 13 September 2011 (T-26/06). Moreover the Court decided to annul the Commission decision as far as it concerned Trioplast Industrie (T-40/06). The actions brought by UPM-Kymmene Oyj (T-53/06), FLS Plast (T-64/06) and and FLSmith (T-65/06) are still pending before the General Court.

Commission did not come up with any direct evidence that Stempher actually received the charts of 1997. Therefore, the GC concluded that Stempher’s participation after 20 June 1997 could not be established. Given that the Commission only investigated Stempher’s conduct at the end of June 2002 and taking into account the limitation period of five years touched in article 25 of Regulation 1/2003, it was therefore no longer competent to impose a fine on Stempher for its participation in the cartel between 1994 and 1996.

The General Court also reduced the initial fine imposed jointly and severally on Low & Bonar and Bonar Technical Fabrics NV. The former is the parent company of an international group that specialises in converting polymers and other materials into advanced products. The latter is an indirect subsidiary of Low & Bonar that has ceased to exist after it merged with its immediate partner company, Bonar Phormium NV. Bonar Phormium NV was a company with two divisions, one of which, Bonar Phormium Packaging (BPP) sold plastic industrial bags and was found to have participated in the cartel between 13 September 1991 and 28 November 1997. The applicants put forward three pleas in law regarding the scope of the alleged single and continuous infringement, the participation of BPP in the single and continuous infringement and the amount of the fine.

The General Court now agrees with the Commission that there was a single and continuous infringement, which included at least the conduct of Fardem and Wavin/BPI with the Teppema group and the Belgium sub group. The latter were able to put in place an overall plan intended to maintain the trading margins on their polyethylene conversion activities for all the types of industrial bags that they manufactured by participating in three types of meetings being Teppema, Valvoplast and the Belgian sub group. However, the Court recalls that the existence of a single and continuous infringement does not necessarily mean that an undertaking participating in one or more manifestations of that infringement may be held liable for the infringement as a whole. The Commission still has to establish that BPP was aware of the anti-competitive activities at European level of the other undertakings involved, or that it could reasonably have foreseen them. The mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice to render that undertaking responsible for the overall cartel.

Therefore the Commission needed to prove that BPP knew or should have known that, by participating in the Teppema group and the Belgium sub group it has subscribed to the overall cartel. Moreover, as BPP was only active in the meetings at which competition was to be restricted was not considered sufficient by the Court to prove on its own that BPP knew or should have known about the existence of an overall cartel linked to Valvoplast. Moreover, as BPP was only active on the market for FFS bags from 1997 on, it had no reason to take an interest in that cartel. Furthermore the Commission acknowledges in recital 388 of the decision that Fardem and Wavin/BPI did not share all information with BPP. They were also reluctant to fully include BPP in their collusive scheme as it was of no advantage. Indeed, inasmuch as Valvoplast concerned principally valve bags and subsequently FFS bag, the implementation in the Benelux of decisions taken at the central level of the cartel did not depend on the activities of the ‘Belgium’ sub group and the Teppema group but only on those of the Benelux sub group. According to the General Court, the Commission did not prove that BPP knew or should have known that, by participating in the meetings of the ‘Teppema group’ and the ‘Belgian sub group’, it was joining in a wider cartel extending over a number of European countries, before it was invited to the meeting of Valvoplast on 21 November 1997. The anti-competitive purpose of the meeting of 21 November 1997 is, however, beyond doubt as all participants to that meeting discussed a large number of sensitive topics including a price raise and the allocation of suppliers to key customers. It is, therefore, established that BPP knew, or should reasonably have known, that its participation in the meeting of 21 November 1997 involved its accession to a wider collusive plan. Consequently, the Commission decision is partially annulled. As a consequence, the starting amount of the fine imposed on BPP must be reduced by 25% increased by 60% for duration and reduced by 10% on the ground that the facts were not contested.

(g) Copper industrial and copper plumbing tubes cartel cases: the Court of Justice confirms that the “full” judicial review of Commission Competition Decisions is not contrary to the requirements of the principle of effective judicial protection

By decision of 16 December 2003, the Commission found that a cartel existed on the market for copper industrial tubes, used in the air-conditioning and refrigeration industry, designed to fix price and share markets. Several companies belonging to the KME group were fined for their involvement in that cartel from 3 May 1988 until 22 March 2001. Moreover, on 3 September 2004, The European Commission condemned several manufacturers of copper plumbing tubes used for water, gas and oil installations, including the KME group and Chalkor, for their participation in a price fixing and market sharing cartel from 3 May 1988 until 22 March 2001. Several of the undertakings concerned filed an application for annulment or for a reduction of the fines which were imposed on them. The General Court however confirmed both Commission decisions. Only regarding Chalkor it reduced the fine imposed on it since Chalkor only participated in one of the three branches of the cartel. The Commission had omitted to examine whether an offender who participates in one part of a cartel commits a less serious infringement than an offender who participated in every branch in the context of the same infringement.

The KME group and Chalkor lodged separate appeals before the Court of Justice, by which they sought to have the judgments of the General Court set aside and the Commission’s decisions annulled. On 8 December 2011 the Court of Justice nevertheless rejected all pleas put forward by the applicants and confirms the General Court judgments. While an exhaustive overview of all legal issues is beyond the scope of the present overview, one aspect does merit further consideration. Namely, all parties submitted that the General Court infringed the principle of effective judicial protection contained in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 47 of the Charter of Fundamental rights of the European Union, providing the ECJ with the opportunity to shed its light on the present cases.

The Court of Justice examined the KME group’s and Chalkor’s pleas in law and noted that the General Court joined the two decisions. As the Court of Justice had never given its opinion on the Commission’s decision concerning Chalkor, the Court of Justice confirmed that this decision was not contrary to the requirements of the principle of effective judicial protection contained in article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms. The Court of Justice also noted that the General Court had not considered the issue of the time limit for bringing an action for annulment or a reduction of a fine.

34 ECJ, 8 December 2011, KME Germany AG and Others, Case C-272/09 P; ECJ, 8 December 2011, Chalkor AE Epeirergasias Metalon, Case 386/10 P; ECJ, 8 December 2011, KME Germany AG and Others v Commission, Case 389/10.
3. **STATE AID**

3.1. Legislation and communications from the Commission

(a) The Commission introduces new rules for the assessment of public compensation for services of general economic interest under the EU State aid provisions

On 20 December 2011 the Commission adopted a revised package of EU state aid rules for the assessment of public compensation for services of general economic interest (SGEIs). According to the Commissioner for competition, Joaquín Almunia, the new framework has to simplify, clarify and diversify the State aid framework for SGEIs. The new rules introduce a diversified approach, with simpler rules for SGEI’s with a small or local scope or with social objectives, while taking more consideration of competition in case of larger SGEIs. An extensive overview of the package is beyond the scope of this chronicle. Therefore we will only set out below the aim of the instrument concerned, as well as the novelties it introduces.

(i) **Clarification: Communication on the application of state aid rules to compensation granted for the provision of services of general economic interest**

First of all, the Commission introduces a new Communication. This communication is to clarify the key concepts underlying the application of State aid rules to public service compensation. As the aim of the communication is clarification, it mainly bundles the established case-law of the European Courts on those notions that are of vital importance for the assessment of State aid under article 106 and 107 TFEU. The Commission firstly comments on the general notions relating to state aid. Successively it examines the meaning of the notions undertaking, economic activity, state resources and effect on trade in the field of state aid law.

Secondly, the Commission examines the concepts typical of SGEIs, in particular the conditions under which public service compensation does not constitute state aid (the so-called Altmark criteria). Thus the Commission elaborates on (1) the existence of a service of general economic interest, (2) the notion of entrustment act, (3) the parameters of compensation and (4) the avoidance of overcompensation and selection of provider.

In addition to this Communication and the other instruments adopted concerning state aid for SGEIs, the Commission will also provide clarification by answering individual questions that arise in the context of the application of the State aid rules to SGEIs. It will do so inter alia through its Interactive Information Service on Services of General Interest, which is accessible on the Commission’s website.


39  Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest, CJ 2011 C-8, p 4-14.

40  http://ec.europa.eu/services_general_interest/registration/form_en.html
The Commission also adopted a revised framework notification requirement for a further period of 2 years. compatible with the internal market and exempt from the accordance with Decision 2005/842/EC shall continue to be force of this Decision that qualified for an exemption in However, any aid scheme put into effect before the entry into force 31 January 2012. The decision has entered into force on 31 January 2012. annual traffic.

or having the character of revenue-producing monopoly. The principles in this Communication only apply to public service compensation in so far as it constitutes State aid not covered by Decision 2012/21/EU, namely all state aid subject to notification. This will lead to greater scrutiny regarding SGEIs involving compensation amounts of more than €15 million a year, where the potential for distortions of competition within the single market is higher. However, it does not apply to the land transport sector or the public service broadcasting sector, which is covered by the Communication from the Commission on the application of State aid rules to public service broadcasting. More specifically, the new framework introduces five novelties. First of all, it sets out a more precise methodology to determine the amount of compensation for public service obligations. That amount can be established on the basis of either the expected costs and revenues or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide. As a general rule, the amount of compensation granted to undertakings entrusted with the provision of a SGEI must not exceed what is necessary to cover the net cost of the undertaking is entrusted with the provision of a SGEI. This implies that the net cost should be calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost of profit that the same provider would obtain without that obligation. If this methodology is not suited, alternative methods can be used, for example based on cost allocation. In that case the net cost is calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations as expected and estimated in the entrustment act. Therefore, all costs necessary to operate the SGEI should be taken into account. However, if the undertaking concerned also carries out activities not related to the SGEI, only the direct costs necessary to discharge the public service obligations and an appropriate contribution to the indirect costs common to both the SGEI and other activities will be taken into consideration. Such appropriate contribution to the common costs can be calculated in reference to the market prices for the use of the resources. Alternatively, if such data are unavailable, the level of reasonable profit the undertaking is expected to make on the activities falling outside the scope of the SGEI can be utilised, as well as any other appropriate methodology. Secondly, the Communication introduces a requirement for Member States to introduce efficiency incentives in compensation mechanisms to warrant the high quality of SGEI provision. Such efficiencies can be designed in different ways to best suit the specificity of each case or sector. In that respect, both fixed compensation payments and efficiency targets are considered appropriate. Any mechanism for efficiency incentives should, however, be based on objective and measureable criteria set down in the act of entrustment and subject to ex-post appraisal.

The Commission also put in place a revised Decision\(^\text{44}\) that exempts Member States from the obligation to notify a public service compensation for certain SGEIs to the Commission under article 108 (3) TFEU. The Decision replaces Decision 2005/842/EC.\(^\text{42}\) The Commission deemed it necessary to review its predecessor, given the development of intra-Union trade in the provision of services of general economic interest. In light hereof, the Commission came to the conclusion that it is appropriate to set a lower limit for the amount of compensation which can be exempted from the notification requirement, while allowing for that amount to be computed as an annual average over the entrustment period. The chief difference between the old and new decision is therefore the threshold set out for exemption of the notification requirement. Under Decision 2005/842/EC the exemption only applied to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million. Decision 2012/21/EU however exempts all SGEIs where the compensation amount is less than €15 million a year from notification to the Commission. Moreover, the new Decision also takes into account the overall duration of the period of entrustment. The exemption of notification, therefore, only applies when the period for which the undertaking is entrusted with the operation of the service of general economic interest does not exceed 10 years. It is important to note that the Decision is also influenced by social objectives. Thus, hospitals and undertakings in charge of social services will benefit from the exemption from notification even if the amount of the compensation they receive exceeds the general compensation threshold laid down in the Decision. Previously, only hospitals and social housing were exempted. Exceptions are also provided for air or maritime links to islands and airports and ports with limited annual traffic.

The decision has entered into force on 31 January 2012. However, any aid scheme put into effect before the entry into force of this Decision that qualified for an exemption in accordance with Decision 2005/842/EC shall continue to be compatible with the internal market and exempt from the notification requirement for a further period of 2 years.

\(\text{(ii) Diversification: European Union framework for State aid in the form of public service compensation}\)

The Commission also adopted a revised framework\(^\text{45}\) for the assessment of large public service compensation amounts granted to undertakings entrusted with the operation of SGEIs or having the character of revenue-producing monopoly. The principles in this Communication only apply to public service compensation in so far as it constitutes State aid not covered by Decision 2012/21/EU, namely all state aid subject to notification. This will lead to greater scrutiny regarding SGEIs involving compensation amounts of more than €15 million a year, where the potential for distortions of competition within the single market is higher. However, it does not apply to the land transport sector or the public service broadcasting sector, which is covered by the Communication from the Commission on the application of State aid rules to public service broadcasting. More specifically, the new framework introduces five novelties. First of all, it sets out a more precise methodology to determine the amount of compensation for public service obligations. That amount can be established on the basis of either the expected costs and revenues or the costs and revenues actually incurred, or a combination of the two, depending on the efficiency incentives that the Member State wishes to provide. As a general rule, the amount of compensation granted to undertakings entrusted with the provision of a SGEI must not exceed what is necessary to cover the net cost of the undertaking is entrusted with the provision of a SGEI. This implies that the net cost should be calculated as the difference between the net cost for the provider of operating with the public service obligation and the net cost of profit that the same provider would obtain without that obligation. If this methodology is not suited, alternative methods can be used, for example based on cost allocation. In that case the net cost is calculated as the difference between the costs and the revenues for a designated provider of fulfilling the public service obligations as expected and estimated in the entrustment act. Therefore, all costs necessary to operate the SGEI should be taken into account. However, if the undertaking concerned also carries out activities not related to the SGEI, only the direct costs necessary to discharge the public service obligations and an appropriate contribution to the indirect costs common to both the SGEI and other activities will be taken into consideration. Such appropriate contribution to the common costs can be calculated in reference to the market prices for the use of the resources. Alternatively, if such data are unavailable, the level of reasonable profit the undertaking is expected to make on the activities falling outside the scope of the SGEI can be utilised, as well as any other appropriate methodology. Secondly, the Communication introduces a requirement for Member States to introduce efficiency incentives in compensation mechanisms to warrant the high quality of SGEI provision. Such efficiencies can be designed in different ways to best suit the specificity of each case or sector. In that respect, both fixed compensation payments and efficiency targets are considered appropriate. Any mechanism for efficiency incentives should, however, be based on objective and measureable criteria set down in the act of entrustment and subject to ex-post appraisal.

\(\text{\textsuperscript{44} Communication from the Commission on the application of State aid rules to public service broadcasting, OJ 2009 C-257, p 1-14.}\)

Thirdly, Member states are explicitly ordered to comply with EU public procurement rules. Consequently, aid will only be considered compatible with the internal market on the basis of article 106 (2) TFEU where the authority has respected the EU public procurement regulations applicable when entrusting the provision of the service to the undertaking in question.

Accordingly, the Commission now proposes to adopt a Regulation in which the minimum compensation amount of EUR 200 000 per beneficiary over a period of three fiscal years. However, the Commission has experienced that the ceiling for additional costs linked to the provision of services of general economic interest, below which there is no effect on trade or distortion of competition, often differs from the general ceiling established in Regulation 1998/2006. First, since some of those advantages are likely to constitute compensation for distort or threaten to distort competition and therefore fall out of the scope of the European Union State aid rules. In this respect, the Commission adopted Regulation 1998/2006 in 2006. This regulation has set a general de minimis ceiling of EUR 200 000 per beneficiary over a period of three fiscal years. However, the Commission has experienced that the ceiling for State aid granted to undertakings providing a service of general economic interest, below which there is no effect on trade or distortion of competition, often differs from the general ceiling established in Regulation 1998/2006. First, since some of those advantages are likely to constitute compensation for additional costs linked to the provision of services of general economic interest. Secondly, since many of those activities have a limited territorial scope.

Accordingly, the Commission now proposes to adopt a Regulation in which the minimum compensation amount of EUR 500 000 over any period of three fiscal years below which the measure is deemed free of aid (article 2). However, Member States would remain free to rely either on this Regulation or on Regulation 1998/2006 as regards aid granted for the provision of services of general economic interest.

The proposed regulation would not apply in those sectors already governed by specific sector regulations, including among others the fisheries and aquatics sector, the export-related activities towards third countries or Member States and the coal sector.

A final decision regarding the entry into force of the Regulation is expected in the spring of 2012.

3.2. Case law

(a) An injunction to provide information under Article 10(3) of Regulation No 659/1999 constitutes an act open to challenge for the purposes of article 263 TFEU

On 12 September 2007 the Commission had initiated a formal investigation procedure regarding State aid in favour of Deutsche Post AG. Subsequently, the Commission sent a request for information to the Federal Republic of Germany which included a questionnaire on Deutsche Post’s revenue and costs for the period between 1989 to 2007. Germany, however, refused to send any data relating to Deutsche Post’s products and charges after 1995. It was of the opinion that the Commission’s examination should be confined to the period from 1989 to 1994. Pursuant to article 10(3) of Regulation No 659/1999 the Commission issued an act requiring Germany to provide, within 20 days, all the information necessary in reply to that questionnaire. Deutsche Post and the Federal Republic of Germany each brought an action for annulment of this act. By orders of 14 July 2011, the General Court dismissed the appeals since it considered that the act at issue was not an act open to challenge for the purposes of article 263 TFEU. According to the General Court, the act at issue falls within the context of an administrative procedure for examining the aid measure in question. Since it does not prejudice the final decision, a request for information needs to be considered an intermediate measure that does not have independent legal effects and cannot form the subject-matter of an action for annulment. Consequently, Deutsche Post and the Federal Republic of Germany brought an action for annulment against the orders of the General Court alleging that the General Court committed various errors of law in the interpretation of the concept ‘an act open to challenge’.

On 13 October 2011 the Court of Justice upheld the appeal and set aside the contested order of the General Court.

In its judgment the Court of Justice first repeated the case-law that any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as acts open to challenge, within the meaning of article 263 TFEU. Where the action is brought by a natural or legal person, the action can be brought only if the binding legal effects of that act are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position. The case-law thus concerns actions brought before the EU judicature by natural of legal persons against measures which were the addressees. In the present case, the action for annulment of Deutsche Post is brought by a non-privileged applicant against a measure that has not been addressed to it. Therefore, the requirement that the binding legal effects of the measure being challenged, the information injunction, must be capable of affecting the interests of Deutsche Post by bringing about a distinct change in his legal position, overlaps with the conditions laid down in the fourth paragraph of article 263 TFEU. Therefore, the Court first had to assess whether an information injunction under Article 10 (3) of Regulation No 659/1999 constitutes a measure which is intended to produce binding legal effects. In this respect, the Court distinguishes the two


48 Order of the President of the GC, 14 July 2011, Deutsche Post v Commission, Case T-571/08; Order of the President of GC, 14 July 2011, Germany v. Commission, Case T-571/08.
stages designed to allow the Commission to obtain all necessary information concerning an allegedly unlawful State aid measure. The first stage, comprised in article 10(2) of Regulation No 659/1999, provides the Commission with the opportunity to request information from a Member State. If that Member State, despite the reminders issued to it, omits providing the information requested within a prescribed period of time, the Commission shall, in a second stage, ‘by decision require the information to be provided’ per the meaning of article 10(3) of Regulation No 659/1999. This assumes the adoption of a decision within the meaning of article 288 TFEU. Such decision is binding in its entirety and the EU legislature intended to confer a binding character on such measure. It follows that such information injunction produces binding legal effects and, therefore, constitutes an act open to challenge under article 263 TFEU. According to the Court, the fact that no sanction is laid down in the event a Member State does not comply with the information injunction does not constitute a decisive factor in assessing whether a measure may form the subject-matter of an action for annulment.

Secondly, the Court had to note that intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject-matter of an action for annulment. At the same time, however, the Court makes clear that it does consider a request for information under Article 10(3) of Regulation No 659/1999 produce independent legal effects. Indeed, an action brought against the decision terminating the procedure concerning the alleged State aid in favour of Deutsche Post is not capable of ensuring sufficient legal protection for both applicants. First, if the injunction is disproportionate in that the information requested is not relevant for assessing the State measure, the illegality vitiating the intermediate measure would not be capable of affecting the legality of the Commission’s final decision, since the latter decision will not be based on information obtained in response to the injunction. Secondly, refusal of the Member State concerned by the information injunction to provide the information requested, constitutes a failure to fulfill an obligation per the meaning of article 258 TFEU.

Moreover, the Court of Justice rejects the Commission’s argument that the possibility of bringing an action for annulment against an information injunction, would lead to a situation where a Member State that refuses to reply to such request for information concerning an aid measure notified or otherwise, would enjoy more extensive legal protection where an unnotified aid measure is at issue. Indeed, article 5 (3) of Regulation No 659/1999 provides that if the Member State concerned, after receiving a reminder, does not provide the requested information concerning a notified aid measure, or provides incomplete information, the notification is deemed to be withdrawn. In that case the aid will be regarded as unnotified and the refusal to respond to a request for information will lead, both in the case of aid initially notified and in the case of aid which has never been notified, to the adoption of an act open to challenge, namely a decision per the meaning of article 10 (3) of Regulation No 659/1999. It follows that the General Court has erred in law by holding that the act at issue could not form the subject-matter of an action for annulment.

The Court of Justice then goes on to assess whether Deutsche Post has the capacity to bring an action for the purposes of the fourth paragraph of article 263 TFEU and confirms this is the case. The Court concludes that the act at issue directly affects Deutsche Post. First of all, Deutsche Post, as beneficiary of the measure concerned by the information injunction and as holder of that information, will be obliged to act on the request contained in the act at issue. Secondly, the definitive and exhaustive content of the information requested is apparent from the act at issue itself, without leaving any discretion in that respect to the Federal Republic of Germany. Moreover, the Court confirms that Deutsche Post is also individually concerned by the act at issue since the information concerned by the act only concerns Deutsche Post. Indeed, it refers to a procedure for examining a State aid measure from which Deutsche Post is alleged to have benefited, notwithstanding that the act at issue is not addressed to Deutsche Post.

Since the General Court has erred in law, the Court of Justice annuls the orders. However, it finds that it is not in a position to rule on the substance of the actions for annulment and refers the actions back to the General Court.

(b) The Court of Justice sets aside the judgment of the General Court and confirms that a tax system in which offshore companies avoid taxation constitutes a State aid scheme that is incompatible with the internal market

In August 2002, the United Kingdom notified the Commission of the proposed reform of corporate tax which the Government of Gibraltar planned to introduce as a consequence of former Commission proceedings regarding tax measures applicable qualifying companies. The proposed reform would introduce a tax system applicable to all undertakings established in Gibraltar, combined with a top up tax only applicable to companies in the financial services and utilities sectors. The Commission was of the opinion that four elements of the reform could be considered as conferring materially selective advantages, namely, the requirement to make a profit which confers advantages on companies that make no profit, the various tax caps conferring advantages on those companies to which they apply, exemption from tax for undertakings based in certain areas of Gibraltar and the exemption of interest received in respect of loans granted for certain purposes. Consequently, the Commission decided that the proposed tax reform constituted a State aid scheme that could not rely on the derogations provided for in article 107 (2) or 107 (3) TFEU. The system was considered regionally selective, given that companies in Gibraltar would be taxed, in general, at a lower rate than those in the United Kingdom. In addition, the reform was materially selective since (1) the requirement to make a profit before incurring liability to payroll tax and business property occupation tax (‘BPOT’) would favour companies which make no profit; (2) the cap limiting liability to payroll tax and BPOT to 15% of the profit would favour companies which, for the tax year in question, have profits that are low in relation to their number of employees and their occupation of business property; and (3) the payroll tax and BPOT would favour offshore companies which have no real physical presence in Gibraltar an which as a consequence do not incur corporate tax.

On 18 December 2008 the General Court annulled the Commission decision. According to the General Court, the Commission had not followed a correct method of analysis as regards the material selectivity. The Commission had failed to demonstrate that certain of its elements constituted derogations from Gibraltar’s common or normal tax regime. Moreover, the Court found, contrary to the Commission, that the reference framework for assessing the reform’s regional selectivity corresponded exclusively to Gibraltar’s, and not to the United Kingdom, territorial limits. Consequently, the Commission and the Kingdom of Spain lodged the present
appeal before the Court of Justice. The Commission has put forward a single ground of appeal, namely, the alleged infringement of article 107(1) TFEU relating to the General Court’s opinion on the material selectivity of the tax reform. The Kingdom of Spain put forward 11 grounds of appeal relating to, first, the regional selectivity and status of Gibraltar, secondly, the material selectivity and, lastly, the proceedings before the General Court. The Court of Justice therefore first examines all grounds relating to the material selectivity.

In order to examine the appeal the Court of Justice recollects its case law regarding the concept of selective advantage in tax matters. First, the definition of aid is considered more general than that of a subsidy, including also positive benefits but also state measures which mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the term, are similar in character and have the same effect. Therefore, a measure by which the public authorities grant certain undertakings a favourable tax treatment which, although not involving the transfer of state resources, places the recipient in a more favourable financial position than the other taxpayers, amounts to state aid. Advantages resulting from a general measure applicable without distinction to all economic operators consequently do not constitute state aid. Therefore, the selectivity of the purpose of tax reform needs to be established, implying that the reform must ‘favour certain undertakings or the production of certain goods’, in comparison with other which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. Thus, the Court goes on to assess all element identified by the contested decision as conferring selective advantages. Regarding the requirement to make a profit and capping of tax, the Court of Justice confirms the General Court’s judgment that such measures are per se general measures applicable without distinction to all economic operators and therefore not liable to confer selective advantages. The fact that a requirement to make a profit would benefit unprofitable operators, and that the requirement of the capping of tax would benefit very profitable operators is merely a consequence of the random event that the undertaking in question is unprofitable or very profitable during the period of assessment.

However, regarding the advantages accruing to offshore companies the Court of Justice states that the reasoning of the General Court is vitiated by an error of law in ruling that no selective advantages for offshore companies existed in the proposed tax reform. According to the Court of Justice, the General Court’s approach was based solely on a regard for the general nature of offshore companies which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. Thus, the Court goes on to assess all element identified by the contested decision as conferring selective advantages. Regarding the requirement to make a profit and capping of tax, the Court of Justice confirms the General Court’s judgment that such measures are per se general measures applicable without distinction to all economic operators and therefore not liable to confer selective advantages. The fact that a requirement to make a profit would benefit unprofitable operators, and that the requirement of the capping of tax would benefit very profitable operators is merely a consequence of the random event that the undertaking in question is unprofitable or very profitable during the period of assessment.

In addition, contrary to what the General Court held, the Court of Justice notes that the Commission did examine the existence of selective advantages for offshore companies in the light of the tax regime at issue, which formally applies to all undertakings. The Commission also demonstrated to the requisite legal standard that offshore companies enjoy selective advantages within the meaning of the case law. Even though it is true that, in the absence of European Union rules, it falls within the competence of Member States or intra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors, the General Court failed to assess the regime and its features at issue as a whole. The features of that regime are, first, a combination of payroll tax and BPOT as the sole bases of assessment, together with the requirement to make a profit, the tax on which is capped at 15%, and, second, the absence of a generally applicable basis of assessment providing for the taxation of all companies covered by that regime. By combining those tax bases, even though they are founded on criteria that are in themselves of a general nature, the Court of Justice finds that in practice the regime would discriminate between companies which are in comparable situations. Combining those bases does not only result in taxation according to the number of employees and the size of the business premises occupied, but also, due to the absence of other bases of assessment, excluded from the outset any taxation of offshore companies, since they have no employees and do not occupy business property. Furthermore, the fact that offshore companies are not taxed is not a consequence of the regime at issue, but the inevitable consequence of the fact that the bases of assessment are specifically designed so that those companies, which by their nature have no employees or occupy premises, have no tax base under the bases of assessment adopted in the proposed tax reform. This gives reasons for the Court of Justice to conclude that offshore companies enjoy selective advantages.

As a result, the Court of Justice gives final judgment on the action of annulment of the contested Commission decision and dismisses the arguments put forward by the United Kingdom and the Government of Gibraltar. It confirms that the Commission did not depart from the notice relating to State aid in the field of taxation and its decision-making practice. Secondly, regarding the fact whether the selective advantage enjoyed by offshore companies might be justified by the nature of general scheme of the tax system, the Court states that it is for the Member State which has introduced a differentiation between undertakings to show that the measure is justified by the nature and general scheme of the system in question. The information adduced must enable the Commission to verify that the conditions for the derogation sought are fulfilled. In the present case, the United Kingdom did not adduce any justification for the selective advantages enjoyed by offshore companies, either in the notification of the proposed reform or during the formal investigation. Furthermore, the applicants at first instance never claimed that the Commission has at its disposal evidence on the basis of which it should have examined possible justifications for the selective advantages enjoyed by offshore companies. Thirdly, the Court of Justice also rejects the plea that there has been a breach of the rights of defence of the United Kingdom and the Government of

Gibraltar. Sufficient opportunities had been offered to the parties involved to make know their views on the truth and relevance of the facts and circumstances alleged and on the observations submitted by interested third parties. Moreover, sufficient warning had been sent out that the investigation during the formal procedure might also relate to sectors which escape taxation by having no employees or property, even if the preliminary assessment by the Commission did not contain any reference regarding offshore companies. The Commission was also not obliged to adopt a position regarding the comments received by the Kingdom of Spain that did make reference to the offshore companies. Lastly, the Court rules that even if the tax reform was not considered regionally selective, such as the applicants claim, the contested decision would still be substantiated. Indeed, it is clear that the proposed reform is materially selective.

4. **MERGER CONTROL**

4.1. **It is all about timing: the appeal by third party, Test-achats, against the clearance and non-referral decisions of the Commission in the EDF/Segebel merger considered inadmissable by the General Court**

In June 2009 Test-achats, the largest consumer association in Belgium, learned that électricité de France (EDF) had announced its intention to acquire exclusive control of Segebel SA, a holding company whose only asset was a 51% shareholding stake in SPE. SPE is the second largest electricity operator in Belgium after incumbent operator Electrabel SA, which is controlled by GDF Suez SA. At that time, the French state held 84, 6 % of the shares in EDF, as well as a minority interest of 35.91% in GDF Suez. Those shareholdings were managed by the same agency (Agence des participation de l’État) but through two separate departments.

On 23 June 2009 Test-achats sent a letter to the Commission expressing its concern about the merger between EDF and Segebel. It asked the Commission to consider the negative consequences on competition that would be brought about as a result of the French State’s shareholding in EDF and GDF Suez, particularly on the Belgian markets for gas and electricity. Since Test-achats was of the opinion that this merger would have an impact on goods or services used by final consumers, it also expressed the wish to exercise their right to be heard under article 11 (c) of Regulation No 802/2004 if the Commission, following notification of that merger, should take the view that it constituted a concentration with a community dimension. The Commission replied on 20 July 2009 that it would take into account the observations of the applicant, should the transaction be considered a merger with a community dimension.\(^{53}\) EDF notified the merger on 23 September 2009 to the Commission and on 30 September 2009 a notification notice was published in the Official Journal of the European Union. Interested parties were invited to submit their observations. On 14 October 2009, in view of the situation on the Belgian electricity market, the Belgian competition authority lodged a request with the Commission for partial referral of the merger at issue.\(^{54}\)

On 12 November 2009, the Commission adopted two decisions, one in which it rejected the request from the Belgian competition authorities for partial referral of the case,\(^{55}\) and the other by which it declared the merger between EDF and Segebel compatible with the common market.\(^{56}\)

Test-achats lodged a complaint with the General Court seeking the annulment of both the clearance decision and the non-referral decision. However, on 12 October 2011 the General Court found the application for annulment against both Commission decisions inadmissible.\(^{57}\)

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\(^{54}\) Pursuant to Article 9 (3)(b) of Regulation No 139/2004.


\(^{57}\) GC, 12 October 2011, Association Belge des consommateurs Test-achats ASBL v Commission, Case T-224/10.
The application for annulment of the clearance decision

In its application Test-achats developed a variety of arguments including breach of the duty to state reasons and article 6(2) of Regulation no. 139/2004, denial of the applicant’s right to participate in the procedure and breach of that provision and manifest error of assessment in the failure to initiate the Phase II procedure. According to the General Court, it results from the case law of the European Courts that for a decision of the Commission relating to the compatibility of a merger with the common market, the locus standi per the meaning of article 263 TFEU of third parties concerned by a merger must be assessed differently depending on whether they, first, rely on defects affecting the substance of those decisions or, second, submit that the Commission infringed procedural rights granted to them by the acts of the European Union Law governing the monitoring of mergers.

In the present case, the General Court found the application of Test-achats regarding the substance of the clearance decision, not to be covered by the first category. First of all, the General Court considered that the persons represented by Test-achats are affected by the clearance decision only by reason of their objective and abstract status as energy consumers, in so far as supply prices are liable to increase as a consequence of the concentration of supply arising from that decision. All electricity and gas consumers residing within the geographic market in question would be affected in the same way and therefore the General Court stated that it would not affect the applicant by reason of certain attributes which are particular to them or by reason of factual situation which differentiates it from all other persons concerned by the clearance decision. By doing so, it did not distinguish itself individually in the same way as the addressee. Secondly, the own interest of Test-achats consists in particular in being given an opportunity to comment during the merger control procedure. Such concern is only relevant for the question whether the applicant’s procedural rights, granted on the basis on EU law, are infringed.

Regarding the application of Test-achats in that it seeks to safeguard the procedural rights of the applicant, the General Court sets out that it must be borne in mind that, under article 11 (c) second indent of Regulation No 802/2004, consumer associations are entitled to the right to be heard, pursuant to article 18 of Regulation No 139/2004, where the proposed concentration concerns product or services used by final consumers. Also the final sentence of article 18 (4) of Regulation No 139/2004 provides that natural or legal persons showing a sufficient interest are to be entitled, upon application, to be heard by the Commission. Similarly, article 16 (1) of Regulation No 802/2004 confers the right to make known their views on third persons who apply in writing to be heard pursuant to article 18 (4) second sentence of Regulation No 139/2004. It follows that Test-achats, as a consumer association, is liable to be entitled a procedural right, notably the right to be heard in respect of a merger investigation at issue, subject to compliance with two conditions: first, that mergers concerns product or services used by final consumers; and, second, that an application to be heard by the Commission during the investigation procedure is made in writing.

As regards the first condition, the General Court confirmed that the merger at issue affected consumer interests with respect to price and service, contrary to the Commission who took the view that the merger at issue only gave rise to secondary effects on consumers. The fact that the effects on consumers are only secondary in nature does not deprive the applicant of its right to be heard. The General Court finds that article 11 (c) second indent cannot be interpreted in restrictive terms. Especially since article 2(1) of Regulation No 139/2004 provides that, as regards the appraisal of concentrations, the Commission must take into account, inter alia, the interest of the intermediate and ultimate consumers. Secondly, under article 153 (2) EC, which essentially has the same wording as article 12 TFEU, consumer-protection requirements must be taken into account in defining and implementing other EU policies and activities. Furthermore, article 38 of the Charter of Fundamental Rights of the European Union provides that EU policies must ensure a high level of consumer protection. Lastly, the Commission cannot reject the claim of a consumer association which seeks to be heard as a third party demonstrating a sufficient interest in a merger without providing that association with an opportunity to show in what respect consumers may be concerned by the merger at issue.

Regarding the second condition, the General Court consequently assesses whether Test-achats has made a valid application to be heard. Neither Regulation No 139/2004 nor Regulation No 802/2004, when they provide that certain third parties must be heard by the Commission, if they so request, specify the period during which that request must be made. However, the General Courts finds it consistent with the logic of EU Legislation on merger control to take the view that the steps which third parties are required to undertake in order to be involved in the procedure must be taken following the formal notification of a concentration. After all, the Commission is only required to take a decision under article 6 of Regulation No 139/2004 with regard to notified concentrations. In that regard, the fact that a request to be heard must be made following notification of the transaction to which it relates makes it possible, in the interest of third parties, to avoid such request being made by them without the Commission having determined the purpose of the transaction at issue. Moreover, the Commission does not have to separate systematically, those requests which concern transactions attributable only to abstract hypotheses, from those which concern transactions resulting in notification.

The Court is of the opinion that the opposite scenario would lead to an unnecessarily heavier burden being placed upon the Commission. Furthermore, this point of view is consistent with the need for speed that characterises the general scheme of EU merger control. Consequently, the Commission cannot be required to investigate, for each notified concentration, whether, prior to notification, third parties have already expressed an interest. Test-Achats had informed the Commission two months prior to the notification of the merger, of its wish to be heard if that institution, following notification of the merger, should take the view that it constituted a concentration with community dimension. This cannot make up for their non-renewal of the application or the lack of initiative once the envisaged economic transaction between EDF and Segesbe became duly notified. Third parties cannot claim to be unaware of this notification, as they are expressly informed of its existence by the Commission itself through publication in the Official Journal of the European Union.34 The Court also puts forward there can be no legitimate expectation based on the Commission response to the letter of Test-achats of 23 June 2009. In that response the Commission did not undertake to contact the applicant again. Furthermore, Test-achats as a prudent and alert economic operator should have foreseen the adoption of an EU measure affecting its interests. It had available the confirmation that the merger at issue had finally been notified, and must have been aware that a decision on the merger was likely to be taken at very short notice, in view of the timetable imposed on the Commission by Regulation No. 139/2004.

34 Pursuant to article 4 (3) of Regulation No 139/2004
(b) The application for annulment of the non-referral decision

With respect to the non-referral decision, Test-achats raises one plea alleging breach of Article 9 (3) of Regulation 139/2004. For such application to be admissible, the General Court is taking into account two considerations. First, whether the parties are entitled to procedural rights during the merger investigation by the Commission in the light of EU law and, second, if the General Court will be the judicial body having jurisdiction to deal with any action against the Commission’s decision bringing the procedure to an end.

The General Court points out that article 9 (9) of Regulation No 139/2004 allows only the Member State concerned the possibility to appeal for the purpose of applying its national competition law. There is nothing in the system of merger control to indicate that Test-achats is entitled to challenge the non-referral decision on the ground that that decision precludes the investigation of the merger at issue and the avenues of legal redress against the decision conducting that investigation from being determined by the law of a Member state, and not by EU law. Furthermore, the General Court states that the admissibility of an action against a non-referral decision cannot result from the fact that the national law in question may confer on the applicant more extensive procedural rights or judicial protection than provided for under EU law. Legal certainty precludes that interested third parties are granted more extensive procedural right or judicial protection than provided for under EU law, due to this more extensive protection under the legal system of the member state asking for referral.

Consequently Test-achats’ application for annulment is declared inadmissible.